



**U.S. House of Representatives**  
**Committee on Transportation and Infrastructure**

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April 11, 2008

**SUMMARY OF SUBJECT MATTER**

**TO:** Members of the Committee on Transportation and Infrastructure  
**FROM:** Subcommittee on Water Resources and Environment Majority Staff  
**SUBJECT:** Hearing on the Clean Water Restoration Act of 2007.

**PURPOSE OF HEARING**

On Wednesday, April 16, 2008, at 11 a.m., in Room 2167 Rayburn House Office Building, the Committee on Transportation and Infrastructure will receive testimony from the U.S. Environmental Protection Agency ("EPA"), the U.S. Army Corps of Engineers ("Corps"), the U.S. Department of Justice ("DOJ"), the U.S. Department of Agriculture's Natural Resources Conservation Service ("NRCS"), representatives of State and local governments, environmental, agricultural, and industry interests, legal practitioners, and other stakeholders on the Clean Water Restoration Act of 2007.

**BACKGROUND**

This memorandum briefly summarizes the authorities of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," including wetlands. It also briefly summarizes the actions of the judicial and executive branches of government related to the jurisdictional reach of the Clean Water Act, including recent Supreme Court decisions affecting the Act.

Finally, the memorandum highlights several uncertainties that have arisen since the two recent Supreme Court decisions with respect to the Act's ability to comprehensively and consistently meet the goals of fishable and swimmable waters. The memorandum describes in greater detail several uncertainties that have been raised by individual states, legal scholars, and the regulated community, resulting from the *SWANCC* and *Rapanos* decisions, and the Corps and EPA implementation guidance.

For a more detailed explanation on the history and structure of the Clean Water Act, please refer to the Summary of Subject Matter for the Committee on Transportation and Infrastructure Hearings on the Status of the Nation's Waters, including Wetlands, under the Jurisdiction of the Federal Water Pollution Control Act, July 17 and 19, 2007. [Available on the Committee's webpage <http://www.house.gov/transportation> or at the Committee office (202-225-4472).]

### **Historical Background of the Clean Water Act:**

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, more commonly referred to as the Clean Water Act, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

The Clean Water Act represented a fundamental shift towards improving and protecting water quality in the nation. From the early days of the nation until 1972, the Federal government’s interests and responsibilities related to protecting the nation’s waters evolved in conjunction with common understandings of the importance and utility of water – starting from the protection of watercourses as a means of waterborne transportation and the movement of refuse from populated areas. As attitudes on the value of water, including wetlands, changed, so did Federal authorities related to preserving and protecting such waters.<sup>1</sup>

Starting with the Water Quality Act of 1948, Congress frequently revisited the issue of Federal legislation to improve water quality. While the initial enactments were an improvement over traditional Federal authorities, they were largely ineffective at achieving significant improvements in overall national water quality. This was, in part, because they relied too heavily on state efforts to establish individual state water quality standards, resulting in a patchwork of state water pollution control efforts, with national efforts limited to only interstate waters and where requested by individual states to resolve intrastate conflicts. For example, as noted in the Report of the Senate Committee on Public Works in 1971:

Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act<sup>2</sup> was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.<sup>3</sup>

The Clean Water Act of 1972 realigned Federal and state responsibilities for protecting water quality by instituting a national system requiring individual permits for discharges of pollutants to the nation’s waters. Unlike earlier Federal efforts, the Clean Water Act established a “Federal floor” for the protection of water quality and wetlands, but allows states to administer their own programs (including the establishment of stricter standards than the Federal standard) should states apply for and have such programs approved by the Administrator of EPA.<sup>4</sup>

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<sup>1</sup> See Meltz, Robert and Copeland, Claudia. CRS Report for Congress: The Wetlands Coverage of the Clean Water Act is Revisited by the Supreme Court: *Rapanos v. United States* (Updated March 17, 2008) (*hereinafter* “CRS report”) at 2.

<sup>2</sup> The Water Quality Act of 1965 (P.L. 89-234).

<sup>3</sup> Report of the Senate Public Works Committee, *Federal Water Pollution Control Act Amendments of 1971*, (Report No. 92-414), page 77.

