SENT VIA E-MAIL and REGULAR MAIL
***CWAwaters@epa.gov*, Attention Docket ID No. OW-2002-0050**

April 16, 2003

Water Docket
Environmental Protection Agency
Mailcode 4101T
1200 Pennsylvania Ave.
NW, Washington, DC 20460,

RE: Docket ID No.OW-2002-0050

To Whom It May Concern,

Public Employees for Environmental Responsibility (PEER) is a national service organization working on behalf of employees administering anti-pollution, land management and wildlife protection laws. As Director of New England PEER, I have heard from numerous local, state, and federal employees concerned about the U.S. Army Corps of Engineers (Corps) and Environmental Protection Agency's (EPA) Advance Notice of Proposed Rulemaking (ANPRM) associated with the scope of waters that are subject to the Clean Water Act (CWA), in light of the U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC).

The ANPRM requests public input on issues associated with the definition of "waters of the United States" and also solicits information or data on the implications of the SWANCC decision for jurisdictional decisions under the CWA. Specifically, the agencies are soliciting comments as to: "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?" In other words, the ANPRM solicits comments from the public as to whether the scope of waters and wetlands under Clean Water Act jurisdiction should be narrowed, and if so, how.

According to the ANPRM, EPA and the Corps are soliciting these comments to "further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA." Unfortunately, the guidance already issued by EPA and the Corps (see Appendix A of the ANPRM) has already resulted in the loss of jurisdiction over critical wetlands and waters throughout the United States. If EPA and the Corps continue along this path, or narrow the scope of Clean Water Act jurisdiction even further, the country would lose tens of millions of acres of wetlands and thousands of miles of streams, all vital to clean drinking water, flood storage, recreation such as boating and swimming, and fish, shellfish and wildlife habitat. Specifically, these waters would be open to unrestricted discharges by industrial polluters, oil exploration, timber and mining companies, and dredging and/or filling by commercial, industrial, and residential developers. The results of this change would be devastating, and PEER urges EPA and the Corps to forego proceeding with the rulemaking immediately. Our specific comments are set forth below.

History of the SWANCC decision

Although EPA and Corps officials claim that the proposed rulemaking and guidance are necessitated by the January 2001 Supreme Court decision in SWANCC, this is not the case. In fact, the Department of Justice itself has argued in numerous cases that the *SWANCC* decision should be narrowly interpreted and does *not* dictate any further limits on the federal government's jurisdiction under the Clean Water Act.[1] Rather, the 5-4 majority in the SWANCC case held that the Corps could not protect intrastate, isolated, non-navigable ponds ***solely based on their use by migratory birds***. The SWANCC ruling did not invalidate existing Clean Water Act rules, and did not require that the Corps and EPA issue rules removing jurisdiction from so-called "isolated" wetlands.

The goal of the 1972 Clean Water Act was to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." To achieve that goal, the Clean Water Act forbids the discharge of pollutants into "navigable waters" without a permit issued from the Corps. "Navigable waters" are defined in the Clean Water Act as "waters of the United States." Until now, the Clean Water Act has protected traditionally navigable waters, tributaries of navigable waters, wetlands adjacent to these waters, and other wetlands, streams and ponds that, if destroyed or degraded, could affect interstate commerce. This interpretation of congressional intent is eminently reasonable.

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[1] See e.g., United States v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. February 21, 2002), *appeal pending* No. 02-1377 (6th Cir.); United States v. Deaton, Civ. No. MJG-95-2140 (D. Md. January 29, 2002) *appeal pending* No. 02-1442 (4th Cir.); also see www.nrdc.org.

The ANPRM solicits comments as to whether the rules of the Clean Water Act should be changed by creating a new, scientifically unfounded type of wetlands and waters called "isolated waters." The ANPRM further considers whether these "isolated" waters should no longer be protected under the law. This change would affect wetlands, intermittent streams, ponds, waters running through canals or other man-made conveyances, and even non-navigable tributaries of navigable waters.

For decades, EPA and the Corps have protected waters not connected at the surface level to navigable waters for a variety of reasons, including the fact that they provide water for agriculture or industry, commercially valuable fish and shellfish, recreation opportunities for interstate travelers, habitat for migratory birds, and habitat for endangered or threatened species. In order to allegedly come into compliance with the SWANCC decision, the administration already issued guidance which directed EPA and the Corps to immediately stop protecting any "isolated" non-navigable waters without case-by-case approval from their respective Washington headquarters. This guidance has resulted in the loss of jurisdiction over countless acres of wetlands and miles of stream, and should be revoked immediately.

