

Alert 2007-1 June 12, 2007

The Clean Water Exchange Action Alert: The Clean Water Restoration Act of 2007 (H.R. 2421)

In response to this Alert we ask you to submit any comments on the proposed legislation to Nathan Gardner-Andrews at ngardner-andrews@nacwa.org by June 22, 2007.

Overview

H.R. 2421 seeks to clarify the jurisdiction of the Clean Water Act (CWA) and ensure broad protections for isolated, non-navigable waters. Introduced May 22 by Reps. James Oberstar (D-Minn.), chair of the House Transportation and Infrastructure Committee, John Dingell (D-Mich.), chair of the House Energy and Commerce Committee, and Vernon Ehlers (R-Mich.), the bill would remove all references to "navigable waters" from the Clean Water Act and replace them with "waters of the United States."

The bill currently has 157 cosponsors. A variety of environmental groups and some conservation organizations strongly support the bill, viewing it as a mechanism to reverse the effects of recent Supreme Court decisions that essentially removed isolated, non-navigable, intrastate waters from the purview of the CWA and left their regulation and management to the states. A coalition of groups representing homebuilders, counties, commercial developers, mining interests, and some industrial dischargers opposes the bill, asserting that it has sweeping, unintended consequences and would only lead to more litigation over jurisdictional issues under the CWA 402 National Pollutant Discharge Elimination System (NPDES) permit requirements and section 404 wetlands permit programs.

Background

The Act defines "navigable waters" as "the waters of the United States, including territorial seas," but does not offer further explanation. Both the U.S. Army Corps of Engineers CWA Section 404 permitting requirements, found at 33 CFR Part 328, and the U.S. Environmental Protection Agency's (EPA) regulations for the CWA Section 402 permitting program, found at 40 CFR 122.2, expand upon the definition of waters of the U.S. as:

(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."

This is essentially the same language the bill would insert as the CWA Section 502 definition of "waters of the United States." H.R. 2421 would not rely on interstate commerce for jurisdiction but would instead employ broader "legislative power of Congress under the Constitution" language. Also notable is that the EPA and Corps regulations state that waters of the U.S. do not include "[w]aste 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."

H.R. 2421 contains no such language, and it is unclear whether these regulatory exemptions, would apply.

Confusion in Supreme Court Cases Led Towards H.R. 2421

Supporters of the bill say the revised definition is needed to restore Congressional intent regarding the reach of the CWA, which they say was blurred by recent Supreme Court rulings. The first was the 5-4 decision in *Solid Waste Agencies of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, which invalidated the "Migratory Bird Rule" as a means of asserting CWA jurisdiction over isolated, non-navigable, intrastate waters. Several states responded by enacting legislation ensuring these areas would remain covered under state law while others examined existing authorities to ascertain coverage. EPA and the Corps also issued guidance insisting on the narrowest possible interpretation of SWANCC, saying that it invalidated only the Migratory Bird Rule and should not be viewed as leaving expansive areas of wetlands and other waters unprotected. Still, confusion reigned as no bright line rule was drawn.

The second decision was a 5-4 decision in *Rapanos v. United States* and *Carabell v United States Army Corps of Engineers*, again failing to provide a clear legal "test" for determining where the CWA's jurisdiction over wetlands ends and where state authority begins. Because the *Rapanos* decision does not set forth a clear test or analytical framework for future jurisdictional determinations, Rep. Oberstar and his colleagues decided congressional action was warranted. Sen. Russ Feingold (D-Wis.) is contemplating the introduction of similarly worded legislation in the Senate.

Clean Water Community Perspectives Sought

Given the diversity of state laws and local geographic considerations, it is unclear how this legislation would affect the clean water community. Most clean water agencies discharge to waters where jurisdiction is clear. However, broadening the scope of jurisdictional waters as H.R. 2421 contemplates may affect:

- * Agencies that discharge to effluent-dominated streams;
- * Agencies that construct wetlands for treatment; or
- * Agencies that need to site a new facility or expand an existing plant.

We would like to know if you have any thoughts/comments on how this legislation might affect your agency or interest. Please send any responses to Nathan Gardner-Andrews at ngardner-andrews@nacwa.org.