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VIA EXPRESS MAIL AND ELECTRONIC TRANSMISSION

Water Docket
Environmental Protection Agency
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Washington, D.C. 20460
ATTENTION: Docket ID No. OW-2002-0050

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ATTENTION Docket ID No. OW-2002-0050

Ladies and Gentlemen:

INTRODUCTION

The City of New York (the “City”, through the New York City Department of Environmental Protection (“NYCDEP”), submits the following comments in response to the United States Environmental Protection Agency’s (“EPA”) and the United States Department of Defense Army Corp of Engineers’ (“Army Corps”) request for public comments on an Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States” published in the Federal Register, Vol. 68, No. 10 (January 15, 2003) (the “Federal Register Notice”). The Federal Register Notice requests early comments on issues 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 City strongly opposes any narrowing of CWA

jurisdiction that would exclude so-called “isolated” wetlands¹ because such wetlands form an integral part of the ecosystems comprising the “waters of the United States” that are intended to be protected under the Clean Water Act.

The City’s primary concerns about Clean Water Act jurisdiction derive from NYCDEP’s role as manager of the City’s extraordinary water supply system. Accordingly, as background, our comments first provide an overview of the New York City drinking water supply watershed (the “Watershed”) and the New York City water supply system (the “water supply”).

BACKGROUND

The Watershed of the New York City water supply is a 1,969 square mile area located primarily in upstate New York, with a small portion located in the State of Connecticut. The Watershed is defined by its hydrology. (A map is attached hereto.) The extremely high quality of the City’s water supply derives primarily from the natural protection and treatment provided by the Watershed itself, including the extensive wetlands in the Watershed, many of which do not have obvious surface water connections to other water bodies.

The water supply provides approximately 1.3 billion gallons of drinking water per day to almost half the population of the State of New York – over eight million people in the City of New York, one million people in Westchester, Putnam, Orange and Ulster Counties and to the businesses, industries and institutions located in these areas.

NYCDEP is the New York City agency with primary responsibility for overseeing the operation, maintenance and management of water supply infrastructure and the protection of the 1,969 square mile watershed. Nearly 1,000 NYCDEP employees are involved in these operations.

The Watershed consists of three unfiltered surface water systems. The Croton system is located east of the Hudson River in Westchester, Putnam and Dutchess Counties. The Catskill and Delaware systems are located west of the Hudson River, in Ulster, Delaware, Greene, Schoharie, and Sullivan Counties. These three upstate water collection systems include 19 reservoirs and three controlled lakes with a total storage capacity of approximately 550 billion gallons.

In the late 1980s, the City decided to apply for filtration avoidance for the Catskill

¹ The Federal Register Notice, based upon SWANCC, defines the waters subject to comment as “isolated, intrastate and non-navigable.” For the sake of brevity, our reference to “isolated” includes all terms.

and Delaware systems – which together supply approximately 90% of the City’s water – under the terms of the Surface Water Treatment Rule.² For the last decade, NYCDEP and its partner agencies and organizations have developed and deployed a comprehensive watershed monitoring and protection program designed to maintain and enhance the high quality of Catskill and Delaware water. This program has been recognized internationally as a model for watershed protection and has allowed the City to secure a series of waivers from EPA from the filtration requirements of the Surface Water Treatment Rule.

The City is in the process of siting, designing and constructing a water treatment plant to filter the Croton Supply, which typically supplies approximately 10% of the City’s average daily water demand. While the Croton system – the oldest of the three systems, and the one most significantly affected by land development – continues to meet all current health-based regulatory standards for a surface water supply, it does experience periodic violations of the aesthetic standards for color, taste and odor. In addition, it is not clear that the Croton system will be able to meet stricter standards for disinfection by-products expected to be imposed under rules to be promulgated in the future. The Croton water treatment plant is expected to resolve these concerns.

COMMENTS AND RECOMMENDATIONS

The Federal Register Notice seeks preliminary comments on a the potential removal of certain types of water bodies, which the City believes are critical components of its water supply system and water systems across the nation, from the reach of the federal Clean Water Act. The City opposes such a change, for the reasons set forth in detail below. While we recognize the need to revise the regulations promulgated pursuant to the Clean Water Act regarding the Migratory Bird Rule, in light of the U.S. Supreme Court’s decision in *SWANCC*, we urge EPA and the Army Corps to take into consideration the critical water quality related functions that so-called “isolated” wetlands, and other water bodies that are not, if considered in isolation, navigable, play in protecting water quality.

