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DEPARTMENT OF ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK 12233-1010

MAR 27 2003

Water Docket
United States Environmental Protection Agency
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1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

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Dear Colleagues:

On behalf of the New York State Department of Environmental Conservation (Department), I applaud the Army Corps of Engineers' (Corps) and Environmental Protection Agency's (EPA) recent re-commitment to the No Net Loss goal, as articulated in the National Wetlands Mitigation Action Plan (Plan) released on December 26, 2002. In that regard, I encourage the Corps and EPA to continue to work with the states in developing subsequent components of the Plan, and in using a watershed approach to water quality and aquatic resource conservation.

However, I am deeply concerned about the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" (ANPR) released on January 15, 2003 and the accompanying Joint Memorandum signed on January 10, 2003. After carefully assessing them, the Department provides the following comments and recommendations.

The Department believes that the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC) decision should be interpreted very narrowly, thereby maintaining a high floor of federal regulation. The Department does not support applying the SWANCC decision broadly to include all isolated wetlands and non-navigable tributary waters. Just as "adjacent wetlands" were recognized in the *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) decision as integral to navigable waters, so too are the non-navigable tributaries, headwaters, and non-perennial streams that support navigable waters. Loss or degradation of isolated or non-navigable surface waters will impair the overall biological, chemical, and physical properties of the nation's waters. Such a result would be wholly inconsistent with the underlying principles of the Clean Water Act.

The January 10, 2003, Joint Memorandum suggests that isolated intrastate waters are not jurisdictional unless an extraordinary case is made otherwise, and that “in general” headwater streams are jurisdictional. This casts a presumption that wetlands and certain streams are not jurisdictional. The Department strongly recommends returning to the presumption that all waters are jurisdictional under the Clean Water Act unless specifically determined otherwise.

At the outset the Department notes that it is not likely that alternative conservation programs or regulations at the state or local level will provide adequate or appropriately broad surrogate protection should Clean Water Act jurisdiction be reduced. Moreover, such an approach could result in a patchwork of jurisdictions and non-binding programs that would not provide consistent and predictable protection for the resource or consistent determinations for property owners and project sponsors. New York’s streams and adjacent wetlands are generally protected from physical disturbance and harmful point source discharges of pollutants under New York State Environmental Conservation Law Articles 15 (Stream Protection) and 17 (State Pollutant Discharge Elimination System), respectively. This State independently recognized the importance of clean water to the economy, environment, and quality of life in New York. Implementation of these programs will not be impacted by reduced federal jurisdiction, but there are numerous non-navigable streams and isolated wetland that are not covered under the state programs and are reliant upon Sections 404 and 401 of the Clean Water Act regulation for protection. Should the Clean Water Act’s jurisdictional scope be reduced, these waters would become vulnerable to alteration or degradation.

Furthermore, reduced jurisdiction will jeopardize resources when state authority is preempted by federal authority or where it exists as the sole basis of the program. Of particular concern are projects under Federal Energy Regulatory Commission (FERC) jurisdiction. Under these circumstances, the state-issued Clean Water Act §401 water quality certificate is an important tool to protect New York’s waters. For example, FERC-regulated pipelines constructed across scores of tributary waters in the Appalachian Highlands of southern New York could have adverse impacts on the tributaries in the watershed of the Susquehanna River, the headwaters to the Chesapeake Bay. Instead, use of the state-issued §401 water quality certificate would avoid and mitigate impacts to the water resources. Clearly, protection of these headwater streams provides significant interstate benefits of social, economic, and ecological importance.

The Department is also concerned about interstate regulatory equity. It is imperative that we maintain strong nationwide Clean Water Act standards to ensure that individual states, or groups of states, cannot benefit from the location of industry, business, or other activities within those states, on the expectation of lower environmental regulatory hurdles. Strong nationwide protection ensures that upstream states cannot export pollutants to downstream communities. Although New York is the headwaters of many of its own waters, notable exceptions of where our water quality and quantity depend on the actions of other states include Lakes Erie, Ontario and Champlain; the Niagara and Allegheny Rivers; the Batten Kill; Long Island Sound; and the

New York - New Jersey Harbor. All of these have important social, economic, and ecological benefits both intrastate and interstate.

The Department is also not supportive of reducing regulatory protection for the nation's waters with the rationale that non-regulatory programs can fill the void. The Department strongly supports the various non-regulatory conservation programs that currently exist, such as those in the federal Food Security Act (Farm Bill). However, restoration, watershed planning, and other incentive-based programs are costly and remedial in nature. Non-regulatory programs should complement, not replace, regulatory programs in the conservation tool box. Regulatory scrutiny remains the primary mechanism to avoid broad-scale despoliation of the nation's water quality. It is cost-ineffective and a poor use of resources in austere times to allow degradation of our waters, and then spend considerable public monies on trying to rectify the problems resulting from loss of habitat, water resources, and water quality.

