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## Feature Article(s)

### **EPA and Army Corps of Engineers Seek Public Comment on Important Wetlands Issues**

***Thomas P. Cody, Esq.***

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) recently published an Advance Notice of Proposed Rulemaking (ANPRM) on the Clean Water Act regulatory definition of "waters of the United States." The ANPRM seeks public comment on issues resulting from the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC). The goal of the agencies is to develop proposed

regulations that will clarify what waters are subject to Clean Water Act (CWA) jurisdiction.

The Court in SWANCC held that CWA jurisdiction does not extend to isolated waters that are both intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines during migration. SWANCC also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on other factors listed in the current regulations.

The ANPRM seeks public comment on two important questions arising out of SWANCC. The first question is whether the factors listed in the regulations other than migratory bird usage (such as use of the water by interstate or foreign travelers for recreation, the presence of fish or shellfish that could be taken and sold in interstate commerce or the use of the water for industrial purposes by industries engaged in interstate commerce), provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters. The second question is whether the regulations should define “isolated waters” and, if so, what factors should be considered in determining CWA jurisdiction over isolated waters.

The EPA and the Corps also recently issued a joint memorandum that sets forth “clarifying guidance” regarding SWANCC and other cases that have been decided since SWANCC (the “Joint Memorandum”). The ANPRM suggests that the regulated community should use the Joint Memorandum, along with advice from the Corps and the EPA on a case-by-case basis, until new regulations are promulgated. The Joint Memorandum supersedes prior guidance on this issue.

The Joint Memorandum describes several complicated factual scenarios that have emerged since SWANCC that support the decision by the Corps and EPA to initiate rulemaking to further define “waters of the United States.” The Joint Memorandum states that field staff should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable where the sole basis for such jurisdiction would be related to use by migratory birds. The Joint Memorandum states that field staff should continue to assert CWA jurisdiction over traditional navigable waters and adjacent wetlands and, “generally speaking,” their tributary systems and adjacent wetlands. The Joint Memorandum instructs field staff to seek formal headquarters review and approval prior to asserting jurisdiction over waters based on the other factors identified in the regulations. Until such time as new regulations are promulgated, this leaves open the question of how policy decisions will be made regarding the other factors identified in the regulations.

All public comments on the ANPRM are available for review on EPA’s electronic docket, found at [www.epa.gov/edocket](http://www.epa.gov/edocket) (docket number OW-2002-0050). Comments may be submitted electronically or in hard copy form to EPA at Water Docket, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460, Attention Docket ID No. OW-2002-0050. The public comment period for the ANPRM has been extended to April 16, 2003.

Click [here](#) to see a copy of the ANPRM and copy of the Joint Memorandum published by the Corps and the EPA.

Thomas P. Cody, Esq. is an attorney with the firm's LandLaw Section and a member of the Coastal Resources Management Center. Please [email](#) him if you have any questions on his article.

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## **Congress Proposing Numerous Coastal-Related Bills**

***Keane Callahan, Environmental Analyst***

Numerous coastal-related bills have been proposed in both the U.S. House and Senate. As of March 12, 2003, bills addressing management of critical habitat for endangered and threatened species on military installations, invasive species control, federal salmon restoration, Essential Fish Habitat, tax credits for the purchase of fishing safety equipment, NOAA reorganization, CZMA reauthorization, the National Estuarine Reserve System, and grants to coastal states have been proposed. Click [here](#) for more information.

## **“No Discharge Area” Proposed for Southeastern Connecticut Coastal Waters**

***Keane Callahan, Environmental Analyst***

The Connecticut Department of Environmental Protection (DEP) has petitioned the Regional Administrator of the U.S. Environmental Protection Agency (EPA) requesting that EPA determine that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the area encompassing the Connecticut portions of the Pawcatuck River, Little Narragansett Bay, portions of Fishers Island Sound and all of Stonington Harbor in the Town of Stonington, Connecticut to qualify as a “No Discharge Area” (NDA). The areas covered under this petition extends from Wamphassuc Point due south past Noyes Shoal to the boundary between Connecticut and New York, easterly following the boundary between Connecticut and New York to the intersection of the Connecticut, New York and Rhode Island State lines and following the boundary between Connecticut and Rhode Island to U.S. Route 1 over the Pawcatuck River and including all Connecticut waters seaward of U.S. Route 1. The resources of the Stonington Harbor, Little Narragansett Bay, Pawcatuck River, and Fishers Island Sound are recreational and commercial including four public beaches, two boat ramps, the Barn Island Wildlife Management Area, and Sandy Point (owned by Avalonia Land Trust) all of which are located within the proposed NDA. The proposed NDA has a variety of rich natural habitats and supports a diversity of fish species such as smelt, small cod, flounder, scup, menhaden, and white perch. The area is also used by both recreational and commercial shell fishermen for the harvest of hard clams, bay scallops, soft shell clams and blue mussels.