<sup>4</sup> To date, 45 individual states have approved NPDES programs under section 402 of the Clean Water Act; the States of Alaska, Idaho, Massachusetts, New Hampshire, and New Mexico (and the District of Columbia) do not have approved

By establishing a uniform baseline for the protection of the nation's waters, including wetlands, the Clean Water Act ensured that all states and communities start from a level playing field with respect to water quality standards, and avoided potential conflicts between upstream and downstream states instituting conflicting water standards for the same waterbody. In addition, the Clean Water Act attempted to avoid the potential for states with differing water quality standards to be at competitive disadvantages for encouraging economic growth, but rather has facilitated states interested in establishing stricter water quality standards to do so, without the fear that they will be placed at a competitive disadvantage to neighboring states.<sup>5</sup>

### U.S. Supreme Court Decisions Affecting Federal Jurisdiction:

The U.S. Supreme Court has issued three distinct rulings on the jurisdictional scope of the Federal Clean Water Act – in 1985, 2001, and 2006.

In the first case, *United States v. Riverside Bayview Homes, Inc.*,<sup>6</sup> (*Riverside Bayview*) the Supreme Court unanimously upheld the Corps' jurisdiction over wetlands adjacent to jurisdictional waters, and held that such wetlands were "waters of the United States" within the meaning of the Clean Water Act.

In the second case, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*<sup>7</sup> ("*SWANCC*"), the Court issued a 5-to-4 decision that overturned the authority of the Corps of Engineers to regulate intrastate, isolated waters, including wetlands, based solely upon the presence of migratory birds (i.e., the Migratory Bird Rule).

In the final case, *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*<sup>8</sup> (hereinafter collectively referred to as "*Rapanos*"), the Court issued a 4-1-4 opinion that failed to produce a clear, legal standard on Clean Water Act jurisdiction. To the contrary, the *Rapanos* decision produced three distinct opinions on the appropriate scope of Federal authorities under the Clean Water Act: (1) the Scalia "relatively permanent/flowing waters" test, supported by 4 justices; (2) the Kennedy "significant nexus" test, and (3) the Stevens dissenting opinion, supported by the remaining 4 justices, advocating for maintenance of existing EPA and Corps authority over waters and wetlands.<sup>9</sup>

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NPDES programs, and such programs are administered by EPA. To date, 2 individual states have approved dredge and fill permit programs under section 404 of the Clean Water Act; these states are Michigan and New Jersey.

<sup>5</sup> See generally, Amicus Brief of the States of New York, Michigan et. al in Support of Respondents, *Rapanos v. United States of America*.

<sup>6</sup> See 474 U.S. 121 (1985).

<sup>7</sup> See 531 U.S. 159 (2001). While the holding of the *SWANCC* case was very narrow, ruling that the Corps could not use the presence of migratory birds on an individual waterbody as the sole basis for protecting the waterbody under the Clean Water Act, this decision marked the first time that the Supreme Court called into question Federal authority over U.S. waters under the Clean Water Act.

<sup>8</sup> The Supreme Court granted *certiorari* in both *Rapanos v. United States*, No. 04-1034, and *Carabell v. Army Corps of Engineers*, No. 04-1384, and consolidated the cases for review. *Rapanos v. United States*, 126 S.Ct. 2208 (June 19, 2006).

<sup>9</sup> According to a CRS Report on the *Rapanos* decision, "scientists contend that there are no discrete, scientifically supportable boundaries or criteria along the continuum of waters/wetlands to separate them into meaningful ecological or hydrological compartments. . . . [Terms] such as "isolated waters" and "adjacent wetlands" are artificial legal or regulatory constructs, not valid scientific classifications." See CRS Report.

During consideration of the *Rapanos* case, the Bush administration argued in support of broad Federal authority under the Clean Water Act, consistent with the dissenting opinion of Justice Stevens. For example, according to the *Brief for the United States*:

If the statutory phrase [navigable waters, including waters of the United States] were read to exclude non-navigable tributaries, then discharges of such materials as sewage, toxic chemicals, and medical wastes into those tributaries would not be subject to the [Clean Water Act's] permitting requirements, no matter how clear the link between the non-navigable tributary and the traditional navigable water or how strong the evidence that such discharges would impair the quality of traditionally navigable waters downstream.<sup>10</sup>

### **Administrative Implementation of the *Rapanos* Decision**

On June 5, 2007, the Corps and EPA released regulatory guidance on implementing the *Rapanos* decision.<sup>11</sup> The guidance was developed as an attempt to ensure that jurisdictional determinations and administrative enforcement actions (regarding Clean Water Act violations) take into consideration the legal analysis of the *Rapanos* decision.

