



Louisiana Wetland News

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Wetland Policy and the Pothole-Loophole

For almost 30-years debate has raged over the appropriate extent of federal jurisdiction in protecting the nation's wetlands. This debate escalated last year after a ruling by the U.S. Supreme Court that created what many are referring to as the "pothole-loophole."

The SWANCC Ruling

The pothole-loophole is the latest dilemma in the controversial history of our nation's primary wetland protection law, the Clean Water Act (CWA). But when the CWA was first established as the Federal Water Pollution Control Act in 1972, it included no mention of the word "wetlands." It was only through amendments that wetland protection was established via Section 404(a), which required a permit from the U.S. Army Corps of Engineers (Corps) for any activity that resulted in the discharge of dredge and fill materials into navigable waters of the United States. By the late 1970s, federal court decisions had effectively expanded the definition of "waters of the United States" (and Corps authority) to include isolated wetlands.

But on January 9th, 2001, after 30 years of jurisdictional debate, the U.S. Supreme Court ruled 5 - 4 that the Corps had exceeded its authority granted under CWA Section 404(a). In its decision in favor of the Solid Waste Agency of Northern Cook County (SWANCC), the Court effectively ruled that CWA jurisdiction does not extend to isolated, non-navigable, intrastate waters that are not tributary, or in the case of isolated wetlands, not adjacent to navigable waters. In short, the Supreme Court had created a pothole-loophole, through which isolated wetlands might be drained, filled, or otherwise developed.

Corrective Legislation?

Since the SWANCC decision, much has been written about what implications the case might have on future wetland preservation efforts. Although interpretations of the ruling vary, worse-case scenarios have received the most attention. Some analyses suggest that SWANCC leaves as much as one third of the nation's wetlands without CWA protection.

Wetlands potentially at risk include playa lakes, bogs, fens, vernal pools, and a variety of fresh marshlands. However, the majority of concern focused on potholes. Indeed, much of the nation's isolated wetlands are located in the Prairie Pothole region of the north central U.S. This vital region is a breeding ground for more than half the nation's duck population and is also habitat for endangered species such as piping plovers and bald eagles.

In July of this year, senators from Prairie Pothole states introduced the Clean Water Authority Restoration Act of 2002 (CWARA) to the U.S. Congress (H.R. 5194 and S. 2780). This legislation seeks to close the pothole-loophole and restore the wetland protection lost under SWANCC. Specifically, the CWARA provides:

- 1) a statutory definition of "Waters of the United States";
- 2) an amendment to the 1972 CWA to remove the word "navigable"; and
- 3) documentation that establishes constitutional authority over all waters and wetlands, including those that are called "isolated."



Photo by Jesse Oelgen

The Prairie Pothole region is breeding ground for much of the nation's waterfowl. A recent Supreme Court Ruling may leave this region at risk to development.

Proponents of the new bill are hopeful that it will restore CWA protection for the vital wetlands of the Prairie Pothole region and finally settle the longstanding debate over federal wetland authority. But the controversy surrounding U.S. wetland policy is not likely to disappear if CWARA passes. Clearly, the SWANCC ruling was viewed as a victory by many developers and landowners who for years have seen CWA authority as an intrusive bureaucracy of questionable benefit.

“Yep, That’s A Wetland...”

To better understand the controversy surrounding U.S. wetland policy, consider the method by which wetlands are classified. After the CWA was first amended in 1977, it became clear that an on-site delineation method was needed to determine the extent of jurisdictional wetlands subject to Section 404(a). Beginning in the 1980’s, several different federal agencies (and branches of the same agencies) began to develop their own field guidelines for wetland delineation. After several painful iterations, some well into the early 1990s, the official definition of a wetland was ultimately set according to guidelines established in a wetland delineation manual developed by the Corps in 1987.