Under what circumstances should 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?
EPA and the Corps should utilize all of these factors in asserting Clean Water Act jurisdiction over isolated, intrastate, non-navigable waters. Specifically, if a wetland or water offers recreational opportunities for interstate or foreign travelers, EPA and the Corps should assert jurisdiction over the wetland or water. In 2001, people engaged in wildlife watching, fishing and hunting activities, contributed more than $108 billion in revenue to local communities across the country.[2] By removing federal protection from so many wetlands and waters, the federal government is risking the loss of this revenue.

Wetlands are vital to the health of our economy because they act as nurseries for millions of fish and shellfish. Seventy-five percent of all commercial marine fish and shellfish depend on wetlands; these fish and shellfish in turn contribute billions of dollars in harvests each year. Therefore, the presence of fish or shellfish that could be taken and sold in interstate commerce provide a basis for EPA and the Corps to assert Clean Water Act jurisdiction over these wetlands and waters.

Similarly if water is used for industrial purposes by industries in interstate commerce, EPA and the Corps should assert Clean Water jurisdiction over such waters. Allowing such waters to be degraded or destroyed could result in significant impacts to the economy.

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[2] See, e.g., National Audubon Society statistics at http://www.capitolconnect.com/audubon/

Finally, PEER believes that one other factor should be taken into account when determining jurisdiction over wetlands or waters. Specifically, if the destruction or degradation of a particular isolated, intrastate wetland or water would result in impacts to interstate waters or wetlands, the federal government should assert jurisdiction.

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

PEER does not believe that "isolated waters" should be defined in the regulation, since many of these so-called "isolated" waters that do not have a direct surface connection to navigable waters are still linked to the navigable aquatic ecosystem via groundwater or overflow hydrological connections. Others, while not aquatically connected, are biologically linked by wildlife use. All of these "isolated" waters are critical for protecting the physical and biological integrity of navigable waters, and fish and wildlife habitat downstream. Thus, the distinction of these "isolated" waters is illogical from a scientific, hydrological and biological perspective, and the creation of this new regulatory category of "isolated" waters is scientifically indefensible.

Estimates of Wetland Loss in New England

If the federal government no longer asserts jurisdiction over so-called "isolated" wetlands, the following wetlands and waters would be at risk from destruction or degradation: 22,399 acres in Connecticut (12% of total wetlands in Connecticut); 297,837 acres in Maine (5% of the total wetlands in Maine)[3]; 46,798 acres in Massachusetts (14% of the total wetlands in Massachusetts); 19,147 acres in New Hampshire (7% of the total wetlands in New Hampshire); and 3,617 acres in Rhode Island (16% of the total wetlands in Rhode Island).[4] The destruction and/or degradation of even a portion of these wetlands and waters would be devastating to the New England environment.

Wildlife Habitat Impacts

There is a plethora of scientific literature expounding the values of "isolated" wetlands. In New England, many of our vernal pools would fall under the definition of isolated wetlands, and therefore would lose protection under the federal Clean Water Act. Vernal pools are critically important breeding habitats for a number of reptiles, amphibians, and invertebrates, many of which are state-listed. Moreover, vernal pools are also used by many birds and mammals as sources of prey and water.

Moreover, many obligate vernal pool species[5] are philopatric (i.e., return to their natal pools to breed). Therefore, destruction or degradation of these vernal pools can cause entire local populations to cease breeding. Given the important role amphibians play in the food chain, this type of habitat destruction could lead to unintended and disastrous consequences for the New England ecosystem. Specifically, the loss of these "isolated" vernal pools could result in the extirpation of wood frogs, mole salamanders (spotted salamander, blue-spotted salamander, and marbled salamander), American toad, Fowler's

[3] Note that this figure includes reservoirs, which may still be protected.
[4] Figures for Vermont were not available.
[5] An obligate species is one which requires vernal pools to breed.