DEP has certified that there will be three pumpout facilities located within the proposed NDA to service vessels in the Stonington Harbor and Little Narragansett Bay. The first is a

shoreside facility located at the Dodson Boatyard. This pumpout facility is connected directly to the Stonington Borough Sewer system . The second pumpout shoreside facility is located at Norwest Marina, which discharges directly into the Pawcatuck Sewer system. The third is a pumpout boat berthed at the Westerly Yacht Club that serves the Pawcatuck River, Watch Hill Harbor, Fishers Island Sound, Stonington Harbor and Little Narragansett Bay in Connecticut and Rhode Island. There are 13 marinas within the proposed NDA along with seven additional pumpout facilities in the surrounding area of the proposed NDA. DEP data indicates that there are 1,600 total vessels which include 1548 recreational, 52 commercial and 300 transient vessels. It is estimated that over 70% of the total vessel population is under 26 feet in length and do not have a Marine Sanitation Device.

### **New Study Links Phosphorus Control to Improving Coastal Water Quality** *Keane Callahan, Environmental Analyst*

A Duke University study suggests that the current emphasis on controlling upstream nitrogen pollution fails to address the effects of phosphorus on coastal water quality, and existing nutrient control strategies or techniques may not be as effective in protecting water quality because phosphorus is not being adequately controlled.

The University of South Carolina's Baruch Marine Field Laboratory, where natural interactions of marine organisms could be studied in a pollution-free coastal ecosystem, was used to conduct this study. Both the phosphorus originating in upstream fertilizer applications, and the nitrogen derived from lawn and agricultural fertilizers or animal livestock operations, flows off the land and discharges into shallow estuaries, causing highly visible algae blooms. However, the study has shown that there is a major response to phosphorus by bacteria, which is not so readily visible or detectable. By treating test plots with measured amounts of nitrogen and phosphorus, and comparing those results with untreated plots, the researchers, led by Pallaoor Venkatesh Sundareshwar of the Duke University Wetland Center learned that bacteria in saturated wetland soils responded to phosphorus, not nitrogen inputs which is often the case with plants. When excessive nitrogen leads to a surge of algae in coastal waters, subsequent algae die offs release nutrients and carbon that the bacteria use for growth. The dying algae robs the water of oxygen, creating so called dead zones. Extra phosphorus causes the bacteria to undergo a growth spurt as well as consume any available organic matter. When carbon is removed from the organic matter, the bacteria take up oxygen as well.

Thus, when coastal waters are overenriched with phosphorus, bacteria can consume all available carbon and remove enough oxygen from the water to harm fish, even if there is no excess nitrogen in the water to cause algae blooms. The tie between phosphorus supplies and bacterial growth also affects inputs and outputs of nitrogen in a wetland ecosystem. The study found that adding extra phosphorus to a pristine coastal wetland or estuary can prompt the non-symbiotic bacteria that reside there to shut down nitrogen fixation instead of promoting it. More information on this topic is available in the January 24, 2003 issue of the journal *Science*.

**Follow-up on California Coastal Commission Case**  
***Keane Callahan, Environmental Analyst***

California Governor Gray Davis signed legislation on February 20, 2003 to retain the California Coastal Commission which oversees development along California's 1,100-mile coastline. The bill established fixed, four-year terms for the eight legislative appointees to the commission, eliminating a conflict with the Separation of Powers Clause in the California Constitution. A state appeals court had found the structure of the panel unconstitutional because the members of the panel served "at the will" of the Legislature, rather than for set terms, and as a result, the Legislature had the ability exert control over its appointees (*Marine Forests Society v. California Coastal Commission*, Cal. Ct. App., 3rd Dist., No. C038753, 12/20/02). See [February 2003 eJournal](#) for details on this case.

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