The 1987 Corps manual provides a 3-criteria approach in which wetlands are delineated as having: 1) appropriate hydrology; and 2) a prevalence of wetland vegetation; and 3) hydric soils. Although this is an accurate method for identifying wetland boundaries, it is often criticized as being more legal than scientific. That’s because it’s not really a classification system. It does not tell you what kind of wetland you have, only whether or not you have a wetland. This would be of no consequence if all wetlands were created equally, but they do vary considerably according to size, shape, and significance. And though a system of nationwide exemptions was originally established under 404(a)

to cover activities of negligible impact, the acreage exemption under these permits has decreased considerably in recent years. As a result, CWA jurisdiction has been extended to increasingly smaller tracts (see inset below).

Symptom and Cause

For those developers and landowners who felt unfairly burdened under CWA, the corrective measures represented by CWARA offer no solution. For these individuals, amending the 1972 Act to remove the word “navigable” is akin to manipulating the true intentions of the original legislation. Conversely, some wetland advocacy groups have suggested that CWARA does not go far enough. For these groups, the proposed legislation does nothing to address additional loopholes and exemptions that currently exist under the CWA.

The one point that both sides agree on is that SWANCC has served to crystallize an even greater issue - the fragile foundation of U.S. wetland policy. This issue was addressed by Mitsch and Gosselink (1993) in their seminal text “Wetlands”:

“Perhaps the most notable feature of federal wetland protection policy today is that there is no specific, comprehensive national wetland law. Rather, federal statutes regulating or otherwise protecting wetlands have evolved piecemeal over the years, and often utilize laws originally intended for other purposes. As a result, jurisdiction for wetland protection is spread over several agencies and federal wetland protection is not as effective or cohesive as it could be.”

In 2002, wetlands regulations are represented by a mosaic of 26 major laws, statutes, and directives carried out by more than a dozen federal agencies. This is the complicated labyrinth that confers “black hole” status to U.S. wetland policy.



Photo by Rex H. Caffey

The Corps in My Backyard

In 1989, Linda Jones purchased a 3-acre tract of rural, non-wetland property east of Baton Rouge. She fenced the land, built a barn, and established a small pasture for her 3 horses. As time passed, additional residents migrated to the area. Since municipal sewage was unavailable, most owners installed septic tanks that emptied to overflow ditches dug along property perimeters.

Eventually Mrs. Jones noticed that one of her new neighbors was piping untreated, raw sewage into a ditch in her backyard. When the neighbor refused to stop, she attempted to block the sewage by shoveling dirt into a low spot between the two houses. Not long afterwards, she was issued a Cease and Desist Order from the Corps for a violation of the Clean Water Act (CWA). Months later, upon inspecting the site, a Corps representative claimed the area as “Waters of the United States”. Linda has been ordered to remove the dirt and must now apply for a Section 404(a) permit to re-route her neighbors sewage at her own expense. Linda’s own comments capture the controversy surrounding the CWA, “I can see the need to protect real wetlands like in coastal Louisiana or the prairie potholes, but when the Corps gets involved in a little pothole in my backyard they are just going too far.”

At The State Level

Jon A. Kusler, Esq. heads the Association of State Wetland Managers (ASWM), a non-profit association established in 1983 to promote and enhance wetland protection and to help translate wetland science into fair and reasonable government policies. Regarding the proposed CWARA legislation, Dr. Kusler says, "it basically just gets us back to where we were before with the Clean Water Act. What we really need is balanced legislation that puts together some of the more ideal components of existing state wetland statutes."

In the wake of the SWANNC ruling, the ASWM has developed a model statute for the more than 36 states that have little or no wetland regulatory policy. Although the model must be tailored to meet state-specific needs, some of its provisions include:

- development of comprehensive state wetland mapping and delineation records;
- increased use of incentive-based restoration such as wetland mitigation banks;
- additional technical assistance and support for local control; and
- establishing means by which state and federal roles can be clarified.

Clarification is exactly what the House Government Reform Committee has been after since late September when they began holding hearings with testimony from the Corps, EPA, and the Justice Department. The Committee wants to find out just what policy these agencies plan to implement in reaction to the Supreme Court's decision regarding isolated wetlands.

