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Mr. Ted Rugiel
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Water Docket OW-2002-0050
U. S. Environmental Protection Agency
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Re: Comments on the Advanced Notice of Proposed Rulemaking on the Clean Water Act Definition of "Waters of the United States"

Dear Ms. Downing and Mr. Rugiel:

Thank you for the opportunity to comment on the January 10, 2003 "Advanced Notice of Proposed Rulemaking on Definition of 'Waters of the United States'" (ANPRM). The ANPRM responds to the 2001 U. S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U. S. Corps of Engineers (SWANCC)* and seeks (1) information regarding the functions and values of wetland and other waters that may be affected by the issues discussed in ANPRM, (2) comments on whether commerce clause factors currently listed in federal regulation should continue as a basis for Clean Water Act (CWA) jurisdiction, (3) comments on whether federal regulations should define "isolated waters," and if so how, (4) data and information on the availability and effectiveness of other federal or state programs for the protection of aquatic resources, and on the functions and values of wetlands and other waters that may be affected by the issues discussed in this ANPRM and (5) data and comments from state and local agencies on the effect of no longer asserting jurisdiction over some of the waters in a watershed on the implementation of Total Maximum Daily Loads (TMDLs) and attainment of water quality standards.

Because the CWA and its numerous regulations are the primary mechanisms that protect and manage the Nation's water and waterways, this proposed rulemaking will effect not only the Section 404 dredged and fill program but also the Section 303 water quality standards program, the Section 311 oil spill program, the Section 401 water

quality certification program and the Section 402 NPDES permitting program. Additional federal programs, such as coastal zone management, may also be affected.

In addition, many state programs derive their jurisdiction directly from the CWA and thus any change in federal jurisdiction will also affect state jurisdiction. Any change in federal jurisdiction will require states to analyze the impact on their programs and enter into a costly political process to determine the applicable and appropriate scope of state programs and jurisdiction.

It is crucial that any proposed rule changes recognize that wetlands, even “isolated wetlands or waters”, are part of an overall inter-related ecosystem. All of these waters are part of a system that acts collectively with other portions of the system. Loss of these waters and their functions such as flood storage, habitat value and water quality protection can and will impact the overall chemical, physical and biological integrity of a watershed.

Our specific comments are below. Because of the limited comment period and the complexity of the above questions a comprehensive response is not possible at this time. For ecological, legal, technical and economic reasons the Wisconsin Department of Natural Resources recommends that the federal agencies maintain jurisdiction over the broadest scope of waters consistent with the SWANCC decision. We further recommend that any change in federal jurisdiction and authority be phased in over a number of years to allow states to respond and adapt to those changes.

Scope of Impacts

Wisconsin has a wealth of aquatic resources, including wetlands, which are extremely important to our citizens and serves as a base of our valuable tourism industry.

Wisconsin has 15,000 named lakes and ponds, 5.3 million acres of wetlands and approximately 44,000 miles of streams.

Because the ANPRM does not specify or suggest how federal jurisdiction may be changed, it is impossible to determine the scope of impact. However, we estimate that the change in federal jurisdiction over “isolated wetlands” as a result of the SWANCC decision resulted in over 1.1 million acres of wetlands in Wisconsin no longer being under federal jurisdiction.

Potential Ecological Impacts

The proposed rule making potentially affects vast portions of Wisconsin’s remaining waters and wetlands, some of them our most valuable and most endangered. Prairie potholes, wet meadows, many forested wetlands, ephemeral ponds, bogs and fringing wetlands along small, nonnavigable ponds, are among the major categories of wetlands that would be at risk.

These areas do not fit the typical image people have of wetlands. In fact, some may question whether they are worth saving. But research well documents their value to the environment, to flood prevention, to water quality protection and to recreation. A diversity of wetland types is needed to maintain the diversity of invertebrate populations essential to waterfowl. Seasonally wet areas provide a rich source of these invertebrates at the time nesting hens and juveniles most need a high protein diet.

Thirty nine percent of Wisconsin's 370 species of birds live in or use wetlands. Many important game birds, mammals and fish are also associated with wetlands.

Fully one-third of the plants and animals on Wisconsin's state endangered and threatened list depend on wetlands. That proportion is even higher (43 percent) for plant and animal species in Wisconsin that are on the federal endangered and threatened species lists.

The potential loss of these wetlands is expected to greatly accelerate amphibian decline. The kinds of wetlands left without protection happen to be the only wetland types that most species of frogs and salamanders can use for breeding. Loss of these wetlands can completely eliminate entire populations for up to a mile away from the wetland itself. Thirty-eight of our 54 amphibians and reptiles depend on wetlands for food or for habitat. Small isolated wetlands play a key role in the continued survival of the state-threatened Blandings turtle. Many small populations would disappear if these wetlands were lost.

Wisconsin wetlands protect water quality by filtering out polluted runoff and preventing flooding by storing water. Studies in the Midwest have shown that flood flows were reduced by 80 percent in basins with wetlands compared to basins without wetlands.

Wetlands can also trap pesticides, fertilizer, sediment, and other substances carried in polluted runoff. Studies have shown that wetlands may remove 80 to 90 percent of the phosphorus attached to sediments. A 1989 study has shown 70 percent removal rates of nitrogen from water entering prairie basin wetlands. In highly altered urban watersheds, however, small isolated surface water wetlands may be some of the only areas that allow water to sink in.