The guidance provides Clean Water Act protection to waters that meet either the Scalia or Kennedy tests. Individual permit applications must, on a case by case basis, undergo a jurisdictional determination, based on the Scalia or the Kennedy tests.<sup>12</sup>

According to the guidance, and the Scalia test, the Corps and EPA would likely determine that the Clean Water Act applies to traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries flow year-round or have continuous flow at least seasonally, or wetlands that directly abut such tributaries.

For all other waters, including wetlands, that fall outside of these categories, the guidance recommends that the Corps and EPA apply the "significant nexus" test. This test is applied based on a fact-specific analysis to determine whether a "significant" connection exists between a traditional navigable water and either a non-navigable tributary that is not relatively permanent; a wetland adjacent to a non-navigable tributary that is not relatively permanent; or a wetland adjacent to but that does not directly abut a relatively permanent non-navigable tributary.

The guidance document also states that the Corps and EPA will generally not assert jurisdiction over swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow, or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water, regardless of their potential impacts to water quality. This exclusion is consistent with the Corps' general practices

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<sup>10</sup> See Brief for the United States, *Rapanos v. United States*, (No. 04-1034), at 20.  
<<http://www.usdoj.gov/osg/briefs/2005/3mer/2mer/2004-1034.mer.aa.html>>.

<sup>11</sup> U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. 2007. "Clean Water Act Jurisdiction: Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" (June 5, 2007)

<sup>12</sup> However, as noted below, the applicable test for determining jurisdiction in a particular waterbody is controlled by the latest judicial interpretation of the highest court in the region.

related to jurisdictional scope, as described in the November 13, 1986 implementation regulations, which excluded certain non-tidal drainage and irrigation ditches, artificial lakes or ponds, artificial reflecting or swimming pools or other small ornamental bodies of water, and water-filled depressions created on dry land incidental to construction activities.<sup>13</sup> Since 1986, these types of waterbodies have been excluded from the jurisdictional reach of the Clean Water Act unless, on a case-by-case determination, the Corps or EPA find that such waters are a water of the United States.

### CONCERNS RAISED ABOUT IMPACTS OF THE SWANCC AND RAPANOS DECISIONS

Individual states, legal scholars, and the members of the regulated community have all expressed concern that the *Rapanos* decision, and the subsequent agency guidance, have created significant uncertainty and confusion in the implementation of Clean Water Act – the implications of which are still undetermined.<sup>14</sup> Although often characterized as affecting only the Corps (and EPA) authorities to regulate dredge and fill activities in the nation’s waters, including wetlands, the implications of the *Rapanos* decision, and the subsequent agency guidance, have raised questions in a broad array of Clean Water Act authorities, as well as other environmental statutes aimed at protecting water quality.

The following is a list of concerns that have been raised by states and other stakeholders following the *SWANCC* and *Rapanos* decisions, and the Corps and EPA implementation guidance:

- (1) **Inconsistent Judicial Tests for Determining Jurisdiction;**
- (2) **Uncertainty and Delay in State and Local Construction Projects;**
- (3) **Impact on the Control of Point Sources of Pollution;**
- (4) **Obstacles for States to Address the *SWANCC/Rapanos* Coverage Gap;**
- (5) **Potential for States to Lose State Clean Water Act Funding; and**
- (6) **Implications of *SWANCC/Rapanos* on other Environmental Authorities.**

#### **Inconsistent Tests for Determining Jurisdiction:**

Following the *Rapanos* decision, the Corps and EPA issued an agency guidance memorandum “to ensure nationwide consistency, reliability, and predictability in [the Corps’ and EPA’s] administration of the [Clean Water Act].”<sup>15</sup> Again, this guidance was developed by the administration as an attempt to ensure that jurisdictional determinations and administrative enforcement actions (regarding Clean Water Act violations) take into consideration the legal analysis of the *Rapanos* decision.<sup>16</sup>

However, because of a lack of a clear legal test in *Rapanos*, Federal courts around the country have adopted widely differing interpretations of which waters are protected under the Clean Water Act—interpretations which establish the controlling test within the various judicial circuits across the nation, and overturn the applicability of the Agency guidance.

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<sup>13</sup> See 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

<sup>14</sup> See generally, CRS Report.

<sup>15</sup> See Environmental Protection Agency and Army Corps of Engineers. 2007. “Clean Water Act Jurisdiction: Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*” (June 5, 2007) at 4.

<sup>16</sup> Yet, because the *Rapanos* guidance document was not a rulemaking, it does not have the force of law, and does not provide any substantive or procedural rights to affected individuals.