Based on extensive expertise, research, and experience, the City believes that all waters, which together form an entire aquatic system, should be considered as part of its related navigable waters. Water moves in hydrological cycles and the pollution, dredging or filling of part of an aquatic system will often adversely affect the water quality of the other waters within that system. Just as “adjacent wetlands” were recognized in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) as integral to navigable waters, so too are the non-navigable tributaries, headwaters and non-perennial streams that support navigable waters. Congress passed the CWA for the stated purpose of “restoring and maintaining the

² The Safe Drinking Water Act (SDWA) amendments of 1986 required EPA to develop criteria under which filtration would be required for public surface water supplies. In 1989, EPA promulgated the Surface Water Treatment Rule (SWTR), which requires all public water supply systems supplied by unfiltered surface water sources to either provide filtration or meet a series of water quality, operational and watershed control criteria.

chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. Section 1251(a). After three decades of federal environmental protection, we have learned that aquatic systems function best when their integral components, connected in ways that may not be apparent, are allowed to function together. Eliminating these protections, which have demonstrably improved water quality in the Watershed and throughout the United States, and dissecting the parts of an aquatic system so that its essential components are beyond the jurisdiction of such protections will, eventually, lead to degradation and contamination of our “Nation’s waters.”

A. The Concept of “Isolated” Waters and Wetlands is Not Scientifically Supportable and Excluding Them From CWA Jurisdiction Would Undermine the Intent and Purpose of the CWA

In the Watershed, the loss of “isolated” wetlands or waters would have a significant impact on the quality of the water supply. As stated by the National Research Council in their review of compensation of wetland losses under the Clean Water Act (National Academy Press 2001), isolated depressional wetlands are among inland wetland types that provide valuable water quality functions. They remove sediments, nutrients, and pollutants from influent precipitation, stormwater, runoff, and groundwater, preventing degradation of downgradient surface waters. In addition, all wetlands, by definition, are characterized by reducing conditions in their sediments that facilitate biogeochemical transformations such as denitrification. This function is independent of connectivity and is of particular importance for watersheds in the northeast, such as the New York City Watershed, that receive significant inputs of nitrogen through atmospheric deposition.

“Isolated” and intermittently connected wetlands are often located in the headwaters of the streams and rivers in the Watershed. There, these wetlands capture and detain precipitation and other surface runoff, reducing downstream flooding, erosion and associated water quality impairment. A study in the Croton Watershed found decreased peak flow and increased lag time between the period of maximum rainfall and maximum runoff in a sub-basin that contained a headwater wetland when compared to a similar sub-basin without wetlands.³ This detained water is released slowly from the wetlands via intermittent surface outflows or groundwater recharge, both of which support stream baseflow.

Based on the watershed-scale functions of “isolated” wetlands, such as flood prevention, groundwater recharge, baseflow support, and water quality improvement, as well as their connection to groundwater and the global hydrologic cycle, NYCDEP considers the

³ The Croton Process Studies Project (the “Project”), conducted by the State University of New York College of Environmental Science and Forestry (SUNY-ESF) (to be published). Information provided by Dr. James Hassett, Project Director, on March 24, 2003 by verbal communication with NYCDEP. The Project involves a research consortium consisting of SUNY-ESF, Upstate Freshwater Institute, United States Geological Survey, and Syracuse University. The goal of the Project is to research the hydrological and biochemical processes that link land use and geographic sources to water quality.

concept of an “isolated wetland” to be technically indefensible.

B. Distribution of “Isolated” and “Intermittent” Wetlands, Ponds and Watercourses in the Watershed

Wetlands and Ponds.

NYCDEP estimates that 3,723 acres of vegetated wetlands and ponds in the Watershed lack readily discernable perennial surface connections to other waters and, as such, could be affected by the proposals suggested in the Federal Register Notice. This amounts to 15% of the 24,439 acres of vegetated wetlands and ponds in the Watershed and includes:

- 1,791 acres, or 20% of the vegetated wetlands and ponds in the Catskill and Delaware Watersheds, and
- 1,932 acres, or 12% of the vegetated wetlands and ponds in the Croton Watershed (see Table 1)

Watercourses.

NYCDEP also estimates that 30% of the 2,900 miles of watercourses in the Catskill and Delaware Watersheds and 34% of the 850 miles of watercourses in Croton Watershed lack perennial flow and thus could also be adversely affected were such water bodies to be excluded from CWA jurisdiction.

