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Michael O. Leavitt
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Lieutenant General Carl A. Strock
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United States Army Corps of Engineers
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Lieutenant Colonel Timothy B. Touchette
Commander and District Engineer-Buffalo District
United States Army Corps of Engineers
1776 Niagara Street
Buffalo, New York 14207

**Re: No-Jurisdiction Determination
for 19 Acre Freshwater Wetland
in Lysander, New York**

Dear Mr. Leavitt, Lt. General Strock and Lt. Colonel Touchette:

This letter constitutes a Notice of Intent to Sue the United States Army Corps of Engineers (the Army Corps) and the United States Environmental Protection Agency (EPA) pursuant to Section 505(a)(1) of the Federal Water Pollution Control Act (the

Clean Water Act), 33 U.S.C. § 1365(a)(2), to challenge as arbitrary, unsupported by substantial evidence and contrary to applicable law, the Army Corps' erroneous determination that a 19-acre wetland in Onondaga County, New York is not subject to the Clean Water Act because it purportedly is "isolated" and therefore is not a "water of the United States."¹

The waters of the United States at issue are located on land owned or controlled by Greenfield Homes, LLC in the Town of Lysander, Onondaga County, north of Routes 370 and 31 and west of Route 690. The water is a wetland identified as Wetland 3 on a wetland delineation map prepared by Terrestrial Environmental Specialists, Inc. for Greenfield Homes, and submitted to the Army Corps in support of an August 6, 2003 request for a no-jurisdiction determination for that wetland. The waters at issue also include any tributaries of the Seneca River on the subject property. Greenfield Homes, LLC plans to fill Wetland 3 and construct housing there.

The State of New York, as owner of the state's waters and as *parens patriae* on behalf of its residents, relies on the Army Corps to fully implement the Clean Water Act's protection of wetlands and other waters of the United States.

**The Army Corps' No-Jurisdiction Determination for
Wetland 3 is Arbitrary, Not Supported by Substantial
Evidence and Inconsistent with Applicable Law.**

There are three separate bases for Army Corps' jurisdiction over Wetland 3 on the Greenfield Homes site: (1) Wetland 3 borders and drains directly into a tributary of the Seneca River, a navigable water, and is therefore "adjacent" to a water of the United States under 33 C.F.R. § 328.3(a)(7); (2) Wetland 3 is contiguous and neighboring to the Seneca River, a navigable water, and is therefore "adjacent" to a water of the United States under 33 C.F.R. § 328.3(a)(7); and (3) the degradation or destruction of Wetland 3 could degrade the Seneca River and could affect interstate commerce on that river within the meaning of 33 C.F.R. § 328.3(a)(3). The Army Corps considered only the first basis

¹Because EPA is ultimately responsible for the protection of wetlands, *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (7th Cir. 1983), and the Army Corps acts as EPA's agent, pursuant to a Memorandum of Understanding, when it renders wetland jurisdictional determinations, both entities are subject to suit under 33 U.S.C. § 1365(a)(2) when the Corps fails to make reasoned wetland determinations and the EPA Administrator fails to exercise the duty of oversight imposed by 33 U.S.C. § 1344(c). *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988).

of jurisdiction and erroneously concluded that Wetland 3 does not drain beyond the boundary of the Greenfield Homes property. The Army Corps' failure to consider the two other bases of jurisdiction was arbitrary and irrational.

The Army Corps Relied On an Incorrect Legal Standard

The Clean Water Act prohibits the discharge of dredge or fill material from a point source into the waters of the United States except pursuant to and in compliance with a permit issued by the Army Corps. See 33 U.S.C. § 1311(a); 33 U.S.C. § 1344. Pursuant to 33 C.F.R. § 328.3(a), waters of the United States include tributaries of navigable waters and their adjacent wetlands. The Army Corps determines the landward extent of tributaries of navigable waters based on the tributary's "ordinary high water mark," and wetlands are "adjacent" to these tributaries if they are "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c).