For example, in at least 15 states, including the State of Illinois, Indiana, Wisconsin, California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Alabama, Georgia, and Florida, the Clean Water Act only applies to waters with a “significant nexus” to traditional navigable waters – the “Kennedy test.” This means that some waters that flow throughout the year might not be protected if they are located too far from or are too tenuously connected to navigable waters.

In 8 other states, the Clean Water Act applies to both continuously flowing or permanent waters (the “Scalia test”), and waters with a “significant nexus” to navigable waters – similar to the Agency guidance. These include the States of Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island, Connecticut, Kentucky, and Minnesota.

However, within the jurisdiction of the U.S. Court of Appeals for the 5<sup>th</sup> Circuit, two separate opinions in two different states, Mississippi<sup>17</sup> and Louisiana,<sup>18</sup> each have utilized a different test for determining jurisdiction; yet the U.S. Court of Appeals for the 5<sup>th</sup> Circuit failed to take a position outlining which test would control for determining jurisdiction within the circuit.

Accordingly, despite the availability of the Corps/EPA guidance, the legal test for determining the scope of the Clean Water Act varies dramatically throughout the country, depending on the State, Corps District, EPA region, or judicial circuit in which the activity or potential discharge may occur. For example, the State of Missouri commented that portions of the State are represented by 5 Corps district offices, in addition to EPA Region 7, each with potentially inconsistent approaches to jurisdictional determinations.<sup>19</sup>

### **Uncertainty and Delay in State and Local Construction Projects:**

As noted by the Corps and EPA, “the Court’s split decision is causing uncertainty among agency field personnel and the general public regarding the scope of Federal jurisdiction under the [Clean Water Act’s] section 404 program. As a result, many jurisdictional determinations and their associated permitting actions have been delayed.”<sup>20</sup> Yet, the release of the *Rapanos* guidance, itself, has had little practical effect in easing permitting delays, but has merely continued much of the regulatory confusion and delay created by the lack of clear legal standard by the two Supreme Court decisions.

In October 2007, John Paul Woodley, the Assistant Secretary of the Army (Civil Works) testified before the Committee that the cause of this uncertainty was the *Rapanos* decision and the decision of the Corps and EPA to utilize the Kennedy “significant nexus” test as part of its implementation guidance. According to Secretary Woodley, prior to the *Rapanos* decision, the Corps and EPA were not required to demonstrate a “significant nexus” to a navigable waterbody in order to utilize the Clean Water Act authorities.

<sup>17</sup> See *United States v. Lucas*, 516 F.3d 316 (CA5 (Miss)) (2008).

<sup>18</sup> See *In re Needham*, 354 F.3d 340 (CA5 (La)) (2003).

<sup>19</sup> See Comments of the State of Missouri Department of Natural Resources, EPA-HQ-OW-2002-0282 (*Rapanos* Guidance).

<sup>20</sup> See EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*, 72 Fed. Reg. 31,824, 31,825

However, under the current system, the Corps and EPA must engage in a case-by-case determination for every waterbody or wetland that is not a “traditionally-navigable water” or does not demonstrate a relatively permanent/continuous flow of water.

The result has been that, across the nation, there has been a significant slowdown in the processing of permits by the Corps – estimated by the Corps to be as much as 60 to 90 additional days per permit application. For example, at its hearing last July, the Committee received testimony from a Minnesota County Public Works Director who commented on one individual highway project that, as a result of the regulatory confusion and requirements for jurisdictional determinations following the *Rapanos* decision, was facing significant delays and cost increases in a state where “the local and state requirements are more restrictive than the Corps.”

The ramifications of this slowdown and delay are felt by many public and private stakeholders, including many State and local public works agencies charged with responsibility over the nation’s infrastructure. For example, the American Association of State Highway and Transportation Officials (“AASHTO”) noted that the *Rapanos* guidance “has substantially increased permit processing times and documentation requirements....For example, one State reports that prior to the *Rapanos* guidance, Section 404 permitting typically took no more than 120 days, but is now taking eight to nine months.”

Similarly, this lack of a national standard for determining what types of waterbodies are considered covered by the Clean Water Act, and the formal reliance on case-by-case determinations, have resulted in increased variation among the various Corps district offices and divisions. According to AASHTO, “Corps districts interpret the guidance differently [and there] is a lack of understanding by Corps districts on how to apply the guidance.”

