

# United States Senate

WASHINGTON, DC : 20510-4502

March 14, 2003

Christine Todd Whitman, Administrator  
US Environmental Protection Agency  
1101A USEPA Headquarters  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

The Honorable R. L. Brownlee  
Acting Assistant Secretary  
of the Army (Civil Works)  
108 Army Pentagon  
Washington, D.C. 20310

Dear Administrator Whitman and Acting Assistant Secretary Brownlee:

As members of the Senate Judiciary Committee, we are writing to express our concerns about the Advanced Notice of Proposed Rulemaking (ANPRM) on the Clean Water Act Regulatory Definition of "Waters of the United States" published in the Federal Register on January 15, 2003. Your proposed rulemaking is not required by the Supreme Court ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), as has been represented by your agencies. We urge you to refrain from using the *SWANCC* decision as a justification for limiting the jurisdiction of the Clean Water Act beyond the holding of that case. We further urge you to abandon your agencies' proposed rulemaking. Instead, we ask you to uphold and enforce the Clean Water Act and the existing, longstanding regulatory definition of "waters of the United States."

EPA and Corps are proposing to make significant regulatory changes purportedly based on the *SWANCC* ruling, where the primary waters in contention were several small ponds that had formed in pits that were originally part of a sand and gravel mining operation. Now it appears that the administration is attempting to use the Supreme Court's decision in *SWANCC*, a wrongly decided but narrowly held opinion, to raise broader questions about the scope of the Clean Water Act that Congress has not questioned for decades.

In the *SWANCC* decision, the 5 to 4 majority clearly articulated the scope of its holding as follows: "We hold that 33 C.F.R. § 328.3(a)(3) . . . as clarified and applied to petitioner's baffle site pursuant to the "Migratory Bird Rule" . . . exceeds the authority granted to respondents under § 404(a) of the CWA." *SWANCC*, 531 U.S. at 174.

Despite this limited holding, the ANPRM questions the basis for continuing to assert Clean Water Act jurisdiction over many non-navigable, intrastate waters for reasons other than the waters' use as habitat for migratory birds. Specifically, the ANPRM asks (1) whether, and, if so, under what circumstances, the agencies should continue to assert

Clean Water Act jurisdiction over so-called “isolated,” intrastate, non-navigable waters and (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. 68 Fed. Reg. 1994. In addition, the agencies solicit comments “as to whether any other revisions are needed to the existing regulations on which waters are jurisdictional” under the Clean Water Act. *Id.*

Although the federal register notice is an Advance Notice of Proposed Rulemaking, and no proposed rule has been offered, the questions posed for public comment indicate that the agencies believe there may be a legal rationale for limiting the scope of Clean Water Act jurisdiction over some intrastate, non-navigable waters for reasons other than that these waters are used as habitat for migratory birds – the only basis for establishing jurisdiction invalidated by the *SWANCC* decision. We believe there is no legal basis for this attempt to limit the scope of the Act or its regulations.

Continued federal protection for the waters placed in question by the proposed rulemaking – waters that have been clearly covered by the Clean Water Act since the law was adopted in 1972 – is both legally justified and needed to achieve the purpose of the Act. This position is shared by the Department of Justice as represented in numerous legal briefs filed in federal courts since the *SWANCC* decision. Rather than finding that the definition of waters of the U.S. needs to be changed by a new rulemaking, as your agencies now propose, the Justice Department has argued in at least two dozen briefs filed in federal courts that the agencies’ existing definition of waters of the United States is not only valid but is necessary to achieve the purposes of the Clean Water Act. The Justice Department’s interpretation of *SWANCC* is at odds with the questions posed in the ANPRM regarding potential limitations to Clean Water Act rules.

For example, the brief for the United States in *U.S. v. Newdunn* in the United States Court of Appeals for the Fourth Circuit, filed on August 30, 2002, states that “Federal regulations reasonably construe the [Clean Water Act] term ‘waters of the United States’ to include wetlands adjacent to all tributaries, not just primary tributaries, to traditional navigable waters.” The brief further argues that the existing Clean Water Act regulations “have consistently construed the Act to encompass wetlands adjacent to tributaries to traditional navigable waters – be they primary, secondary, tertiary, etc. – since 1975, a construction that comports with Congress’s intent to control pollution at its source and broadly protect the integrity of the aquatic environment.”

In the brief for the United States in *U.S. v. Rapanos*, filed in the United States Court of Appeals for the Sixth Circuit in July 2002, the government argued that wetlands having a surface hydrological connection to a drain, which empties into a creek that then connects to a traditional navigable river, are jurisdictional under the Clean Water Act. The government’s brief stated that “[t]o exclude non-navigable tributaries and their adjacent wetlands from the coverage of the Act would disserve the recognized policies underlying the Act, since pollution of non-navigable tributaries and their adjacent wetlands can have deleterious effects on traditionally navigable waters.”

Fortunately, the Department of Justice's position has prevailed in most cases. The majority of court decisions since *SWANNC* have also taken a narrow view of the holding in *SWANNC*. See, e.g., *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9<sup>th</sup> Cir. 2001) (irrigation canals that receive water from natural streams and lakes, and divert water to streams and creeks are jurisdictional); *United States v. Interstate General Co.*, 152 F.Supp.2d 843 (D. Maryland 2001) (wetlands adjacent to non-navigable tributaries of navigable waters subject to the Clean Water Act); *United States v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652 (N.D.Ill.2002) (tributaries linked through other connections two or three times removed from a navigable water are subject to Clean Water Act jurisdiction).

Inexplicably, your agencies' proposed rulemaking appears to question the Clean Water Act's jurisdiction over these waters and other waters that the Department of Justice and most federal courts have found to be within the Act's scope, even after the *SWANCC* decision.

Moreover, the effects of your proposed rulemaking on the nation's water resources would be significant, as your rulemaking would affect the entire scope of Clean Water Act jurisdiction. The law has one definition of waters that applies to the entire Act, so whatever streams, wetlands, ponds and other so-called "isolated" waters your proposed rulemaking would attempt to cut out of the Clean Water Act, if upheld, would no longer receive any federal legal protection against pollution, filling, dredging and other forms of degradation and destruction. The only result of such an action by this administration would be more pollution of streams and rivers, more flooding caused by wetlands destruction, increased threats to public health and less wildlife habitat, among other risks. This proposal is inconsistent with the goals and the letter of law of the Clean Water Act.

Congress passed the Clean Water Act for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2002). The Clean Water Act was the culmination of a series of legislative measures passed in response to the problem of heavily polluted waters throughout the country, typified by a 1969 fire on the Cuyahoga River in Cleveland caused by a slick of industrial waste. Congress passed the legislation with the goal of ending water pollution in this nation altogether by 1985.

This purpose of the Clean Water Act has yet to be fully achieved. While the Act has had many successes, almost half of the nation's waters are still not safe for swimming, fishing, drinking water supply and other uses. The EPA and Corps should redouble efforts to achieving the goals of the Clean Water Act, and not use thinly-veiled legal

excuses for shedding responsibility for protecting all of the nation's waters. We expect that an answer to our concerns over the EPA's and Corps' attempt to obfuscate the underlying goals of the Clean Water Act will be forthcoming.

Sincerely,

Patrick Leahy

Russell D. Feingold

Herb Kohl

Bill Dowd

Ed Kennedy

John Stenger

Joe Biden

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