The Army Corps committed legal error and acted arbitrarily and capriciously in classifying Wetland 3 on the Greenfield Homes site as "isolated," and thus not subject to Section 404 Clean Water Act jurisdiction. The no-jurisdiction letter states that the determination was based on a review of the administrative record and various maps "in light of the recent Supreme Court decision in [*SWANCC*]. *Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001).

The Army Corps' application of *SWANCC* to the wetlands at issue here, however, was legally erroneous. In an extremely limited holding, the *SWANCC* Court ruled that the Army Corps' assertion of jurisdiction over water collected in abandoned pits from a defunct sand and gravel mine on the sole ground that migratory birds which cross state lines used them (the Migratory Bird Rule), exceeded the authority granted the Corps under Section 404(a) of the Clean Water Act. 531 U.S. at 174.

The holding in *SWANCC* is irrelevant to Army Corps jurisdiction over Wetland 3 on the Greenfield Homes site which is adjacent, and hydrologically connected to the Seneca River, a navigable water. This basis of CWA jurisdiction was not addressed or undermined in any way by *SWANCC*, as the Army Corps recognized in its post-*SWANCC* guidance, which advises field staff "to continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands)." Because the *SWANCC* decision is entirely irrelevant to the issue of whether Wetland 3 is a "water of the United States," relying on that decision in making the no-jurisdiction determination was legally erroneous.

The Army Corps Acted Arbitrarily in Ignoring Relevant Evidence

Factually, the Army Corps' no-jurisdiction determination is arbitrary and irrational because it contradicts, without any explanation, compelling evidence that Wetland 3 is not "isolated" but is hydrologically connected to the Seneca River, a navigable water of the United States. That evidence was presented to David Dralle of the Army Corps in September 2001, and consists of 1957 and 1962 maps of the area adjacent to the Greenfield Homes site which depict a brook that flowed from Wetland 3 into the Seneca River.

When Hugh Kimball and Lee Mills, residents of a subdivision adjoining the Greenfield Homes site, presented these maps to the Army Corps in 2001, they explained that a section of the brook had been channeled through an 18 inch-pipe in the 1960s to facilitate the subdivision's construction and that the brook flows for approximately one-half mile through this pipe and an open ravine before emptying into the Seneca River. In response, Mr. Dralle indicated that the Army Corps would thoroughly study the information provided by Mr. Kimball and Mr. Mills before it issued a jurisdictional determination for Wetland 3.

In the Army Corps' rationale for its August 22, 2003, no-jurisdiction determination for Wetland 3, David Dralle and Army Corps employee Maggie Crawford stated that Wetland 3 had no discrete waterway flowing from it and no natural stream draining it. The no-jurisdiction determination did not mention the 1957 and 1962 maps depicting a brook that connected Wetland 3 to the Seneca River or Mr. Kimball's and Mr. Mills' explanation that the brook has simply been channeled underneath the adjacent subdivision and empties into the Seneca River.

In the spring of 2004, Mr. Kimball spoke with Mr. Dralle and sought an explanation for the no-jurisdiction determination for Wetland 3 in light of the 1957 and 1962 maps and the channeling of the stream underground. Mr. Dralle stated, in substance, that he remembered receiving the material but was not sure whether he possessed it before rendering the no-jurisdiction determination in 2003. In fact, Mr. Dralle had this information in his possession in 2001.

If the Army Corps inadvertently overlooked relevant evidence of a hydrological connection presented by Mr. Kimball in 2001, then its no-jurisdiction determination based on the alleged "isolation" of Wetland 3, is contradicted by substantial evidence of a hydrological connection, and is arbitrary.

Additionally, on November 1, 2004, the New York State Attorney General's office confirmed the direct hydrological connection between Wetland 3 and the Seneca River by placing a floating object in the pipe at the southeastern edge of Wetland 3 between 8223 and 8227 Dexter Parkway. Approximately 20 minutes later, the floating object was discharged from the other end of the pipe into an open stream in a ravine that flows towards the south and the Seneca River, flows underneath Route 370 in a pipe, and then empties into the Seneca River -- a total journey of approximately 2,941 feet. We attach an aerial photograph of the area with the pipe superimposed upon it, with the pipe's inlet and outlet highlighted, and with the path of the water from Wetland 3 to the Seneca River illustrated. The water from Wetland 3 enters the Seneca River at the boat docks of Cooper's Marina, just south of Route 370. Water flowing into the Seneca River from this drainage carries with it enough sediment to cause siltation in the river, particularly near the boat berths, which must periodically be dredged so that they remain functional as boat slips.