### **Impact on the Control of Point Sources of Pollution:**

While the facts of the *Rapanos* decision centered on the filling of four Michigan wetlands, and the application of section 404 of the Clean Water Act, the implications of this decision have called into question the operation of the entire Clean Water Act, including the ability of the Act to protect against discharges of pollutants from point sources.

The structure of the Clean Water Act prohibits the “discharge of any pollutant,” except in compliance with a permit. This phrase is further defined as including the “additional of any pollutant to the navigable waters from any point source.” Accordingly, the uncertainty raised by the *Rapanos* decision on the term “navigable waters” is equally applicable to the ability of EPA or State authorities to prevent the discharge of pollutants from point sources under section 402 – the National Pollutant Discharge Elimination System (“NPDES”) program.

As a result, under *Rapanos*, previously regulated point source dischargers many no longer be required to comply with existing Federal discharge limits, or in the cases of an approved State NPDES program, State discharge limits, should the discharge be located in a non-jurisdictional waterbody. For example, in *United States v. Robinson*,<sup>21</sup> the United States Court of Appeals for the 11<sup>th</sup> Circuit overturned the criminal conviction of a pipe manufacturer in Alabama for discharging

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<sup>21</sup> 2007 WL 3087419 (C.A. 11 Ala.)

“process wastewater...including hydraulic oil, excess iron, and trash” into a local creek on the grounds that the creek may not have been a “navigable water” of the United States.

EPA estimates that between 53 to 59 percent of the total length of streams in the United States (excluding Alaska) would be considered non-navigable waters,<sup>22</sup> for which Clean Water Act jurisdiction is uncertain following the *Rapanos* decision. In addition, according to EPA, at a minimum, 16,730 individual NPDES permits, or approximately 40 percent of all existing NPDES permits, are located on headwater, intermittent, or ephemeral streams (i.e., waterbodies that are likely to be non-navigable in fact) that, prior the *Rapanos* decision, were clearly within the jurisdictional reach of the Clean Water Act.<sup>23</sup> This number includes approximately 4,600 permits for publicly owned treatment works, 1,500 permits for other sewerage systems (not publicly owned), 64 permits for petroleum refineries, and 55 industrial chemical facilities.

In the two years since *Rapanos*, individual dischargers have started to challenge Clean Water Act authority over existing NPDES permits on the grounds that the waterbody into which the discharge occurs is outside the scope of Federal (or State) authority. According to EPA, individual point source permit holders have started to petition the Agency and the States that they are no longer required to comply with their existing NPDES permits because the waterbody into which they discharge is no longer subject to the Clean Water Act.<sup>24</sup>

### **Obstacles for States to Address SWANCC/*Rapanos* Coverage Gap**

The Clean Water Act instituted a partnership between the Federal and State governments for the protection of water quality. This partnership is evident in the very structure of the Clean Water Act, which established broad national goals of “restoring and maintaining the chemical, physical and biological integrity of the Nation’s waters,” but established a policy to “recognize, preserve, and protect” the rights of States to address pollution sources and plan for the development and use of lands and water resources.

The Act also established the policy that the individual States implement the permitting programs authorized by the Act, including the point source permit program (section 402), and the program to regulate dredge and fill activities in waterbodies, including wetlands (section 404). To this end, the Clean Water Act provides specific authority for individual States to assume authority for and manage both the 402 and 404 programs within their states. To date, 45 individual states have approved NPDES programs under section 402, but only 2 individual states have approved dredge and fill permit programs under section 404 of the Clean Water Act (Michigan and New Jersey).

As stated earlier, the Clean Water Act authorizes a “Federal floor” for the protection of water quality, but allows states to implement more stringent programs to protect water quality within their individual state borders. Individual state water quality programs vary in both form and

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<sup>22</sup> See Letter from Ben Grumbles, Assistant Administrator for EPA’s Office of Water to Jeanne Christie, Association of State Wetland Managers, dated January 9, 2005.

<sup>23</sup> See Letter from Linda Boornazian, Environmental Protection Agency to Joan Mulhern, Earthjustice, dated May 18, 2007 (FOIA No. HQ-RIN-00684-07)

<sup>24</sup> See Letter from Ben Grumbles, Assistant Administrator for EPA’s Office of Water to the Honorable James L. Oberstar, dated January 11, 2008.



substance, with some states utilizing the Federal Clean Water Act as a baseline for the protection of state waterbodies, and other states adopting a more stringent approach.

Because of this variability in State water quality protection laws and regulations, the likely implications of the *SWANCC* and *Rapanos* decisions will impact different States differently. In those states that adopted individual state water quality programs more stringent than the pre-*SWANCC* Clean Water Act, the implications will be less<sup>25</sup> than those states that utilized the Clean Water Act as a baseline for individual state water quality programs.