But additional clarification and legislation cannot resolve all the controversy associated with 404(a) jurisdiction. Indeed, examples of excessive regulatory action have occurred under the CWA, and unfortunately these actions are now jeopardizing more legitimate efforts, such as protection of the Prairie Pothole region. Perhaps some prospect lies in the development of model statutes, sculpted from the few states that have developed progressive examples of wetland protection policy. However, the short term is likely to bring additional piecemeal policy efforts at the federal level.



New Coastal Zone Map Available

Source: LaDNR-CMD

A newly released map of the Louisiana Coastal Zone has been developed by the Louisiana Geological Survey and the Louisiana Department of Natural Resources' Coastal Management Division (CMD)

The digitally-mastered, 72-layer, full-color map depicts the coastal zone boundaries contained in all or part of nineteen parishes. From the west at the Texas/Louisiana state line, the boundary proceeds easterly through the parishes of Calcasieu and Cameron, then goes south through Vermilion, St. Mary, St. Martin, Assumption, Terrebonne and Lafourche.

The boundary then extends north to include the parishes of St. Charles, St. John the Baptist, St. James and then goes east again through Livingston, Tangipahoa and St. Tammany parishes to the Mississippi state line. Seven parishes lie completely within the coastal zone area. Those parishes are Orleans, Jefferson, St. Bernard, Plaquemines, St. John the Baptist, St. James, and St. Charles.

The CMD has produced and printed 4,000 copies of the new coastal zone boundary map. CMD Project Manager Steve Chustz said the new full-color map shows the coastline as it is today with vital data not available on other printed maps. He said the information is presented on a larger scale and is greatly enhanced over the 1995 edition.

Free copies of the map are available to the public by contacting CMD at 1- 800-267-4019. A limited supply of the coastal zone maps will also be available without charge at the Permit Information Centers located in Cameron, Jefferson, Lafourche, Plaquemines and Terrebonne parishes. For more information on this topic, contact DNR Public Information Office at 225-342-7591.



A new Louisiana coastal zone boundary map is available free of charge through the Coastal Management Division of the Louisiana Department of Natural Resources.



LDWF Sets Final 2002-2003 Migratory Waterfowl Seasons

Source Louisiana Department of Wildlife and Fisheries
LDWF Post Commission News (Sept. 5, 2002)

DUCKS AND COOTS (EXCEPT PINTAIL AND CANVASBACK)

WEST ZONE: Nov. 9 - Dec. 8 (30 days) & Dec. 21 - Jan. 19 (30 days)

EAST ZONE: (including Catahoula Lake): Nov. 16 - Dec. 1 (16 days) & Dec. 14 - Jan. 26 (44 days)

Pintails:

WEST ZONE: Nov. 9 - Dec. 8 (30 days)

EAST ZONE: Nov. 16 - Dec. 1 (16 days) & Dec. 14 - Dec. 27 (14 days)

Canvasback:

STATEWIDE: Closed

Youth Waterfowl Weekend:

WEST ZONE: Nov. 2-3

EAST ZONE: Nov. 9-10

Limits: The daily bag limit on ducks is six and may include no more than four mallards (of which no more than two may be females), three mottled ducks, one black duck, two wood ducks, one pintail (during the specified 30 day season only and during youth hunts), three scaup, and two redhead. Daily bag limit on coots is 15. The daily bag limit for mergansers is five, and only one of which may be a hooded merganser. Merganser limits are in addition to the daily bag limit for ducks. The possession limit on ducks, coots and mergansers is twice the daily bag limit.

GEESE

Light Geese (Snow, Blue and Ross') and White-Fronted Geese: STATEWIDE: Nov. 2 - Dec. 8 (37 days) & Dec. 14 - Jan. 31 (49 days). The daily bag limit on light geese (snow, blue and Ross') is 20. There is no possession limit on light geese. The daily bag limit on white-fronted geese is two. The possession limit is four.

