Croton Watershed Clean Watershed Comments

Re: EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act

Comments submitted by e-mail to:
ow-docket@epa.gov with EPA-HQ-OW-201100409 in the subject line.

July 14th, 2011

These comments are being submitted by the Croton Watershed Clean Water Coalition, Inc. (CWCWC), a not-for-profit coalition of over fifty groups throughout NYC Westchester and Putnam Counties. CWCWC includes community, environmental, housing and religious groups.

Our common purpose, originally, was to protect and enhance the high quality of Croton Watershed waters in the East of Hudson Watershed. More recently, since Westchester is increasingly receiving its waters from West of Hudson (WOH) Watersheds, we have expanded our activities to include those areas and others that could be affected by high-volume hydraulic fracturing (HVHF) for natural gas in NYS's Marcellus Shale play. In our opinion, HVHF poses an existential threat to the uniquely high quality of the water in those areas.

Streams, both small and large, wetlands, ponds, lakes and groundwater will be threatened by storm water runoff from drill pads rendered impervious and contaminated by the hundreds of trucks and equipment packed together on 5 acres, the average size of a pad. Forests fragmented by drill pads, connecting roads, and conveyor pipelines will no longer be able to do what they do best: provide pure, clean water.

The effects on water quality in NYS could be devastating unless, under the Clean Water Act, Section 402, HVHF would be subject to such stringent rules as to render it impractical.

The EPA and the Corps' Definition of their Jurisdiction, under the Clean Water Act (CWA), over U.S Waters

We would support the EPA and the Corps if, indeed, "[u]nder this proposed guidance the number of waters identified as protected by the Clean Water Act (CWA) will increase compared to current practice and this improvement will aid in protecting the Nation's public health and aquatic resources."[i]

However, we fail to see how this is possible under their Draft Guidance on Identifying Waters Protected by the Clean Water Act (Guidance) since the EPA and the Corps only assert their jurisdiction over "traditional navigable waters of the United States" as defined in 33 C.F.R. part 329.

Under Section 1: Traditional Navigable Waters of the Guidance, the EPA and Corps state that "For purposes of CWA jurisdiction and this guidance, waters will be considered traditional navigable waters if:

They are subject to section 9 or 10 of the Rivers and Harbors Act; or

A federal court has determined that the water body is navigable-in-fact under federal law; or

They are waters currently being used for commercial navigation, including waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments); or

They have historically been used for commercial navigation, including commercial waterborne

recreation; or

They are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation. Susceptibility for future use may be determined by examining a number of factors, including the physical characteristics and capacity of the water to be used in commercial navigation, including commercial recreational navigation (for example, size, depth, and flow velocity), and the likelihood of future commercial navigation, including commercial waterborne recreation. A likelihood of future commercial navigation, including commercial waterborne recreation, can be demonstrated by current boating or canoe trips for recreation or other purposes. A determination that a water is susceptible to future commercial navigation, including commercial waterborne recreation, should be supported by evidence."

The EPA and Corps assert that they will also maintain jurisdiction over all interstate waters "[c]onsistent with the agencies' current regulations defining 'waters of the United States' to include 'interstate waters including interstate wetlands'".

In addition, the agencies will comply with *SWANCC*[ii] and *Rapanos*[iii] in asserting their jurisdiction over waters with a significant nexus to "traditional navigable waters" (as defined above), or interstate waters.

As stated in the Federal Register/Vol.68, No. 10/ Wednesday. January 15, 2003/Proposed Rules, page 1996 - "*SWANCC* squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters for migratory birds that cross state lines in their migrations..."

The EPA and the Corps Overly Restrict their Jurisdiction Under the Clean Water Act

EPA and the Corps, in their willingness to accept the Supreme Court's decisions in *SWANCC* and *Rapanos*, and in allowing their jurisdiction under the CWA to be curtailed, are not fulfilling their mandate under the CWA, and neglecting their duty to protect the health and interests of the American people.

Let us recall how "waters of the United States" are defined under the CWA.