The fundamental concern the Department has is that decreased jurisdiction, and therefore lessened protection, will have adverse impacts on the biological, chemical and physical nature of the State's waters. Lost protection for isolated wetlands and non-navigable streams will result in a number of problems, including:

- Loss of vital habitats that support the biological diversity of our aquatic systems.
There are many important ecological communities, such as fens, for which protection would be lost. In New York, fens are key habitats for a number of federally or state endangered species. For example, some of the best bog turtle (*Clemmys muhlenbergii*) habitat in the state are patches of rich fen, protection of which would be eliminated if SWANCC is interpreted broadly. Further loss of unique habitats may also result in the endangerment of additional species. This has potential impacts on landowners and government, and is contrary to Congress's intent to prevent further declines in wildlife populations as demonstrated by funding of the State Wildlife Grants programs through the United States Fish and Wildlife Service.

Vernal pools are critical habitat for breeding amphibians, populations of which are already declining globally due, in part, to habitat loss. Vernal pools will be lost through a broad reading of the SWANCC decision.

Perennial headwater streams, which may be non-navigable, are important habitat for brook, brown, and rainbow trout. These smaller streams function as important spawning and nursery areas for wild trout populations. This, in turn, provides important recreational and economic benefits to the state. For example, the Beaver Kill and Willowemoc Creek systems are renown in angling history for their trout fishing opportunities and traditions. Our creel surveys indicate that an estimated 18,000 angler trips were taken to the Beaver Kill during 2001, yet less than 10 percent were from local residents. Primary use is from visiting or tourist anglers that reside outside the area. About 47 percent emanate from the New York - New Jersey area, with visitors from

Canada, Germany, Yugoslavia, Japan, South Africa, England, and Ireland all being documented.

- Increased flooding.

Loss of isolated wetlands and headwater streams, which may occur with a decrease in Clean Water Act jurisdiction, will result in the loss of the water retention capacity of these areas. The result will be increased downstream flooding with its attendant social and economic impacts to residents, local governments, and businesses. Federal and state governments also will incur costs in responding to flood events and remediating flood impacts. Increased runoff also results in increased scouring of stream channels and therefore increased turbidity of water. The result is harm to aquatic habitat, and increased sedimentation in drinking water reservoirs and navigational channels. The economic costs of these have been well demonstrated historically. In fact, the Upper Susquehanna Coalition is actively involved in creating small wetlands to help reduce flood losses in that watershed. These actions are articulated in the Susquehanna/Chemung Watershed Restoration and Protection Action Strategy, prepared in collaboration with, and under support of, EPA.

- Decreased water quality.

It is unquestioned that through retaining or detaining the flow of rain water and snow melt to streams and lakes, small wetlands, whether isolated or not, protect our water quality. Headwater streams have been shown to have higher water quality buffering capacity than larger, deeper streams and rivers. The mere existence of these wetlands and tributary waters provide significant water quality benefits to the nation. To lose protection for them, and therefore to subject them to unregulated discharges or to elimination altogether will result in increased pollutant loads to the receiving waters and in diminished buffering capacity. This comes at a time when EPA recognizes the importance of increased stormwater management for improving the quality of the nation's waters. The benefits we expect to accrue through the Phase II stormwater and Total Maximum Daily Load (TMDL) program implementation will be undermined if we abandon protection for isolated wetlands and headwater tributary streams. Clearly, any effort to read SWANCC broadly is countered to our significant recent accomplishments in water quality protection programs, and our strategy of attaining fishable, swimmable waters.

In sum, the Department does not support a rulemaking at this time, in particular we do not favor restrictive changes to the definition of waters of the United States. The Department believes that the definition that is currently embodied in regulation is acceptable and one with which the states and the public have become accustomed to working with and for which complementary state and local programs have been developed. As such, we encourage the continued use of all factors listed in 33 CFR §328.3 (3)(a)(i)-(iii) for purposes of asserting Clean Water Act jurisdiction. Whereas additional guidance may be necessary to clarify application of the SWANCC decision within the context of the definition of "waters of the United States," the Department does

not believe a new rulemaking is necessary or desirable. Whether headwater or isolated, wetlands and streams are integral components of the state's and nation's waters. It serves us socially, ecologically, and economically to protect these resources for the health of our natural resources and citizens.

Sincerely,

A handwritten signature in black ink, appearing to read "Erin M. Crotty". The signature is fluid and cursive, with a large loop at the end of the last name.

Erin M. Crotty