However, for this second category of States, the *SWANCC* and *Rapanos* decisions have potentially created a Clean Water Act coverage gap – whereby waters and wetlands that were previously protected by the Clean Water Act, in the absence of affirmative State legislative or administrative action to cover these waters, would no longer be covered.

This is especially true in states that, prior to *SWANCC* and *Rapanos*, utilized the Federal definition for determining the scope of State water pollution control authorities. For example, as noted in the comments of the State of New Mexico, which does not have an approved state 402 or 404 program, and where EPA administers the permitting program, it is the Federal definition of “waters of the United States” that dictates the jurisdictional scope of the Clean Water Act. In these states, any narrowing of water quality protection coverage at the Federal level would result in equal narrowing of coverage at the State level, without affirmative assumption by the State.<sup>26</sup>

Similarly, according to the Corps, “approximately 25 States have some limitations on their ability to establish environmental requirements that are more stringent than those called for under federal law. This ranges from notification requirements when programs proposed are more stringent, to strict prohibitions against state programs that are more stringent than the [Clean Water Act].”<sup>27</sup> These so-called “no more stringent” rules limit the ability of certain states to assume responsibility for the protection of waterbodies and wetlands that were once covered under the Clean Water Act, and turn “federal floors into regulatory ceilings” for the protection of water quality.<sup>28</sup>

This concern is shared by several States, including those States that manage their individual Clean Water Act programs. As noted in a March 2008 CRS report “[many] states are barred from enacting laws or rules more stringent than federal rules, or are reluctant to take action, due to budgetary and resource concerns, as well as apprehension that regulation will be judged to involve “taking” of private property and require compensation.”<sup>29</sup>

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<sup>25</sup> However, even in states that have enacted comprehensive state Clean Water programs, the *Rapanos* decision and Federal implementation guidance have resulted in confusion and delay in the processing of permits. For example, the States of Michigan and Wisconsin submitted comments on the *Rapanos* guidance expressing concern with the delay in the Corps’ processing of permits under section 404.

<sup>26</sup> See Comments of Secretary Ron Curry, New Mexico Environment Department, Docket EPA-HQ-OW-2002-0282 (*Rapanos* Guidance) and Comments of Director Steven Owens, Arizona Department of Environmental Quality, Docket EPA-HQ-OW-2002-0282 (*Rapanos* Guidance).

<sup>27</sup> See USACE “Questions and Answers for *Rapanos* and *Carabell* Decision. (June 5, 2007) <[http://www.usace.army.mil/cw/cecwo/reg/cwa\\_guide/rapanos\\_qa\\_06-05-07.pdf](http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/rapanos_qa_06-05-07.pdf)>.

<sup>28</sup> See Andrew Hecht, Note, Obstacles to the Devolution of Environmental Protection: States’ Self-Imposed Limitations on Rulemaking, 15 Duke Envtl. L. & Pol’y F. 105 (2004).

<sup>29</sup> See CRS Report at 18.

For example, in its public comments on the *Rapanos* guidance, the State of Colorado expressed concern “that a narrow reading of *Rapanos* reflected in the current EPA/Corps Guidance may result in a significant reduction in Federal protection of certain water resources in Colorado, thereby shifting to the State the burden of protecting such waters.”<sup>30</sup> In addition, the State of Missouri noted that “[under the Missouri Clean Water Act, a water body could be considered as a water of the state while having no regulatory protection.”<sup>31</sup> Finally, as noted by the State of Arizona, “a final decision . . . that a water body is not jurisdictional [means that] the Clean Water Act protections previously applicable, are, in effect, presumptively lost for, at a minimum, that water body [and] shifts the burden from the federal government to the State to ensure that the Clean Water Act protections remain applicable to the water body requiring the State to devote its limited resources to this new effort.”<sup>32</sup>

In sum, States may not be able to maintain existing levels of environmental protection in the absence of Federal protection due to a variety of factors, including budgetary constraints or individual State “no more stringent” laws.<sup>33</sup> Accordingly, following the *SWANCC* and *Rapanos* decision, there is significant uncertainty whether individual waterbodies, including wetlands, that were once protected under Federal law will have any level of protection against the discharges of pollution (or in the case of wetlands, against their draining and filling).

