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APR 16 2003

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Acting Commissioner

April 16, 2003

Water Docket Staff
Water Docket Mail Code 4101T
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Attn: Docket ID No. OW-2002-0050

Re: Comments on the Advanced Notice of Proposed
Rulemaking on the Clean Water Act Rule Change

Dear EPA Staff:

The Massachusetts Department of Environmental Protection (the "Department") offers the following comments on the Advance Notice of Proposed Rulemaking on the Clean Water Act (the "ANPRM") Rulemaking Definition of "Waters of the United States." As proposed, the amendments suggested in the ANPRM will impact isolated wetlands in Massachusetts as currently regulated by the National Pollution Discharge Elimination System ("NPDES"), Section 401 Water Quality Certification, the Wetlands Protection Act, and ongoing efforts to implement the Total Maximum Daily Load ("TMDL") program. The cumulative effect of such changes will undercut on-going efforts in Massachusetts to improve wetland resource protection, increase program effectiveness, and reduce regulatory process. The proposed changes will result in significant impacts to valuable wetland resources and habitat destruction in vernal pools. In addition, the changes will undermine existing exemptions to state regulations, which are afforded certain projects currently reviewed under the Clean Water Act ("CWA"). The loss of exemption status for these projects, coupled with ongoing budget constraints, will result in longer state permitting review time for many projects.

Any amendment of the definition of "waters of the United States" should reflect the narrow holding of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). The Army Corps of Engineers and the Environmental Protection Agency should not seek to make broader changes than expressly required by SWANCC because these would be beyond the authority of the CWA. In addition, any such broader changes will significantly impact Massachusetts in a manner inconsistent with the purposes of the CWA.

This information is available in alternate format. Call April McCabe, ADA Coordinator at 1-617-556-1171. TDD Service - 1-800-298-2207.

DEP on the World Wide Web: <http://www.mass.gov/dep>

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In SWANCC, the Supreme Court held that there is no Clean Water Act jurisdiction over isolated, intrastate non-navigable waters if jurisdiction would be solely based on their use as habitat for migratory birds that cross state lines.¹ Importantly, SWANCC does not change CWA jurisdiction as it applies to all other waters such as intrastate lakes, rivers, streams (including intermittent streams), wetlands, or natural ponds that are or could be used by interstate or foreign travelers for recreation, shellfishing and interstate commerce, or that are used or could be used for industrial purposes by industries conducting interstate commerce.

The ANPRM reaches beyond the narrow SWANCC holding. The Supreme Court held that the federal jurisdiction of isolated, intrastate, non-navigable wetlands cannot be based **solely** on their use as a habitat for migratory birds. However, the proposed changes would exclude from jurisdiction **all** isolated, intrastate, non-navigable wetlands, including those wetlands that are or may be used for recreation, industry, and irrigation of crops (including fish or shellfish) that enter into interstate commerce and/or those (e.g. vernal pools) that serve as habitat to threatened or endangered species.

Massachusetts is home to an example of an intrastate isolated water which would no longer be subject to Clean Water Act jurisdiction under a broad interpretation of SWANCC as suggested by the ANPRM: Walden Pond. As a 100-foot deep glacial kettle hole pond, Walden Pond is the best known of many kettle ponds in Massachusetts that are isolated waters. Because of the legacy of Henry David Thoreau, Walden Pond has been designated a National Historic Landmark and is considered by many to be the birthplace of the American conservation ethic. Visitors come from throughout the United States and other countries, so the Pond easily would meet an interstate commerce test; to preserve the resource, visitors are limited to 1000 at a time. Yet, the result of EPA's revisions could result in unregulated discharges of industrial pollutants or stormwater to the Pond, or even simply paving it over. The fact that Massachusetts has strong state laws to prevent any such degradation to Walden Pond does not justify the ANPRM's proposed abrogation of federal responsibility for ecologically, economically and culturally significant water resources. The Supreme Court has not mandated the withdrawal of Clean Water Act protection from Walden Pond, and neither should EPA.

In general, the proposed ANPRM changes will result in less protection for selected wetland areas, particularly for those isolated vernal pools that often serve as valuable food, shelter, breeding, overwintering, or migratory habitat for amphibians. These vernal pool habitats provide critical habitat for amphibian populations, many of which are protected under the Massachusetts and federal Endangered Species Act. Of particular concern is the contribution the proposed changes will make to the on-going loss of vernal pool habitat and associated amphibian populations.²

¹ As per an EPA/Corps guidance memo of January 10, 2003, in light of the SWANCC decision as well as subsequent court decisions, "neither agency will assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction rests on any of the factors listed in the Migratory Bird Rule."