In addition to these benefits that wetlands provide, they also are key to the health of Wisconsin's landscape. Because Wisconsin wetlands are so interspersed with other major community types in the state - lakes, rivers, prairies, forest - they play a critical role in maintaining the overall health and functions of these communities. Any wetland loss detracts from the diversity of species and the ecological health of other landscape communities.

In addition to the possible ecological impacts the WDNR believes that the loss of federal regulation would put environmentally protective states at an economic disadvantage relative to less protective neighbor states, remove the "level playing field" that now exists and create pressure for reduced state protection. The legislative history of the

CWA clearly indicates that a central purpose of the CWA was to prevent this problem from occurring. Other anticipated economic affects in Wisconsin would be a decrease in nature and water based tourism with subsequent loss of tourist industry revenue and the loss of revenue from public recreation (e.g., park fees, sales tax on recreational equipment and services).

Commerce Clause Basis for Jurisdiction

Historically, the federal test of navigability required commercial navigation or the ability to support commercial navigation. Similarly, many states use the public trust doctrine to protect the right of commercial navigation on waters. Commerce is clearly a legitimate basis for federal and state authority and Congress' intent to protect waters for their commercial impacts is well established.

Over the years, states have expanded the test of navigability to include recreational boating and the public trust doctrine has expanded from its historical roots to protect recreational boating, water quality, fishing and hunting, enjoyment of scenic beauty and other recreation on the water. Congress declared in section 404(g) that the CWA protects "other waters" and expanded the CWA's jurisdiction beyond commercial navigation when it broadened the definition of "navigable waters" to include "all waters of the United States." Therefore, we suggest that federal interest in "waters of the United States" be expanded to recreational boating and the factors included in the public trust.

Wisconsin believes that the current commerce clause factors should continue as the basis for CWA jurisdiction over isolated, intrastate, non-navigable waters. But the factors should also include recognition of significant regional, state or national economic impacts if the water was not protected. For example, one of the largest industries in Wisconsin, and many other states, is water-based recreation and tourism. The loss of isolated, intrastate, "non-navigable" waters would have a devastating affect on this industry.

Definition of "Isolated Waters"

We believe that the term "isolated waters" should be defined. We concur with the California Water Resources Control Board reasoning and proposed definition included in their March 13, 2003 response to the ANPRM. Therefore we also recommend that "isolated waters" be defined as: *"Isolated waters' are those waters which, individually or cumulatively, have no affect on the chemical, physical or biological integrity of the navigable waters (including their tributaries and adjacent wetlands), and whose loss would not diminish the chemical, physical or biological integrity of the navigable waters (including their adjacent wetlands or tributaries)"*

Effectiveness of Other Federal or State Programs

The proposed rule making could limit the reach of federal jurisdictional waters, affecting programs operating under CWA sections 303 (water quality standards), 311 (oil and hazardous substance spills), 401 (water quality certification), 402 (national pollutant discharge elimination system), and 404 (dredge and fill discharges). It would be up to the states to replicate the federal responsibilities that would be withdrawn as a result of redefining jurisdictional waters.

The state/federal CWA regulatory partnership has developed over thirty years. We anticipate that reducing the scope of this partnership would cause significant program disruption, additional state costs, potential lapses in regulation, and an eventual reduction of federal funding support. Most state's existing programs do not replicate the Corps' protection of the potentially affected waters, and expanding these programs in the foreseeable future is unlikely given the budget crisis in most states. Even if funding were made available, preparing environment documentation for and adopting regulations and policy to establish or modify a state program would take several years because of the controversial nature of the issue.

Our department (and predecessor agencies) has been actively involved with the management of wetland resources and protection of our waterways for nearly 100 years. Our water regulation program is one of the most successful programs in the country. We run our own permitting program for state navigable waters and are responsible for the issuance of CWA section 401 water quality certification for Section 404 permits. We were the first state to deny and condition section 404 nationwide permits and to adopt water quality standards specifically for wetlands. To date, we are the only state to pass legislation in response to the SWANCC decision to assume jurisdiction over waters declared to be "non-federal". But while we have taken action to protect our isolated wetlands we remain concerned about the fate of isolated waters in other states. A large percentage of Wisconsin's wildlife migrates and spends some portion of their life in other states and countries. If the wetlands are lost along migration routes or on wintering grounds, Wisconsin will suffer enormously. The recent reintroduction of whooping cranes to Wisconsin is a prime example: not only do the birds winter and summer in isolated wetlands, they use isolated wetlands as stopovers in their migration to and from their Florida wintering grounds.

Effect on Attainment of Water Quality Standards

Loss of federal jurisdiction over potentially affected waters would affect CWA section 402 NPDES regulation of municipal, industrial, stormwater, and confined animal discharges to those waters. Any effluent discharged to an ephemeral or intermittent stream will eventually drain to navigable waters. Impeding the ability of states to protect water quality in ephemeral streams would jeopardize the chemical, physical, and biological integrity of downstream rivers, lakes, wetlands, estuaries, and coastal regions. This would exacerbate the difficulties of formulating TMDL plans in the

downstream jurisdictional waters, and would likely lead to additional waterbodies being listed as "impaired" under CWA section 303(d).

Summary

Again, we recommend that federal agencies maintain jurisdiction over the broadest scope of waters consistent with the SWANCC decision. We believe that failure to do so will result in significant losses to the quality and quantity of the Nation's waters, with significant ecological and economic repercussions.

Sincerely,

P. Scott Hassett
Secretary

cc: Scott Hausmann –FH/3