### **Potential for States to Lose State Clean Water Act Funding**

The jurisdictional scope of the Clean Water Act is integral to the entire structure of the Act, not simply the limits of the regulatory authority over point sources and wetlands. For example, EPA utilizes a formula<sup>34</sup> based on the number and length of waterbodies within a State and the number of “potential point sources” on these waterbodies to determine the appropriate funding for state implementation grants (under section 106 of the Act). Section 106 grants are a major source of funding for state clean water protection programs, which a State may utilize for management of individual state clean water programs.

However, if certain waterbodies, or point sources dischargers on these waterbodies, are determined to be beyond the scope of the Clean Water Act, it is uncertain how this will affect an individual state’s grant allocation under section 106. States, such as Arizona,<sup>35</sup> have expressed concern that they stand to lose significant portions of their 106 grant funding should certain types of waterbodies be excluded from the calculation of an individual state’s jurisdictional waters. As noted in its comments on the *Rapanos* guidance, the State of Arizona estimated that, if certain intermittent and ephemeral streams were excluded from the scope of the Act, the State would lose protection

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<sup>30</sup> See Comments of the State of Colorado, EPA-HQ-OW-2002-0282 (*Rapanos* Guidance).

<sup>31</sup> See Comments of the State of Missouri Department of Natural Resources, EPA-HQ-OW-2002-0282 (*Rapanos* Guidance).

<sup>32</sup> See Comments of Director Steven Owens, Arizona Department of Environmental Quality, Docket EPA-HQ-OW-2002-0282 (*Rapanos* Guidance).

<sup>33</sup> See Andrew Hecht, Note, Obstacles to the Devolution of Environmental Protection: States’ Self-Imposed Limitations on Rulemaking, 15 Duke Envtl. L. & Pol’y F. 105 (2004).

<sup>34</sup> See 35 C.F.R. §162 (2007).

<sup>35</sup> See Comments of Director Steven Owens, Arizona Department of Environmental Quality, Docket EPA-HQ-OW-2002-0282 (*Rapanos* Guidance). According to the Arizona Department of Environmental Quality, the State could lose up to 96 percent of its existing 106 grant funding should intermittent and ephemeral streams be excluded.

over 96 percent of its surface waters, and, therefore, a significant portion of its Federal 106 grant allocation.

### **Implications of SWANCC/Rapanos on other Environmental Authorities**

As stated earlier, because the term “navigable waters” appears throughout the Clean Water Act, the definition of this term (and any confusion on its scope) impact Clean Water Act authorities outside of the 402 and 404 programs. For example, the term “navigable waters” dictates the scope of the list of impaired waters under sections 303(d) and 305(b), the obligation to establish total maximum daily loads (“TMDLs”) for impaired segments under 303(d)(1)(C), the authority for non-point source management grants under section 319, and the state certification authority under section 401 of the Act.<sup>36</sup>

The definition of “navigable waters” and “waters of the United States” also impacts other Federal environmental authorities and statutes aimed at protecting the nation’s waters, including the Oil Pollution Prevention, Spill Prevention, Control, and Countermeasure Plan Requirements of section 311 of the Clean Water Act, and the Oil Pollution Act of 1990.<sup>37</sup>

### **LEGISLATIVE PROPOSAL**

On May 22, 2007, Chairman James L. Oberstar, Congressmen Dingell and Ehlers, and 155 additional Members of Congress introduced H.R. 2421, the Clean Water Restoration Act of 2007. This legislation amends the Clean Water Act by substituting the phrase “navigable waters” with its existing definition “waters of the United States” to restore the protections over the nation’s waters that existed prior to the *SWANCC* and *Rapanos* decisions. The phrase “waters of the United States” has been part of the Clean Water Act since its enactment in 1972, but its common-understood meaning has been defined for decades through Federal agency regulations.

In addition, the Clean Water Restoration Act defines the term “waters of the United States,” utilizing the existing EPA and Corps regulatory definitions, located at 40 CFR § 122.2 (EPA) and 33 CFR § 328.3 (Corps) (*attached*). H.R. 2421 defines the term “waters of the United States” as follows:

The term ‘waters of the United States’ means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”

Finally, the Clean Water Restoration Act includes a “Savings Clause” that reaffirms all existing Clean Water Act statutory permit exemptions. The following list of activities, which are currently exempt from the Clean Water Act permitting requirements, are incorporated into the “Savings Clause” of H.R. 2421.

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<sup>36</sup> See CRS Report at 14.