Table 1. Area of isolated and intermittently connected wetlands and ponds in the

New York City Water Supply Watershed. E.O.H. includes portions of the Watershed East of the Hudson River (Croton Watershed), W.O.H. includes the areas of the Catskill and Delaware Watersheds located West of the Hudson River.

¹Based on National Wetlands Inventory (NWI) Data, vegetated wetlands include Aquatic Beds, Emergent, Forested, and Scrub-shrub classes. Ponds include Unconsolidated Bottom classes in the Palustrine system.

²Isolated wetlands are defined as wetland complexes in the NWI that are beyond 65m of any watercourse in the NWI linear coverage or NYCDEP's stream coverage which integrates streams shown on United States Geological Services Topographic and Natural Resources Conservation Service Soils Maps.

³Intermittent refers to wetlands adjacent to intermittent streams identified as Subsystem 4 of the Riverine system in the NWI and any other watercourse not shown as a blue line on USGS maps.

C. SWANCC's Analysis Should be Applied Narrowly and Not Broadly Applied throughout the CWA and Other Federal Environmental Regulations.

The *SWANCC* decision was limited to the issue of Section 404(a) jurisdiction over the filling in of isolated, intrastate, non-navigable ponds and other waters where the sole basis for jurisdiction over such waters was that the loss of such waters would affect migratory birds and their habitat as defined in the "Migratory Bird Rule." The City believes that numerous bases for jurisdiction over many critical, but "isolated," wetlands remain in federal regulations, such as 33 CFR 328.3(a)(i)-(iii). Moreover, the *SWANCC* decision does not suggest or require changes in federal jurisdiction under other sections of the CWA, let alone under other statutes. The Federal Register Notice suggests, however, that in response to *SWANCC*, the EPA and Army Corps may amend other sections of the CWA regulations and "counterpart regulations" relating to other federal environmental statutes that contain a substantially similar definition for "waters of the United States" to exclude federal jurisdiction over isolated water bodies.⁴

The consequences of such amendments would be serious. Eliminating "intermittent

⁴ According to the Federal Register Notice, the *SWANCC* decision may affect the scope of regulatory jurisdiction under other provisions of the CWA including: Section 303 (water quality standards); Section 311 (the oil and hazardous substance release program); Section 401 (state water-quality certification program) and Section 402 (National Pollutant Discharge Elimination System (NPDES) permitting program) as these sections also pertain to "waters of the United States."

Substantially similar regulatory definitions appear at 40 CFR Sections 110.1 (Discharge of Oil), 112.2 (Oil Pollution Prevention), 116.3 (Designation of Hazardous Substances), 117.1 (Determination of Reportable Quantities for Hazardous Substances), 122.2 (National Pollution Discharge Elimination System), 232.2 (Ocean Dumping-Part 404 Definitions; Exempt Activities), 300.5, part 300 App. E (Superfund -National Oil and Hazardous Substances Pollution Contingency Plan), 302.3 (Superfund- Designation, Reportable Quantities and Notification) and 401.11(Effluent Guidelines and Standards-General Provisions).

streams” from Section 402 (NPDES) jurisdiction, for example, would eliminate an important regulatory structure that protects water quality. In the Watershed, there are over sixty (60) surface-discharging wastewater treatment plants (WWTPs) sending effluent into intermittent streams. Each of these WWTPs currently operates pursuant to a State Pollutant Discharge Elimination Permit (SPDES) from the NPDES-delegated agency in the State of New York, the New York State Department of Environmental Conservation. In the event that these streams— all of which feed larger tributaries to City reservoirs— were to be eliminated from CWA jurisdiction, these WWTPs would not be required to have permits under federal law. Even assuming that they remained subject to State permitting requirements, such a change in federal law would preclude the City from bringing CWA citizen suits against the owners of WWTPs, in the event of repeated violations of their SPDES permits. Through use of such citizen suits in the past, the City has required dozens of WWTPs in the Watershed with chronic violations to come into compliance. If this enforcement mechanism were to be eliminated, violations at surface-discharging WWTPs could threaten water quality throughout the Watershed.

The Watershed is remarkable not only for its water quality but because its excellent water quality is generated in a large rural and suburban area with hundreds of thousands of residents, thousands of businesses, roadways, other impervious surfaces and on-going development, all of which make the water quality vulnerable to degradation. A reduction in protection in the federal regulatory scheme regarding oil spills, the release of hazardous substances or other environmental protections identified in the Federal Register Notice could result in an overall reduction in the quality of the drinking water supply.

For these reasons, we urge EPA and Army Corps to refrain from narrowing the definition of “waters of the United States” in the CWA or the “counterpart regulations.”