Section 502(7) of the CWA, in defining "navigable waters," reads as follows: "The term 'navigable waters' means the waters of the United States, including the territorial seas." Under the Code of Federal Regulations, CFR Part 328, Section 3, "waters of the United States" are defined as follows:

All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

All interstate waters including interstate wetlands;

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...;

Tributaries of waters identified in the above categories;

Wetlands adjacent to those waters identified above that are not themselves wetlands.[iv]

"Navigable waters" are nowhere mentioned except as meaning "waters of the United States, including the territorial seas." The emphasis is on a water body's possible contribution to "interstate or foreign commerce" rather than on its navigability. Even if a water body were isolated, it could still contribute to commerce, foreign or otherwise. An isolated wetland or an isolated water body could provide hunting or fishing opportunities that would attract hunters or anglers from out of state or from foreign countries.

This broader definition is more inclusive of the various types of water bodies encountered in the US, and makes more sense from a commercial point of view than the narrow definition adopted by the EPA and the Corps. And, it reflects the original intent of the American people and Congress.

Conclusions

1. Climate change is already producing extreme water distribution patterns in the US. - from severe droughts in most of Texas (The Texas drought has been declared a "natural disaster" by the US Department of Agriculture) and large sections of the South West and South East, to disastrous floodings of the Mississippi and the Missouri rivers (http://www.csmonitor.com/USA/2011/0627/Missouri-River-soaks-Nebraska-nuclear-plant-but-it-s-no-Fukushima). In addition, depletion of the Ogallala aquifer, particularly in Texas, is a growing concern.
2. Pollution of wetlands, streams and individual wells has become a frequent occurrence in Texas, Wyoming, Colorado, Pennsylvania, to name a few, due to high-volume hydraulic fracturing for natural gas (methane). This process pollutes streams, wetlands, lakes and ground water. The process, known as "fracking," requires millions of gallons of water per frack. Over half the water remains underground. The rest, heavily polluted with brine, high-level radioactive wastes, heavy metals and undisclosed, trade secret chemicals, is stored in plastic-lined open lagoons, and then dispatched to treatment plants that are not equipped to treat such wastes. The waste is then discharged into the nearest available water body. The Corps and the EPA should have the power to stop such practices if the state regulatory agency is unable to do so.
3. The EPA and the Corps should assume greater control over US waters and adopt the broader definition of "waters of the US," as presented in these comments. Moreover, laws passed by the Supreme Court are seldom clearly defined until tested in several of the lower courts. The EPA and the Corps seem overly eager to comply with the Supreme Court's rulings on *SWANCC* and *Rapanos.* These rulings do not reflect the intent of Congress.

Finally, our country's water resources are being stressed to the limit through over-use, waste and pollution. Clean, potable, affordable water can no longer be taken for granted. EPA and the Corps are, and must continue to be this country's first line of defense against the irresponsible usage of our water without which there can be no sustainable economy, no healthy environment for ourselves and our children, and no viable future.

Respectfully submitted,

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Director
CWCWC

[i] EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, April 26, 2011
[ii] This refers to the January 9, 2001 U.S. Supreme Court decision regarding Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers. The decision reduces the protection of isolated wetlands under Section 404 of the Clean Water Act (CWA), which assigns the U.S. Army Corps of Engineers (Corps) authority to issue permits for the discharge of dredge or fill material into "waters of the United States." See www.ducks.org

[iii] "Four justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term “waters of the United States” is limited to only those waters that are navigable in the traditional sense and their abutting wetlands.7 However, the plurality concluded that the agencies’ regulatory authority should extend only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters.

Justice Kennedy did not join the plurality’s opinion but instead authored an opinion concurring in the judgment vacating and remanding the cases to the Sixth Circuit Court of Appeals. Justice Kennedy agreed with the plurality that the statutory term “waters of the United States” extends beyond water bodies that are traditionally considered navigable. Justice Kennedy, however, found the plurality’s interpretation of the scope of the CWA to be “inconsistent with the Act’s text, structure, and purpose[,]” and he instead presented a different standard for evaluating CWA jurisdiction over wetlands and other water bodies. Justice Kennedy concluded that wetlands are “waters of the United States” “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”

Four justices, in a dissenting opinion authored by Justice Stevens, concluded that EPA’s and the Corps’ interpretation of “waters of the United States” was a reasonable interpretation of the Clean Water Act." (preceding quote from EPA & the Corps, June 5, 2007: CWA Jurisdiction following US Supreme Court's Decision in *Rapanos v. United States and Carabell v. United States*)

[iv] See www.newyorkwater.org, CWCWC Newsletter #44 on the Clean Water Restoration Act, May/June 2008