



Congress Should Oppose Expansion of the Definition of Waters of the United States

Introduction

In the wake of Supreme Court decisions in both *SWANCC* and *Rapanos*, legislative efforts to address the jurisdictional scope of the Clean Water Act have been discussed, including a proposal to eliminate the word "navigable" from the CWA and replace it with a new definition of the term "waters of the United States." If proposals similar to this, and others introduced in the 109th Congress, become law, the end result would be the most significant legislative expansion of the CWA since its adoption in 1972.

Contrary to assertions by proponents, prior legislative proposals do not "reaffirm" or "clarify" the original intent of Congress or clearly define that "waters of the United States" are subject to the CWA. Instead, eliminating 'navigable' from the statute and replacing it with previously proposed definitions would significantly expand the reach of the CWA by premising its jurisdiction on "the legislative power of Congress under the Constitution." In reality, such a premise would serve only to significantly broaden the jurisdiction of the CWA in a fashion even more ambiguous than current regulations. If proposals such as this were to become law, the only way to answer whether a "water" is subject to CWA's jurisdiction would be thorough costly and time consuming litigation.

Inevitably, such litigation would involve not just the scope of the CWA but the scope of Congress' Constitutional authority, because that is the only limit such proposals clearly acknowledge (but do not define).

Previous legislation introduced regarding this matter contains several major flaws:

I. It expands the regulatory authority of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers to include all "intrastate waters" – essentially all wet areas within a state including impoundments, groundwater, ditches, pipes, streets, gutters, and desert features.

The proposed definition of waters of the United States provides unequivocally that "all interstate and intrastate waters and their tributaries" are subject to CWA regulation, "including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, lakes, natural ponds . . ."

Courts and federal agencies generally do not consider use of the word "including" in a statute as limiting the meaning to the enumerated items. Instead, such wording is likely to be read to mean the listed types of waters are simply examples -- i.e., a non-exclusive list. Therefore, ditches, pipes, streets, gutters, man-made ponds, ephemeral

drainages, desert washes and other features could be regulated as "intrastate waters" even though they are not specifically listed.

The proposed definition also includes all "impoundments of the foregoing," regardless of whether the impoundment is natural or man-made. The new definition would nullify existing regulations that interpret the current definition, thus wiping out various regulatory exclusions, such as waste treatment systems. The new definition would likely regulate all treatment ponds associated with any industrial activity, requiring the development of expensive new treatment systems. Read broadly, it could be applied to include any accumulation and storage of waters that otherwise would not be regulated, thus extending the reach of the statute to waters that, after thoughtful consideration by Executive Branch agencies, have been withdrawn from regulation as waters of the United States.

Finally, if all intrastate waters are regulated, the language could be interpreted to include every wet area within a state, including groundwater, which has always been regulated at the state level. Indeed, the legislation does not give any limitation on what should or should not be considered as a "water," and therefore all waters of any kind located within any state could be swept into jurisdiction.

II. Grants EPA and the Corps authority to regulate virtually all activities (private or public) that may affect "waters of the United States," regardless of whether the activity is occurring in or may impact water at all.

The proposed definition first broadly defines "waters of the United States" subject to the law, and then authorizes regulation "to the fullest extent that these waters, *or activities affecting these waters*, are subject to the legislative power of Congress under the Constitution." The definition of "activities affecting these waters" does not exist in current law or regulations. A reference to "activities" in the definition of "waters" diverges from the format of the CWA, which prohibits the "discharge of any pollutant" (section 301) and authorizes permits for discharges of pollutants from point sources (section 402) and discharges of dredged and fill material (section 404), not "activities." This creates significant ambiguity. For example, this language could be read broadly to allow the regulation of all activities that "affect" waters. In other words, regardless of whether an activity is discharging a pollutant from a point source or discharging dredged and fill material into a water of the United States, the fact that the activity may impact a "water" would allow the activity to be regulated under the CWA. The introduction of undefined terminology such as "activities" and "affecting" provides federal agencies and courts with considerable room for expansive interpretation.

