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To: CWAwaters@EPA
cc:
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Water Docket, Attention Docket ID No. OW-2002-0050

Proposed Rule to Change CWA Jurisdiction in light of the SWANCC court decision

This document is a public comment in response to the proposed rulemaking in response to the SWANCC ruling, which invalidated the sole use of the migratory bird rule as the sole reason to protect wetlands, and restricts jurisdiction of the Clean Water Act.

First and foremost, the Supreme Court in the SWANCC decision stated that they didn˘t believe that the migratory bird (rule) was not related to the protection of interstate commerce. This is truly a decision by blind justice, blind to the facts of the matter. Migratory birds migrate! They don˘t stop at state or national lines. That is why they call them migratory birds. That is why hunters have to purchase a federal migratory hunting stamp in order to legally hunt! The birds born out west fly to other states, and are responsible for the multi-billion dollar industry that surrounds duck and goose hunting. The agencies involved should press the justice department to bring a new case to reinstate the migratory bird (rule), and this time, actually try to win the case. Hunters travel the country to hunt migratory birds, and spend billions of dollars in other states in order to do so.

RE-ELECTION FUND-BASED, ENVIRONMENTAL POLICY DECISIONS
There are grave concerns that are not addressed in this rulemaking. On the face of it, and throughout, it appears to be a sellout to the developer and polluter interests whose lobbing efforts have so eroded the rights and representations of ordinary American citizens. A uniformed military soldier heads the U.S. Army Corps of Engineers. His subservience to the Commander and Chief, and his military standing, have proven to be clearly detrimental to the Clean Water Act˘s goal of cleaning up the nations waters.

The emails he has sent out, both pre, and post 9-11 encouraging Corps field biologists to expedite dredge and fill permits to help the economy, are incredible, and reveal a political and military-like blind loyalty to the administration˘s ill considered, ideas about Clean Water Act jurisdiction. I object to the rule, as it is a blatant attempt to circumvent the Clean Water Act for polluters and developers. The Corps and U.S.E.P.A are at the mercy of the White House Office of Management and Budget. The effective existence of these agency heads, and their budgets, rests in the hands of the White House. The high bidders for legislative favors should not have a right to the nations human health, nor water quality, nor its habitat. The rule should be discarded because it is inherently dishonest, the result of the selling out of the health, recreational hunting and fishing interests, and quality of life, of the vast majority of American citizens.

METHYL MERCURY CONTAMINATION
By looking at one single pollutant and it˘s method of transport through

the air and water, and applying the definition(s) of Waters of the United States , one can see that the quality of any body of water, regardless of size and location, does substantially and negatively affect the quality of distant Waters of the United States.
Mercury, lets say from a coal-fired power plant, falls into the water and as methyl mercury, boils up from the lakes and streams on a daily basis, the winds can take it hundreds or even thousands of miles before it mixes and falls with the rain. This in itself proves that NO body of water is isolated, nor less deserving of protection. The very idea of trying to put a world traveling resource like water into a category of less protection because it isn˘t next to a large open water, is scientifically and logically unsound. This rule is simply an attack on the public health and on the beneficial uses of water for recreational purposes. It is clearly contrary to the Clean Water Act in that regard, regardless of how you stretch or interpret the SWANCC decision. The rule cannot and does not stand up to any test with regard to beneficial uses, and the definitions of waters of the United States . How many water pollutants are transported by air? The rule should take these into consideration in determining jurisdictional matters.

This rule seeks to go one GIANT step farther and make waters that pass through a pipe, man made channel, or small stream NON-JURISDICTIONAL. The rule should mandate that all waters in the country are jurisdictional. At the very least, the rule should insist that regardless of the conduit or surface conveyance the water takes, if the water reaches a navigable waterway, then the source of that water is jurisdictional.

SWANCC
This rule stretches the very narrow meaning of the SWANCC decision to such a degree, that it completely ignores human health and science, fishermen and hunter˘s interests in having fish that are safe to eat, and acceptable numbers and types of species for hunting and trapping.

SWANCC should not be broadened by an administrative rule by the Corps and U.S. EPA. Such a change in course for the Clean Water Act should be a product of the legislative branch, not a product of the polluter and developer˘s lobby. Better yet, Please ask the public if they would like to vote on it.

SWANCC (continued)
The Corps and USEPA should have asked the Supreme Court for clarification with regard to SWANCC.
If the language of the Clean Water Act needs updated, the court should be asked to say so, and the Corps and USEPA should ask for such clarification. At that point the Corps and USEPA should make a strong request to the legislature and the executive branch, to put through legislation to make protective changes in the language of the Clean Water Act. This has not been done because the rule is a product of polluter and developer dollars to politicians.