Canada Geese: STATEWIDE (with the exception of one area as described below): Jan. 18 - Jan. 26 (9 days)

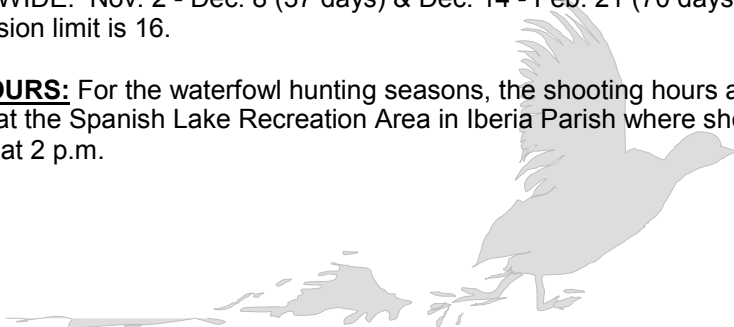
The Canada Goose Season will be open statewide except for a portion of southwest Louisiana. The closed area is described as follows: Beginning at the Texas state line, proceeding east along LA Hwy. 82 to the Calcasieu Ship Channel, the north along the Calcasieu Ship Channel to its junction with the Intracoastal Canal, the east along the Intracoastal Canal to its juncture with LA Hwy. 82, then south along LA Hwy. 82 to its juncture with Parish Road 3147, then south and east along Parish Road 3147 to Freshwater Bayou Canal, then south to the Gulf of Mexico, the west along the shoreline of the Gulf of Mexico to the Texas state line, the north to the point of beginning at LA Hwy.82. A special permit shall be required to participate in the Canada Goose season. A permit is required of everyone, regardless of age, and a non-refundable \$5 administrative fee will be charged. This permit may be obtained from any license vendor.

CONSERVATION ORDER FOR LIGHT GEESE (SNOW, BLUE AND ROSS'): STATEWIDE: Dec. 9 - Dec. 13 (5 days) & Feb. 1 - Mar. 9 (37 days) Only snow, blue and Ross' geese may be taken under the terms of the Conservation Order, which allows the use of electronic calls and unplugged shotguns, and eliminates the daily bag and possession limits. During the Conservation Order, shooting hours begin one-half hour before sunrise and extend until one-half hour after sunset.

RAILS and GALLINULES: STATEWIDE: Nov. 9 - Jan. 8 (61 days) For King and Clapper Rails, the daily bag limit is 15 in the aggregate, and the possession limit is 30. Sora and Virginia Rails have daily and possession limits of 25 in the aggregate. The daily bag limit for gallinules is 15, and the possession limit is 30.

SNIPE: STATEWIDE: Nov. 2 - Dec. 8 (37 days) & Dec. 14 - Feb. 21 (70 days). For snipe, the daily bag limit is eight and the possession limit is 16.

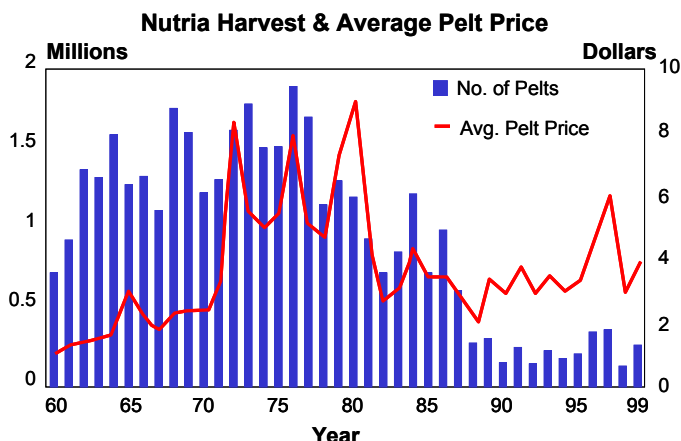
SHOOTING HOURS: For the waterfowl hunting seasons, the shooting hours are one-half hour before sunrise to sunset, except at the Spanish Lake Recreation Area in Iberia Parish where shooting hours, including the Conservation Order, end at 2 p.m.



