

and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources * * * 33 U.S.C. 1251(b).

The jurisdictional scope of the CWA is "navigable waters," defined in the statute as "waters of the United States, including the territorial seas." CWA section 502(7), 33 U.S.C. 1362(7). The existing CWA section 404 regulations define "waters of the United States" as follows:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) which are used or could be used for industrial purposes by industries in interstate commerce.

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)–(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)–(6) of this section.

(8) Waters of the United States do not include prior converted cropland ... Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds ...) are not waters of the United States. 40 CFR.230.3(s); 33 CFR 328.3(a).

Counterpart and substantively similar regulatory definitions appear at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300 App. E, 302.3 and 401.11 (hereafter referred to as "the counterpart definitions").

In regulatory preambles, both the Corps and EPA provided examples of additional types of links to interstate commerce which might serve as a basis under 40 CFR 230.3(a)(3) and 33 CFR 328.3(a)(3) for establishing CWA

jurisdiction over intrastate waters which were not part of the tributary system or their adjacent wetlands. These included use of waters (1) as habitat by birds protected by Migratory Bird Treaties or which cross State lines, (2) as habitat for endangered species, or (3) to irrigate crops sold in commerce. 51 FR 41217 (November 13, 1986), 53 FR 20765 (June 6, 1988). These examples became known as the "Migratory Bird Rule," even though the examples were neither a rule nor entirely about birds. The Migratory Bird Rule later became the focus of the SWANCC case.

IV. Potential Natural Resource Implications

To date, some quantitative studies and anecdotal data provide early estimates of potential resource implications of the SWANCC decision. One of the purposes of the ANPRM is to solicit additional information, data, or studies addressing the extent of resource impacts to isolated, intrastate, non-navigable waters.

Non-navigable intrastate isolated waters occur throughout the country. Their extent depends on a variety of factors including topography, climate, and hydrologic forces. Preliminary assessments of potential resource impacts vary widely depending on the scenarios considered. See, e.g., Ducks Unlimited, "The SWANCC Decision: Implications for Wetlands and Waterfowl" (September 2001) (available at http://www.ducks.org/conservation/404_report.asp); ASWM, "SWANCC Decision and the State Regulation of Wetlands," (June 2001) (available at <http://www.aswm.org>).

There is an extensive body of knowledge about the functions and values of wetlands, which include flood risk reduction, water quality improvement, fish and wildlife habitat, and maintenance of the hydrologic integrity of aquatic ecosystems. The ANPRM seeks information regarding the functions and values of wetlands and other waters that may be affected by the issues discussed in this ANPRM.

V. Solicitation of Comments

The agencies are seeking comment on issues related to the jurisdictional status of isolated waters under the CWA which the public wishes to call to our attention. To assist the public in considering these issues, the following discussion and specific questions are presented. The agencies will carefully consider the responses received to this ANPRM in determining what regulatory changes may be appropriate and the issues to be addressed in a proposed rulemaking to clarify CWA jurisdiction.

The SWANCC holding eliminates CWA jurisdiction over isolated, intrastate, non-navigable waters where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross State lines in their migrations. 531 U.S. at 174 ("We hold that 33 CFR 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the "Migratory Bird Rule," 51 FR 41217 (1986), exceeds the authority granted to respondents under section 404(a) of the CWA."). The agencies seek comment on the use of the factors in 33 CFR 328.3(a)(3)(i)–(iii) or the counterpart regulations in determining CWA jurisdiction over isolated, intrastate, non-navigable waters.

The agencies solicit comment from the public on the following issues:

(1) Whether, and, if so, under what circumstances, the factors listed in 33 CFR 328.3(a)(3)(i)–(iii) (*i.e.*, use of the water by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters?

(2) Whether the regulations should define "isolated waters," and if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes?

Solicitation of Information

In answering the questions set forth above, please provide, as appropriate, any information (*e.g.*, scientific and technical studies and data, analysis of environmental impacts, effects on interstate commerce, other impacts, etc.) supporting your views, and specific recommendations on how to implement such views. Additionally, we invite your views as to whether any other revisions are needed to the existing regulations on which waters are jurisdictional under the CWA. As noted elsewhere in this document, the agencies are also soliciting data and information on the availability and effectiveness of other Federal or State programs for the protection of aquatic resources, and on the functions and values of wetlands and other waters that may be affected by the issues discussed in this ANPRM.

VI. Related Federal and State Authorities

The SWANCC decision addresses CWA jurisdiction, and other Federal or