How in the world will the country meet the swimable-fishable goals that Ohio has set as a goal under the states rules and laws that are based on the CWA? It will be impossible. Forty five percent of Ohio˘s streams and lakes currently do not meet this goal. Most state legislatures have an obligation and intent to minimize EPA budgets as directed by their re-election campaign contributors, and many states are receiving vastly lower payments from the federal government. The states have neither the money, nor the political will to pass laws that would protect waters that fall from Corps/USEPA jurisdiction. This rule is an attempt to pass an environmental calamity. When the public, hunters, and fishermen are made fully aware of this rule I can assure you it will be reversed at the courts, and at the voting booth.

This rule specifically destroys the physical, chemical, and biological integrity of navigable waters because there is neither state, nor

federal, nor physical boundary that water will respect. Water, and pollutants travel through the air, pipes, waterways, and through the ground vertically as well as horizontally. There is no isolated water anywhere on this planet. That is why the definitions of waters of the U.S. are so broad, and so numerous. The definition has been narrowed some by the takings issue . But this is the first real attempt to destroy the Clean Water Act by stretching a court decision to the limit, in order to write an administrative rule that has no real basis.

DIFFERENT STATES, DIFFERENT LAWS, SAME WATERWAY
Water respects no boundaries, not state boundaries, not the boundaries of nature or man. This rule will absolutely result in different states˘ water quality rules being applied to the same bodies of water. There are numerous streams, wetlands, and lakes that would be subject to pollution and destruction, because there would be multiple state˘s laws and rules, applied to the same body of water. Many states do not have the budget, nor legislative will to implement the protections required.

HISTORICAL CONSIDERATIONS
When there is NO jurisdiction on a water body by the Corps of Engineers, there is NO mandate for a historical study of the area proposed for development or impact. This will result in further loss of our nations heritage.

WASTED PUBLIC MONEY ON LITIGATION
This rule is a huge waste of time, labor resources, and public money, and will not stand up to the inevitable court challenges, and will cost many millions to defend, because it is contrary to the Clean Water Act, and the SWANCC decision itself.
The SWANCC decision ONLY ruled out the migratory bird rule when dealing with a quarry pond with an impervious bottom. Before the SWANCC decision could be properly applied to even a quarry pond, a dye or other tests should be performed to assure that the quarry pond is indeed impervious to water˘s inevitable infiltration. The developer or polluter should pay expenses for the tests and the dye monitoring wells.

Even then, SWANCC would only apply if one were using the single narrow protection of the migratory bird rule. Every body of water eventually ends up contributing to the health or pollution of a navigable body of water. This is not a new scientific fact, it is well known.

PIPES DO NOT STOP WATER FLOW
The rule suggests that perhaps wetlands and streams connected to distant navigable waters via pipes will not fall under federal jurisdiction. I urge you to go out to a creek or wetland whose downstream waters eventually flow through a pipe, you will see that the water does indeed flow through the pipe and continues downstream, perhaps even to a navigable waterway. Calling such a wetland or stream isolated is an exercise in double-speak. The pipe is not an obstacle to the inevitable flow of water downstream; therefore it should NOT constitute the end of federal jurisdiction upstream of the pipe. If such logic were to stand, every time the Corps issues a nationwide permit for a driveway or road crossing, it will signal an end to jurisdiction upstream of the pipe. This is ludicrous, but it appears to be what the rule is saying. What about attained and designated beneficial uses, will they continue to be ignored by the nationwide permits? If the Corps and U.S. EPA consider that SWANCC states otherwise, then why aren˘t you pressing for a legislative change in the Clean Water Act to clarify that all waters are federally protected equally. What better way to ignore beneficial uses under the C.W.A., than to remove streams and wetlands from jurisdiction.

In Ohio, virtually every stream and wetland empties into a navigable waterway. Does that mean all of Ohio˘s waters are jurisdictional? It should mean just that. However, in this rule you state that piped areas

may be the end of the jurisdictional area for upstream areas and wetlands connected by pipes or small streams, and imply that wetlands must be next to open waters to be jurisdictional. This logic defies the most generous attempts at granting credibility. This rule doesnˇt have a chance of standing, nor should it stand. What will be damaged before this rule is thrown out in court? Certainly some well connected developers and polluters stand ready to pounce in the interim between rule implementation and itˇs eventual court-ordered or legislative demise.

STATES RIGHTS VS. FEDERAL POWERS

This issue is not a perplexing issue of statesˇ rights vs. federal powers. The states clearly do not have the money nor will to fill the vacuum of enforcement created by this harmful rule. The state governments and EPAs are largely too influenced by the developer and polluter lobby to fill the void, even if they had the money to enforce new duties and state laws regarding isolated streams and wetlands. The federal government is giving less and less money to the states. In Ohio, one legislative committee is even talking about ways in which to terminate the Ohio EPA. (McGregor).