Coastal Nutria Trappers To Benefit From New Bounty Program

When the fur season arrives in November, Louisiana's coastal trappers will benefit from a new program established earlier this year by the Coastal Wetlands Planning, Protection and Restoration Act Task Force. The Task Force approved \$2.2 million per year for five years for the "Coastwide Nutria Control Program" (CNCP). The CNCP will provide registered trappers with a bounty payment of \$4 per nutria tail for tails of 7" or longer. Tails will be collected at several coastal stations to be established in the coastal zone.

Nutria (*Myocastor coypus*) are herbivorous rodents that were introduced into Louisiana in the early part of the 20th century. After escaping to the wild, populations grew rapidly. From the 1940s through 1970s a nutria trapping industry developed. At the industry peak in the pelts sold for almost \$9 each and more than 1.7 million nutrias were harvested annually. However, demand dropped dramatically during 1980s and 1990s and harvest plummeted.



The Coastwide Nutria Control program is expected to subsidize the harvest of 2 million nutria over the next five years. Nutria populations have exploded since pelt prices fell in the 1980s.

Nutria have been especially problematic in the coastal zone, where they have displaced much of the native muskrat population and denuded coastal vegetation. Recent aerial surveys show that nutria populations have grown very large and now impact upwards of 100,000 acres of coastal marsh. The \$4/tail bounty provides a financial incentive that will hopefully result in an annual harvest of 400,000 nutria during each year of the program.

The Louisiana Department of Wildlife and Fisheries (LDWF) also put nutria on the resident-game hunting season list for the first time last year. Hunters may harvest nutria with firearms in the same manners as with

other game animals, but without size and bag limits. However, officials from LDWF have emphasized that the CNCP bounty is primarily for trappers.

Earlier this summer, the Louisiana Sea Grant Program worked with the LDWF to sponsor a series of coastal meetings designed to familiarize trappers with the new program. Trappers wishing to participate in the CNCP must fill out and return a registration form as soon as possible before opening of trapping season. Program instructions and application packets can be obtained on-line at the LDWF website <http://www.wlf.state.la.us> or by contacting the LDWF Fur and Refuge Division, (225) 765-2811.



Upcoming Meetings and Events in Louisiana

- Oct. 9 -10, 2002 **Society of Wetland Scientists, South Central Chapter Meeting**, Burden Conference Center, Baton Rouge, La., Andy Nyman (225) 225 578-4220 <http://www.rnr.lsu.edu/wetlandsmtg/FirstCallMain.htm>
- Oct. 11, 2002 **Environmental State of the State IV**, Hotel Acadiana, Lafayette, La. Robert Twilley (225) 767-7520. <http://www.ercla.org/EsosConference.htm>
- Oct 12-13, 2002 **Atchafalaya Days**, Atchafalaya Basin Program, Sandra Thompson Decoteau, (225) 342-6437. <http://www.dnr.state.la.us>
- Nov. 1, 2002 **Back to the Bayou**, Barataria-Terrebonne National Estuary Program and the Gulf of Mexico Program. Deborah Schultz (985) 447-0868. <http://www.btneop.org/>
- Nov. 7, 2002 **Ocean Commotion**, LSU Field House, Baton Rouge, La. La Sea Grant, Pam Borne-Blanchard, (225. 578-1558) http://www.lsu.edu/university_relations/oceancommotion/
- Nov. 7-8, 2002 **Comparing Rivers: The Mississippi and the Niger**, Old U.S. Mint in New Orleans French Quarter, Tulane University and US Army Corps of Engineers, Joan Exnicios (504) 862-1760, <http://nigerdelta.aaas2.org/>



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Thank you,

Rex Caffey

Rex H. Caffey
Associate Professor, Wetland & Coastal Resources
Rm 179, Dept. of Agricultural Economics, LSU
Baton Rouge, La 70803-5604
225-578-2266 (p)

LSU AGRICULTURAL CENTER
U.S. DEPARTMENT OF AGRICULTURE
KNAPP HALL
P.O. BOX 25100
BATON ROUGE, LA 70894-5100



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