<sup>37</sup> 33 U.S.C. § 2701. The Oil Pollution Act has its origins in section §311 of the Clean Water Act, and accordingly, uses the same definition for “navigable waters” as contained in the Clean Water Act. See *American Petroleum Institute v. Johnson*, No. 02-2254 (D.C. Cir.) filed March 31, 2008.

Discharges related to:

- agricultural return flows (§402(l)(1));
- stormwater runoff from oil, gas, and mining operations (§402(l)(2));
- normal farming, silvicultural, and ranching activities (§404(f)(1)(A));
- maintenance of currently serviceable structures, such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures (§404(f)(1)(B));
- construction or maintenance of farm or stock ponds or irrigation ditches, or maintenance of drainage ditches (§404(f)(1)(C));
- construction of temporary sedimentation basins on a construction site (§404(f)(1)(D));
- construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment (§404(f)(1)(E)); and
- activities with respect to which a State has an approved program under §208(b)(4) of the Clean Water Act (§404(f)(1)(F)).

Proponents of H.R. 2421 contend that this legislation is necessary to restore the comprehensive protections provided by the Clean Water Act in meeting its goals of “fishable and swimmable waters,” and restore the regulatory certainty that existed for almost three decades prior to the *SWANCC* and *Rapanos* decisions.

Critics of H.R. 2421 contend that the bill would greatly expand the Federal regulatory jurisdiction of the Clean Water Act. They are concerned that the proposed definition of “waters of the United States” is ambiguous and has the potential for jurisdiction to be interpreted far more broadly than was understood in 2001, and causing more uncertainty, rather than clarifying the issue.

sludge or waste water treatment devices or systems, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For purposes of this definition, "domestic sewage" includes waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works. In States where there is no approved State sludge management program under section 405(f) of the CWA, the Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal in 40 CFR part 503 as a "treatment works treating domestic sewage," where he or she finds that there is a potential for adverse effects on public health and the environment from poor sludge quality or poor sludge handling, use or disposal practices, or where he or she finds that such designation is necessary to ensure that such person is in compliance with 40 CFR part 503.

*TWTDS* means "treatment works treating domestic sewage."

*Upset* is defined at § 122.41(n).

*Variance* means any mechanism or provision under section 301 or 316 of CWA or under 40 CFR part 125, or in the applicable "effluent limitations guidelines" which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

*Waters of the United States* or *waters of the U.S.* means:

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

(b) All interstate waters, including interstate "wetlands;"

(c) 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 would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

*Wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing. Notice shall also be given to all Federal agencies affected by the proposed action, and to state and local agencies and other parties having an interest in the subject matter of the hearing. Notice shall be sent to all persons requesting a hearing and shall be posted in appropriate government buildings and provided to newspapers of general circulation for publication. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

(b) The notice shall contain time, place, and nature of hearing; the legal authority and jurisdiction under which the hearing is held; and location of and availability of the draft environmental impact statement or environmental assessment.

### PART 328—DEFINITION OF WATERS OF THE UNITED STATES

#### Sec.

- 328.1 Purpose.  
 328.2 General scope.  
 328.3 Definitions.  
 328.4 Limits of jurisdiction.  
 328.5 Changes in limits of waters of the United States.

AUTHORITY: 33 U.S.C. 1344.

SOURCE: 51 FR 41250, Nov. 13, 1986, unless otherwise noted.

#### § 328.1 Purpose.

This section defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States." The terminology used by section 404 of the Clean Water Act includes "navigable waters" which is defined at section 502(7) of the Act as "waters of the United States including the territorial seas." To provide clarity and to avoid confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used through-

out 33 CFR parts 320 through 330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR parts 322 and 329).

#### § 328.2 General scope.

Waters of the United States include those waters listed in § 328.3(a). The lateral limits of jurisdiction in those waters may be divided into three categories. The categories include the territorial seas, tidal waters, and non-tidal waters (see 33 CFR 328.4 (a), (b), and (c), respectively).

#### § 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term *waters of the United States* means

(1) 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 which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) 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 including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

## § 328.4

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(d) The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics

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such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term *tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

[51 FR 41250, Nov. 13, 1986, as amended at 58 FR 45036, Aug. 25, 1993]

### § 328.4 Limits of jurisdiction.

(a) *Territorial Seas.* The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR 329.12)

(b) *Tidal waters of the United States.* The landward limits of jurisdiction in tidal waters:

(1) Extends to the high tide line, or

(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) *Non-tidal waters of the United States.* The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

### § 328.5 Changes in limits of waters of the United States.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the