In light of these facts, the real purpose of this rule is to hand over the nations health and natural resources to the moneyed few who would clearly profit from leaving our water dirtier than when they found it, destroying wetlands, and eliminating fishing and wildlife opportunities. Itˇs cheaper to buy and destroy a wetland than it is to buy the land a block over that doesnˇt need dredging and filling. Developers often profit from dredging and filling by charging contractors to dump fill dirt on the site, or they use fill from another of their own projects. Wetlands are filled for shortsighted profit, ignoring beneficial uses.

ENVIRONMENTAL RAPE

Itˇs cheaper to dump pollutants into a small stream than it is to properly treat water before discharging it back into the biosphere for human consumption. Again it must be said, this rule isnˇt some generous turnover of federal powers to the states based on the legitimate reading and application of a court ruling (SWANCC), it is the rape of our natural resources based on a great stretch of SWANCCˇs application.

ACROSS THE BOARDS

On every environmental front, air, water, habitat, pollution levels, funding of existing projects, logging our national forests, drilling in our federal national wildlife refuges, and numerous human health considerations, this administration has attempted and sometimes succeeded in giving away our nations environmental treasures and health, for moneyˇs sake. The rule represents an administrative insult, piled upon an already notorious environmental record.

A NEW INDEPENDENCE FOR ENVIRONMENTAL REGULATORS

Environmental regulators should have publicly elected heads, with a proven history of environmental protection. They should not be industry hacks, or army colonels, and their budgets should not be in the control of the White House, nor the Office of Management and Budget. Science should not have to be 200 years old before it can be considered. The importance of human health and our natural areas dictate that we utilize the leading edge of scientific findings to protect our people and our natural areas. Industry should be prohibited under law from attempting to influence environmental law, rules, or policy, their voice is too often the only voice considered, when that voice is amplified by campaign contributions. This rule is a perfect example of political pressure, and political appointees who consider what their bosses want, rather than what is healthy and proper for the nationˇs people. The agencies involved desperately need new mechanisms in place to protect them from outside political influence and budget slashing.

THE CURRENT TREND

The current trend by this administration is clearly to continue to allow pollution and habitat impacts to streams and wetlands that are not pristine and navigable. Removal of these smaller wetlands and streams from jurisdiction would eventually destroy the isolated wetlands, and relegate the small streams to be in effect, storm sewers. Renaming a stream, with the name storm sewer is NOT what the Clean Water Act intended, nor what it states. Destroying a wetland because its waters run through a pipe on the way to Lake Erie detracts from Lake Erie˘s water quality and eliminates the flood control the wetland provides. Removing streams and wetlands from existence, because they don˘t currently meet the swimmable-fishable goal, is NOT an honest, or moral way to meet the Clean Water Act goals. The Clean Water Act was written to clean up those streams and wetlands, not rename them and/or destroy them.

A NEW RULE

Why not create a new rule? Call it the Water Goes Everywhere rule, based on the undeniable fact that water is constantly moving by slow infiltration, evaporation and condensation, wind transport, through pipes, through small streams, and eventually into large rivers, lakes, and oceans, which are all navigable.
Every living thing is made up of mostly water; humans are not an exception to the rule. Ducks and Geese migrate! Hunters travel to other states to hunt them. That is interstate commerce.

All water is jurisdictional, if it is poisoned in one location, it will carry the poison in some way to another location, either quickly, or slowly. The Clean Water Act has considerations for future generations, while this proposed rule does not.

WETLANDS
The rule lessens wetlands protections, even worse than the Corps poor wetlands record prior to this rule. There is no science, and no excuse for this. It is pandering to unwise, harmful development, and allows the destruction of the highly efficient water filtration that wetlands provide. That a wetland˘s downstream waters flow through a pipe, ditch, or small stream, should not stop federal jurisdiction of the wetland. Small western wetlands without readily apparent connections to the biosphere, and other wetlands that appear isolated are just as worthy of protection under the Clean Water Act. They support rare and cherished species and provide a major portion of the nations duck-breeding habitat. What reasonable rule would so easily allow for their destruction? A developer˘s rule would, certainly an industrial polluters rule would, but a rule written according to the Clean Water Act would not. The argument that SWANCC dictates this rule is a blatant misrepresentation.

