



RHODE ISLAND

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

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TDD 401-222-4462

April 16, 2003

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

RE: Docket ID No. OW-2002-0050

In my capacity as Director of the Rhode Island Department of Environmental Management, the State agency designated to implement the Clean Water Act as well as enforce freshwater wetlands protection for most of Rhode Island, I am writing to express my serious concerns with the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" (ANPRM) issued January 15, 2003 by your agency and the Department of Defense. Using the U.S. Supreme Court decision, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANNC) as the impetus, the ANPRM suggests consideration of potential changes in the definition of waters, which when implemented, would constitute a dramatic retreat from federal protection of our nation's water resources including its wetlands. The SWANNC ruling does not justify such changes and accordingly Rhode Island would strenuously object to any reduction in the legal federal protection provided our water resources.

State and federal programs share the goal of restoring and protecting the integrity of our water resources. To accomplish this ambitious goal, state and federal agencies are increasingly using watershed-based approaches in their work. Such approaches recognize the interrelationships between the surface waters, groundwater and wetland resources in our landscape. In our state, these relationships are strong with the ecological health of larger surface waters integrally tied to the protection of our other waters; e.g. tributaries, groundwater and wetlands. Rhode Island waters are not viewed as isolated, but rather parts of an interconnected resource system functioning within a watershed. The protection and restoration strategies employed at both the federal and state level must reflect this understanding.

The ANPRM contemplates various changes in the definition of waters that would lead to removing federal protection from portions of the waters within a watershed. Our state experience speaks to why such an action is technically unsound and ill advised. Regarding small, shallow (non-navigable) tributaries, an analysis of current geographic information mapped at a scale of 1:24,000 indicates that such streams (generally first and second order) comprise about 85 percent

of the total stream miles in the state. Any action to remove this extensive portion of the surface water resource from the jurisdiction of the Clean Water Act would have serious consequences. Among the total maximum daily load studies (TMDL) under preparation or completed for Rhode Island rivers, lakes and estuary waters, DEM has identified small, non-navigable tributary streams as important contributors of pollutant loadings in nearly every case. As a technical necessity, our water quality assessment investigations routinely move from the targeted navigable waterbody into the smaller streams contributing from the upper reaches of a watershed. Such small streams need to remain under the federal framework of water quality standards and criteria and pollution control requirements; e.g. NPDES/RIPDES. As recognized in numerous federal court decisions, applying Clean Water Act jurisdiction to tributaries is essential to achieving water quality goals in our navigable waters.

The SWANCC case focussed on Section 404 of the Clean Water Act and waters and wetlands that are non-navigable and isolated. While it is estimated that 14% of the Rhode Island land area is vegetated wetland, there is no definitive analysis of which wetlands are isolated or tributary versus adjacent to navigable waterbodies. Regardless, isolated and tributary wetlands contribute to the maintenance of navigable waters and their loss or degradation may contribute to the addition of pollutants and therefore reduce biodiversity. Isolated and tributary wetlands may trap and treat sediments, nutrients, and other pollutants, and therefore limit their distribution to navigable waters. Also, these wetlands provide flood storage capacity and may retain or detain floodwaters and therefore desynchronize downstream flooding, thereby maintaining channel stability. They also support flora and fauna that contribute to the biodiversity of navigable waters by providing linkages between wetlands and wetland systems. Finally, isolated wetlands may be groundwater recharge areas and may contribute to the maintenance of baseflow of navigable waters. Recognizing these important benefits of isolated and tributary wetlands, it is my assertion that the federal government should maintain broad authority over all wetlands.

The ANPRM asked for information on the capacity of other programs to address protection of water resources. In Rhode Island these programs are concentrated in DEM and with the exception of freshwater wetlands have developed and expanded largely in response to the Clean Water Act. While Rhode Island General Law provides legal authority to support continued implementation of regulatory programs at the state level, DEM is very concerned about the impacts on existing programs that would result from significant changes in federal jurisdiction. Many of the DEM water regulatory programs are derived from and supported by federal Clean Water Act requirements. The Clean Water Act mandates to states are often instrumental in insuring state water resource programs are sustained and enhanced. The Clean Water Act also provides for a measure of consistency between states that would be undermined by changes in jurisdiction and lead to the disparate treatment of waters and inequities in the minimum level of water resource protection.

The federal-state partnership regarding water resource protection is cemented by the grant funding provided to states to implement programs. Federally delegated or approved water

programs are administered statewide in Rhode Island and DEM, as the implementing agency, relies heavily on EPA grant funds (106, 319, 104b3, 604b) to perform this work. If a curtailment in federal jurisdiction was accompanied by a restriction on the use of current Clean Water Act grant funds, not only would program administration become more complicated, but more importantly the effectiveness of our state programs would be significantly jeopardized. The state is not in a position fiscally to provide significant new resources in lieu of federal funds. DEM would object to any change that reduced our ability to expend Clean Water Act funds to protect and restore priority waters regardless of their location within the state. Also of concern for Rhode Island is any jurisdictional change that would affect claims to the National Pollution Fund Center for reimbursement of oil spill clean-up costs. The state currently has no reliable source of state funding for spill response and continued federal support is vital. If removing small tributaries from the definition of waters prompted a corresponding elimination of eligibility under the Oil Pollution Act, a significant financial hardship would result for the state and jeopardize the effectiveness of spill response.

In conclusion, I urge both the Environmental Protection Agency and the Department of Defense to abandon the ANPRM. The narrow implications of the SWANCC decision are best addressed via agency policy and do not merit the changes contemplated in Clean Water Act jurisdiction. The business of protecting and restoring the quality of our nation's waters requires broad application of the Clean Water Act and a continued strong partnership between federal agencies and the states to get the job done.

Sincerely,

Jan H. Reitsma, Director

cc: Governor's Policy Office  
Sen. Jack Reed  
Sen. Lincoln Chafee  
Rep. Patrick Kennedy  
Rep. James Langevin  
Robert Varney, EPA Region 1  
Robert Mendoza, EPA Region 1