² See: NHESP Potential Vernal Pool Study at <http://www.state.ma.us/mgis/pvp.htm> which identifies 29,000 potential vernal pools in the state, of which 3,000 comprise certified vernal pools and represent outstanding resource waters in the Commonwealth.

The proposed changes recommended in the ANPRM would result in several changes to existing environmental protection programs in Massachusetts. The proposed changes will affect the following specific state-administered resource protection programs.

Water Quality Certification Program:

- The federal CWA, with additional authority under the Massachusetts Clean Water Act (M.G.L. c. 21, s.26 – s.53), requires discharges of pollutants to “waters of the US” to obtain a 401 Water Quality Certificate to ensure compliance with the Massachusetts Surface Water Quality Standards (314 CMR 4.00). Modifications to federal jurisdiction that reduce protections to vernal pools will directly affect the ability of the Commonwealth to protect these unique resources through the use of 401 Water Quality Certificates issued by the Department pursuant to 314 CMR 9.00. Loss of jurisdiction in these areas will also diminish protections which have been afforded to select isolated wetlands designated Outstanding Resource Waters which constitutes waters with outstanding socio-economic, recreational, ecological and/or aesthetic values. While Massachusetts does protect certain wetland resource areas, certain Outstanding Resource waters such as vernal pools are not regulated under the Wetlands Protection Act. Reduced federal protections, and the associated contraction of 401 jurisdiction, will result in the loss of protection of these valuable and threatened habitats.

NPDES:

- The ANPRM’s narrow interpretation of “waters of the United States” will also affect the scope of regulatory review currently established under the federal NPDES permit program. Changes to the scope of jurisdiction of the NPDES program that exempt certain projects from NPDES permitting will necessarily result in additional regulatory review for such projects under the various state programs.

Surface Water Discharge Permit Program:

- At present, the existing Massachusetts Surface Water Discharge Permit Program (314 CMR 3.05(2)) and the 401 Water Quality Certification Program (314 CMR 9.01(2)) provide that if the discharge of dredged or fill material is regulated under s. 404 of the federal CWA (which requires a state-issued 401 Water Quality Certificate), then such discharges are exempt from a permit under 314 CMR 3.00³. Removal of these types of projects from Section 404 jurisdiction may result in the need to obtain a discharge permit under 314 CMR 3.00 if they are no longer regulated by Section 404.

³ The phrase in 314 CMR 3.05(2) "and are exempted from the need for a permit pursuant to 314 CMR 9.01(2)" infers that where such discharges are subject to jurisdiction of 314 CMR 9.00, they are adequately regulated thereunder and are, therefore, exempt under 314 CMR 3.00.

Wetlands Protection Program:

- Under 310 CMR 10.03(4), projects which receive a state Surface Water discharge permit issued pursuant to 314 CMR 3.00, in conjunction with the NPDES permit, are presumed to protect the eight interests of the Wetland Protection Act with respect to the effects of the discharge on water quality. Elimination of this presumption for those projects that no longer need to obtain an NPDES permit will result in additional review for impacts to water quality under the Wetland Protection Act.

The Massachusetts Department of Environmental Protection requests that if EPA engages in rulemaking which will negatively impact state wetlands programs, the federal agencies narrowly interpret the SWANCC decision so that federal regulation of isolated, intrastate non-navigable waters will continue if any connection to interstate or foreign commerce can be established. Further, federal Clean Water Act jurisdiction should continue to apply to tributaries to navigable waters, including intermittent streams, as well as wetlands that are adjacent to navigable waters and their tributaries. Determinations of adjacency should take into account not just physical proximity, but hydrological factors as well. Federal protection of these waters not only contributes to needed protection of navigable waters, but to preservation of the rare and endangered wildlife habitat that these waters provide. Without these measures, the proposed changes will adversely impact valued wetland resource areas.

Finally, the Massachusetts Department requests that the effective date of the federal regulation revisions be one year from the promulgation date. This period of time is needed so as to afford states an opportunity to revise its regulations to protect surface waters that no longer will have the protections afforded by the existing definition of "waters of the United States" in the federal Clean Water Act and regulations.

Sincerely,



Cynthia Giles
Assistant Commissioner