III. Eliminates the existing regulatory limitations authorized by both Democratic and Republican administrations allowing common sense uses, such as prior converted cropland and waste treatment systems.

The proposed definition does not include any regulatory limitations, nor does it acknowledge the agencies' authority to create limitations. The enactment by Congress of a broad statutory definition of the term "waters of the United States" without acknowledgement of any specific limitations or of the agencies' authority to create such limitations would make it difficult, if not impossible, for the agencies to carve out future regulatory limitations. The omission of any limitations is particularly important because

the existing rules acknowledge two important limitations covering prior converted cropland and waste treatment systems designed to meet CWA requirements. The regulated community has come to depend on both limitations and would be severely impacted by their loss.

IV. Fails to clarify any limits on federal authority.

The legislation would regulate the activities affecting these waters “to the fullest extent” of Congress’ authority under the Constitution. This is an expansion of the existing CWA and its regulations, which link coverage under the Act to Congress’ authority under the Commerce Clause. Thus, anything subject to the Treaty Power or reachable through the Property Clause and the Necessary and Proper Clause or other parts of the Constitution could provide a basis for jurisdiction under the legislation. The reach of such power is far from clear. Supreme Court justices and constitutional scholars have been debating the scope of each of these constitutional clauses since 1789.

V. Burdens State and Local Governments.

This broad expansion of the CWA’s jurisdiction would unnecessarily burden state and local governments, even the federal government, and the regulated community. When read in tandem with other sections of the statute that apply to waters of the United States, the legislation would impose significant new administrative responsibilities. For example, states would be required to adopt water quality standards, to monitor and report on the quality of those waters and ensure attainment of applicable standards, including preparation of total maximum daily loads and allocations where necessary. Because most states now possess National Pollutant Discharge Elimination System (NPDES) permitting authority, they will also need to issue many new NPDES permits for any point source discharges to the expanded inventory of “waters” and potentially devise regulatory programs for “activities affecting these waters.” The consequences on state non-point source control programs are difficult to determine, but they could be equally dramatic. Nothing in the bills suggests that the proponents have considered the wisdom of imposing such requirements or how to pay for them.

Local governments will also bear a heavier burden because they are both the regulator and regulated party. Many states require, as part of their state water acts, primary implementation at the local level (i.e. coastal zone management acts in Alaska and California – fresh water acts in Massachusetts, Connecticut, Florida and Maryland and state coastal wetlands acts in Virginia).

Changes at the state level would impact comprehensive land use plans, floodplain regulations, building and/or special codes, watershed and stormwater plans, etc. Local governments, both large and small, are also responsible for a number of public infrastructure projects that will be impacted by proposed changes, including water supply, solid waste disposal, road and drainage channel maintenance, stormwater detention, mosquito control and construction projects. Local government efforts to carry out maintenance of government-owned buildings (hospitals, schools, municipal offices, etc.) could also be adversely impacted.

About the Waters Advocacy Coalition

The Waters Advocacy Coalition is active in working to protect our nation's wetlands resources as members of the regulated community and/or co-regulators and is comprised of both public and private organizations. Members include: American Farm Bureau Federation; American Forest and Paper Association; American Road & Transportation Builders Association; Associated General Contractors of America; CropLife America; Edison Electric Institute; The Fertilizer Institute; Foundation for Environmental and Economic Progress; International Council of Shopping Centers; National Association of Counties; National Association of Home Builders; National Association of Industrial and Office Properties; National Association of Manufacturers; National Association of State Departments of Agriculture; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Multi Housing Council; National Pork Producers Council; National Stone, Sand & Gravel Association; and RISE – Responsible Industry for a Sound Environment.

For more information contact Virginia Albrecht or Deidre Duncan at Hunton & Williams, LLP, at 202-955-1943.