D. Voluntary Federal Programs, State Regulatory Protection and City Land Acquisition Programs are Insufficient To Protect Wetlands

Federal Programs:

NYCDEP has investigated other existing federal, state and local programs designed to protect aquatic resources, particularly wetlands. In general, these programs are very helpful, but they are also subject to limitations on eligibility and/or funding. This limits their ability to reach all of the wetland areas potentially deserving of protection and conservation. For example, in 2001, NYCDEP met with the Wetlands Reserve Program (WRP) (administered by the Natural Resources Conservation Service) and the Partners for Fish and Wildlife Program (Partners Program) (administered by the U.S. Fish and Wildlife Service), two voluntary programs mentioned in the Federal Register Notice, to discuss wetland protection in the Watershed. In the State of New York, the WRP has typically been oversubscribed, with approximately 100 projects a year selected from more than 250 applications. The Partners Program is also significantly oversubscribed, with more than 400

landowners in the program in 2001 and just 4 statewide staff to administer the program.

While both of these programs have achieved certain success throughout the State of New York and the United States in restoring wetlands and habitats, neither of the programs appear to be widely applicable in the Watershed. Since the WRP tends to prioritize factors regarding habitat, rather than overall water quality protection, it is unlikely that projects in the Watershed would rank high enough to qualify for funding. In any event, given the relatively small proportion of isolated wetlands in the Watershed to total wetlands throughout New York State competing for limited funds, these programs are unlikely to affect Watershed resources significantly.

State Regulatory Program

The New York State Department of Environmental Conservation (DEC) administers the Freshwater Wetlands Act (Article 24 of the New York State Environmental Conservation Law), the only State of New York wetland protection program. In order to be protected under the Freshwater Wetlands Act, a wetland must be at least 12.4 acres in size, or designated as a wetland of unusual local importance. Wetlands in the Watershed less than 12.4 acres, or not determined by DEC to be wetlands of “unusual local importance”, are not regulated or protected by DEC, with the exception of certain smaller wetlands adjacent to City reservoirs.

Given the limitations in the State’s regulatory program, NYCDEP’s own wetland inventory indicates that 2,892 acres, or 78%, of the ‘isolated’ wetlands in the New York City Watershed, are not protected under New York State Law.

City and State Land Protection

a. New York City’s Watershed Regulations

Pursuant to State law, the City has the authority to promulgate and enforce regulations governing land use in the Watershed in order to protect water quality. See N.Y.S. Public Health Law Section 1100(1). While the City’s current Watershed Regulations, as approved by New York State, restrict certain activities in and adjacent to wetlands, the Regulations apply only to wetlands mapped and regulated by DEC. Therefore, the City must use other techniques, such as its Land Acquisition Program discussed below, to try to protect those wetlands – including the vast number of “isolated” wetlands – that do not meet DEC’s threshold pursuant to the Freshwater Wetlands Act, discussed above.

b. New York City Land Acquisition

Under its Filtration Avoidance Determination, NYCDEP is involved in a Land Acquisition Program (the “Program”) that will, over the course of ten years beginning in

1997, solicit owners of approximately 355,000 acres of Watershed land and acquire significant acreage for protection. Wetlands are one of the natural features criteria evaluated in prioritizing acquisitions within the Program. However, given the vast range of properties eligible for acquisition, and a number of restrictions built into the Program – for instance NYCDEP may purchase land only from willing sellers – the Land Acquisition Program is precluded from focusing solely on the protection of isolated wetlands. Of the 30,000 acres acquired to date by NYCDEP under the Program, only 172 acres are “isolated” wetlands. This amounts to 4.6% of the “isolated” wetlands and ponds in the Watershed.

An additional 470 acres, or 12.6%, of “isolated” wetlands are on other city- and state-owned lands within the Watershed. DEP therefore relies on other programs, including federal and state regulatory programs, to supplement land acquisition and protect the remaining 3,081 acres, or 82.8%, of isolated and intermittent wetlands in the Watershed.

Because the vast majority of “isolated” wetlands are not covered under New York State and City regulations, a reduction of federal regulatory protection would decrease the effectiveness of NYCDEP’s efforts to protect the City’s water supply.

Loss of Wetlands Nationally

With existing regulations and voluntary programs combined, our nation continues to experience a net loss of 58,500 acres of wetlands annually. While voluntary programs can be effective in restoring or protecting key areas, they do not fully offset our losses. NYCDEP strongly supports EPA’s “No Net Loss” goal articulated in the National Wetlands Mitigation Action Plan, released on December 26, 2002, but believes that regulation under the CWA is essential to achieving this goal. Voluntary programs are not sufficient to protect the 24,439 acres of wetlands in the Watershed, nor will they be adequate in safeguarding our nation’s 105.5 million acres of wetlands.