The Army Corps Acted Arbitrarily In Failing to Consider Whether It Has Jurisdiction Over Wetland 3 Pursuant to 33 C.F.R. § 328.3(a)(3)

_____ Included within the Army Corps' definition of "waters of the United States," are "all other waters whose "use, degradation or destruction" could "affect interstate or foreign commerce... ." 33 C.F.R. § 328.3(a)(3). This jurisdictional basis does not depend on whether a wetland is hydrologically connected or otherwise adjacent to a navigable water and was not specifically addressed by the Supreme Court in *SWANCC*. Wetland 3 clearly falls within this definition of "other waters" of the United States. As set forth above, sediment and silt flowing from Wetland 3 has already had an adverse impact on a channel of interstate commerce – the Seneca River – which is part of the Erie Canal system that connects Lake Ontario and points beyond to the Atlantic Ocean. In addition, siltation caused by Wetland 3's overflow has had an adverse impact on a business – Cooper's Marina – that engages in interstate commerce by servicing boaters that travel on the Erie Canal.

Clearly, the degradation or destruction of Wetland 3 creates a potential for exacerbating these adverse impacts on the Seneca River or creating new ones. Wetland 3 presently stores storm water run-off and filters some sediments and pollutants from the water flowing into it from a residential development and other areas. Excavating or filling in the wetland and destroying its vegetation will likely diminish its storage and filtration functions and cause even more silt and sediment to flow to the Seneca River. Destroying Wetland 3 and constructing a housing development there may cause greater surges of storm water run-off containing pollutants from paved areas and excess nutrients from landscaped areas, all of which will end up in the Seneca River. Any excess nutrients

in the river may increase the growth of the invasive water chestnut, which already diminishes navigability during its growing season.

In sum, whether or not Wetland 3 is adjacent to the Seneca River, the Army Corps should have asserted jurisdiction over it because its destruction or degradation could affect interstate commerce under 33 C.F.R. 328(a)(3).

The Army Corps' Refusal to Reconsider Its No-Jurisdiction Decision Is Arbitrary, Capricious and Legally Erroneous

On May 11, 2004, Mr. Kimball spoke with Joseph Kassler of the Army Corps about the Army Corps' apparent failure to consider evidence of the hydrological connection between Wetland 3 and the Seneca River. In a follow up e-mail that same day, Mr. Kimball in essence asked the Army Corps to reconsider its no-jurisdiction determination based on the evidence of a hydrological connection to the Seneca River, informed Kassler that a large number of people in the community supported reconsideration and attached a draft petition which set forth Kimball's factual and legal arguments.

In an e-mail response on June 14, 2000, Kassler offered the following rationales for refusing to reconsider the no-jurisdiction determination: (i) in 2003 the Corps was not required to consider historical connections destroyed before full implementation of the Clean Water Act; (ii) the EPA and Army Corps' post-*SWANCC* guidance document advising field staff to continue to assert jurisdiction over traditional navigable waters, their tributaries and their adjacent wetlands "had absolutely no holding with the Headquarters' administration of our program;" (iii) Army Corps jurisdictional determinations are intended to remain in effect for five years; and that (iv) David Dralle had visited the site twice and stated that Kimball's information would not have affected his no-jurisdiction determination.

Kassler also suggested that in 2003 when the Greenfield Homes no-jurisdiction determination was issued, the Buffalo District, as a matter of post - *SWANCC* legal interpretation, did not consider hydrological connections to navigable waters through man-made water conveyances as establishing Clean Water Act jurisdiction. Kassler claimed that the Buffalo District abandoned this legal interpretation after the decision of the Sixth Circuit in *United States v. Rapanos*, 339 F.3d 447 (6th Cir. Aug. 5, 2003) sustained Clean Water Act jurisdiction over wetlands connected to navigable waters through man-made conveyances.