IMPACTS

SWANCC˘S REAL MEANING
There is no consequence of the SWANCC ruling that would require this rule to be written NOR implemented. SWANCC applied to an extremely narrow set of circumstances, in a case where the Corps did not use, or was not able to find, other grounds for protecting the impervious rock quarry pond in Cook County Illinois. This is no reason to exclude from jurisdiction, 20 million acres of natural wetlands, and hundreds of thousands of miles of the nations streams. The rule˘s only purpose is to destroy water resources, streams and wetlands, which the administration does not want to bring into compliance with the Clean Water Act. What better way, than to remove those streams and wetlands from Clean Water Act jurisdiction by an administrative ruling, without letting the legislature make the decision.

To bring these streams and wetlands into compliance, meeting the goals of the Clean Water Act, would require that developers and polluters stop destroying and polluting them. Developers would lose their favorite cash cow, namely buying a wetland cheaper, cheaper simply because it is a

wetland, then filling it in, using dirt they are paid to permanently store (fill). The land is instantly worth the same as the land around it. Instant profit! They are paying money to our politicians to allow this to continue. They literally co-wrote, Ohio˘s wetland protection bill.

To bring the nations waters into compliance would mean that coal companies, and industrial polluters must clean up what they dump into our environment in terms of water and air discharges. They are bribing our legislators with campaign monies to make sure this never happens. In Ohio, these polluters heavily co-write rules which govern coal and industrial pollution.
To bring the nations waters into compliance and meet the goals of the Clean Water Act would also mean the eventual, meaningful regulation of farm runoff, with government help to provide physical structures, or chemical limits, to eliminate the runoff (use manmade wetlands perhaps or safer and less chemicals?).

The various polluter and developer lobbies see what would be required to reach the Clean Water Acts goals, and don˘t want to commit to the obvious and responsible paths that would result in meeting the Clean Water Act˘s goals. They have decided instead to pay for the ability to have more representation than all of the rest of us, and the result is this proposed rule, which is a blatant, ill-considered, hyperbole of the correct and narrow application of the SWANCC decision. If the rule is correct and necessary based on SWANCC, and I am wrong, then where is the outcry from the Corps and the U.S. EPA to correct the Clean Water Act so that the current national water goals are eventually met, without renaming, or relegating our streams to storm sewers , and bulldozing wetlands. The collective silence of the agencies is proof of the need for independence from the other branches of government.

This rule˘s presentation, without a demand for corrective legislation is proof that there is undue political influence on both the Corps and the U.S. EPA. The dedicated and well- meaning employees of these agencies increasingly find themselves as an unwilling part of agency efforts to allow destruction of, rather than protection of, the environment.

This rule reflects the political will of this administration, to greatly exaggerate a court ruling, fabricating the bogus need for this rule. The purpose of the exaggeration and fabrication of need for this rule is to allow current federal protections for streams and wetlands under the Clean Water Act to be eliminated. This rule lifts the financial burden from developers and industry, when they should be mandated to achieve the honorable and beneficial goals of the Clean Water Act. They are getting what they paid for.

WINDFALL PROFITS, NOT PASSED ON TO CONSUMERS
Consumers pay the ultimate cost of environmental progress; time and time again consumers have voiced their overwhelming willingness to do so. Why then, do our legislators give more weight to the developer and polluter lobby than to the voice of citizens and environmentalists? Being able to dredge and fill a wetland is a windfall profit for the developer. He does not pass on savings to the buyers of his homes. He simply keeps the windfall from the large difference between what he paid for the wetland, and what it is now worth after he filled it for free, or he may have even profited from the filling by charging others to dump fill. This is why the Builders Associations spend so much money on our legislators. They don˘t want to do the right thing. Doing what is wrong for America is making them more money.

HOW WILL WE MEET THE CLEAN WATER ACT GOALS. Pretending wetlands and streams don˘t exist, via this rulemaking, is not the way to meet those goals! Culling isolated water resources from the herd of what we are willing to regulate is what one would expect from a polluter, not from the regulators.

If the Corps wants to be out of the wetlands regulation business, then give that responsibility to an agency that is independent, and robust in the implementation and prosecutions of the Clean Water Act laws.

Agencies charged with protection of the air and water should have publicly elected heads and non-political budgets, with annual inflation adjustments. The budgets of such agencies should be beyond the reach of the legislature or the executive branch and their developer and polluter cohorts.

In addition to violating the conservative-court damaged definitions of waters of the U.S. this rule is probably a violation of our constitutional rights. Clean water is necessary for human life, and therefore easily falls within the guarantees in the bill of rights. Who is looking out for those rights?

For the hundreds of millions in profits that developers and polluters enjoy now if this rule is implemented, taxpayers will spend hundreds of billions to eventually clean up the toxic mess and loss of habitat that will result.

Sincerely,

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