toad, spring peeper, and gray treefrog. Extirpation of these species would in turn adversely affect populations of birds such as herons, a variety of hawks, and king fishers; reptiles such as the rare Blanding's turtle, wood turtle, spotted turtle, and ribbon snakes; and mammals such as fox, otters, muskrats, and coyotes. This troublesome prediction is not based on speculation: scientists have demonstrated that the loss of small, isolated wetlands in Maine would have substantial impacts on populations of turtles and small mammals.[6]

"Isolated" wetlands are also rich in the number and diversity of invertebrates. Aquatic invertebrates provide food to a number of predators in New England, and are important contributors in breaking down and processing organic matter. If these wetlands are lost or degraded, less food will be available for higher level consumers, and the detrital food chain will be disrupted. Specifically, waterfowl, wading birds, wetland dependent mammals, bats, and insectivorous songbirds will also be affected.

Clean Water

Some scientists estimate that as many as 20 million acres of wetlands and 60% of stream miles in the United States could be lost if the federal government no longer asserts jurisdiction over "isolated" waters.[7] Waters no longer protected due to their "isolated" status would not only be open to filling and dredging, but also to discharges of pollutants. The potential impacts on public health and the environment would include increased water pollution and dirtier drinking water sources. The more wetlands and streams that are destroyed, the more contaminants we will have in our drinking water. Isolated wetlands and streams upstream of drinking water supplies help filter water moving into our water supply reservoirs and ground water aquifers. These wetlands and waters save communities millions of dollars that would otherwise be spent on expensive water treatment facilities.

Flooding

The hydrologic actions of streams and wetlands significantly reduce flood damage each year in the United States. By allowing destruction of up to 20 million acres of wetlands throughout the country, we can anticipate increased flooding and loss of property and life.

Non-federal Protection of "Isolated" Waters

It is irrational to assume, as the ANPRM suggests, that states will step up to the plate to protect whatever waters and wetlands lose federal protection under this ANPRM. First, many states do not even have wetland protection laws on the books - only 17 states have a freshwater wetland protection program. States that do not have freshwater wetland protection programs include: Alaska, Louisiana, Georgia, Texas, North Carolina, South Carolina, and Mississippi. Second, many of the states that do have some type of wetland protection scheme have laws that fall far short of the protection offered by the federal

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[6] Gibbs, JP. 1993. Importance of small wetlands for the persistence of local populations of wetland-associated animals. Wetlands 13(1):25-31.

[7] Kusler, Jon, The SWANCC Decision and State Regulation of Wetlands, Association of State Wetland Managers, aswm@aswm.org

Clean Water Act. For example, New York's wetlands law protects only those wetlands that are larger than 12.4 acres in size.[8] Third, many states are currently in a fiscal crisis, and do not have the resources to implement their existing laws, let alone more stringent protections. For example, the Commonwealth of Massachusetts currently has a $3 billion deficit, and is considering extensive layoffs and budget cuts in the Department of Environmental Protection. Other states throughout New England are in the throes of similar fiscal crises. Finally, even if states did adopt comprehensive wetland protection schemes, their waters would still be vulnerable to damage from states upstream that do not have similar laws. The federal Clean Water Act creates a level playing field across all states; resorting to different laws and regulations in all 50 states would be confusing for the regulated community, and would result in drastically degraded wetlands and waters in many states.

Conclusion

When former President George H.W. Bush adopted a national policy of "no net loss" of wetlands in 1990, the decision was applauded by environmentalists around the country. Thirteen years later, the United States continues to lose an estimated 50,000 to 100,000 acres of wetlands per year. The current Bush administration has obviously forsaken the policy of no net loss of wetlands. However, these losses would pale in comparison to the destruction that would be caused by implementation of the proposed rulemaking. As stated above, the United States would lose up to 20 million acres of wetlands, and hundreds of thousands of miles of streams. In these times of heightened national security, one would hope that the administration would take care of the country's natural resources, as clean water and economic security are necessary components of national security.

In conclusion, PEER urges EPA and the Corps to forego proceeding with the rulemaking, as it eliminates millions of acres of critical waters and wetlands from protection under the Clean Water Act. Further, PEER urges EPA and the Corps to rescind the guidance included in the ANPRM as Appendix A, and prepare a new ANPRM which adheres to the narrowest possible interpretation of the SWANCC decision.

Sincerely,

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[8] Id.

cc: Region 1 EPA

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