In addition, federal funding for voluntary programs is not guaranteed indefinitely, and remains susceptible to decrease or elimination each fiscal year. For example, the proposed fiscal year 2004 federal budget would scale back enrollment in the Wetlands Reserve Program from the 250,000 acres approved in the federal Food Security Act (the Farm Bill) to 178,000 acres per year. This level of funding would limit enrollment to about 1 million acres over the life of the Farm Bill, a cut of 29 percent. This level of funding would allow an increase over current enrollment, but will still be short of the maximum amount of funding permitted under the law.

Many of these voluntary programs are focused on restoration of agricultural lands, yet urbanization is the current leading factor in wetland loss. Also, protection of our existing wetlands guarantees maintenance of a natural level of function, whereas the level of function achieved through restoration remains uncertain. According the National Research Council (National Academy Press 2001), wetland restoration and creation sites often fail to achieve

the functional equivalency of reference wetlands within 5 years, and that up to 20 years may be required to assess whether restored or created wetlands will reach the functional equivalency of undisturbed wetlands. Furthermore, highly disturbed restoration sites are unlikely to ever reach functional equivalency and certain isolated wetland systems, such as vernal pools, are impossible to recreate.

E. The Factors Used for CWA Jurisdiction Should Remain

Among other things, the Federal Register Notice specifically seeks comments on whether certain factors in the federal regulations, other than the Migratory Bird Rule, should be used to provide a basis for establishing CWA jurisdiction over isolated, intrastate, non-navigable waters.⁵ Because, as noted above, the City believes that such “isolated” waters are critical to maintaining water quality and ecosystems, the City urges EPA and the Army Corps to use these existing provisions to preserve CWA jurisdiction in light of the *SWANCC* decision.

Based on NYCDEP’s experience managing its own lands in the Watershed and our familiarity with natural features and land use throughout the Watershed, we believe that the factors listed in the federal regulations as giving rise to federal jurisdiction apply to most, if not all, of the “isolated” waters in the Watershed. We expect that these factors are likely to apply similarly to natural resources across the nation, and we therefore urge EPA and the Army Corps to retain these critical regulations and apply them so as to preserve federal jurisdiction over “isolated” waters.

In particular, interstate and foreign travelers use “isolated” waters in the Watershed for recreational purposes. See 33 CFR Section 328.3(a)(3)(i). As part of its land management program, NYCDEP issues “Public Access Permits” (PAPs) for certain recreational uses on its lands and its reservoirs. Nearly 4,000 PAPs are currently issued to people residing outside New York State who travel to the upstate New York counties to hike, bird watch, hunt, fish and boat throughout the Watershed. It is anticipated that this number will increase as the Land Acquisition Program acquires more land. Some of these lands contain “isolated” wetlands, ponds or watercourses. In addition to supporting interstate recreation, these natural resources indirectly support interstate commerce as the permit holders eat at local restaurants, buy necessities locally, etc.

⁵ 33 CFR 328.3(a)(3)(i)-(iii): The term waters of the United States means . . . (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.

Similarly, the New York City water supply system provides water to the vast number of industries, institutions, businesses and other commercial enterprises located in New York City and several upstate counties. Because, as discussed above, “isolated” waters are integral to the New York City water supply system, these waters are used “for industrial purposes by industries in interstate commerce.” See 33 CFR Section 328.3(a)(iii).

CONCLUSION

The City urges EPA and the Army Corps to reconsider their proposal to reduce overall CWA jurisdiction in response to the *SWANCC* decision, as such a proposal could impact nearly 4,000 acres of waters in the New York City Water Supply Watershed. Rather, the agencies should take advantage of existing sources of regulatory jurisdiction over “isolated” waters, other than the Migratory Bird Rule, to ensure that these valuable resources are protected from degradation. The CWA and other federal environmental statutes have proven to be effective in protecting the nation’s waters and ecosystems that rely on them. Rulemaking that would exclude “isolated” waters from the reach of these laws would undermine Congress’ intention of improving the nation’s waters. The City has embarked on a long-term partnership with EPA to protect its Watershed and the New York City water supply. That effort should continue to be supported by all of the applicable federal environmental protection regulations, including the full strength of the CWA.

Respectfully submitted,

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Commissioner

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