The Buffalo District's purported policy of refusing to assert Clean Water Act jurisdiction over wetlands with hydrological connections to navigable waters through man-made conveyances before the *Rapanos* decision violated applicable law and its decision that Wetland 3 is "isolated" based on that policy is arbitrary. Moreover, even assuming that the Army Corps' pre-*Rapanos* policy was not an irrational interpretation of existing law, the no-jurisdiction determination for Wetland 3 was issued more than 15 days *after* the *Rapanos* decision and is therefore legally insupportable under the Army Corps' own analysis.

In *United States of America v. TGR Corporation*, 171 F.3d 762 (2d Cir. 1999), the United States Court of Appeals for the Second Circuit interpreted the term "waters of the United States" in the Clean Water Acts to include a non-navigable brook which was channeled in places into underground pipes and eventually flowed into a navigable stream. Accordingly, in 1999, the interpretation of "waters of the United States" in the federal circuit covering New York State clearly encompassed water flowing through man-made conveyances into a navigable water. Other circuits have reached similar conclusions. *See e.g., United States v. Eidson*, 108 F.3d 1336 (11th Cir.) (man-made storm drainage ditch is a jurisdictional tributary), *cert. denied* 522 U.S. 899 (1997).

The *SWANCC* decision did not address the jurisdictional relevance of hydrological connections through man-made conveyances because the water flooding into abandoned mining pits in *SWANCC* was not hydrologically connected in any manner to any other surface water. Therefore, the *SWANCC* decision cast no doubt whatsoever on the Second Circuit's conclusion in *TGR* that Clean Water Act jurisdiction extends to a tributary of a navigable water that flows through a man-made pipe – precisely the situation at the Greenfields Homes site.

Indeed, one and one-half years before the Army Corps' August, 2003 no-jurisdiction determination for Wetland 3, EPA asserted Clean Water Act jurisdiction over a wetland in the Buffalo District in Amherst, New York after the Army Corps had declined to. EPA determined that the wetland was subject to the CWA because it was hydrologically connected, through an underground ditch and culvert, to a stream that emptied into the Niagra River, a traditional navigable water. The fact that the connection included man-made ditches and culverts did not deprive the Army Corps or EPA of jurisdiction. *See* EPA Region 2, Memorandum for the Record, Special Case Designation for 2220 Wehrle Drive Site (Nov. 22, 2002).

Similarly, in March, 2001, three months after *SWANCC* and two and one-half years before the no-jurisdiction determination at issue here, the Army Corps asserted

jurisdiction over a wetland in the Town of Lancaster that was connected to Cayuga Creek through man-made culverts. *See* Army Corps File Number 2000-00325(2).

This evidence strongly suggests that the Buffalo District had no consistent policy regarding hydrological connections through man-made conveyances in rendering no-jurisdiction determinations after *SWANCC*, and knew that EPA considered hydrological connections through man-made conveyances to navigable waters as conferring Clean Water Act wetland jurisdiction. Asserting jurisdiction over some wetlands connected to navigable waters via man-made conveyances while declining jurisdiction over others, without providing any reasoned basis for the difference, is the essence of arbitrary action.

Mr. Kassler also refused to reconsider the determination based on an alleged Army Corps' policy that its jurisdictional determinations remain in effect for five years. That policy is rational only if the Army Corps' initial determination was based on an accurate interpretation of existing law, the law then changed after the determination's issuance, and a developer has relied upon the initial determination. Here, however, the determination was clearly legally erroneous when issued, and it is irrational to insist that an erroneous decision remain in effect for five years, when the developer has not yet relied upon it, in any substantial way, to his detriment.

We hope that you will review the Greenfield Homes site no-jurisdiction determination in light of the considerations raised here. If at the close of the 60-day notice period, you have not reconsidered and vacated that determination, the State of New York intends to file a citizen suit against the Army Corps and the EPA pursuant to 33 U.S.C. § 1365(a)(2).

Very truly yours,

/s/ Lisa Feiner

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