

WESTERN STATES WATER

Issue No. 1723 May 25, 2007

CONGRESSIONAL UPDATE/WATER QUALITY

Clean Water Act - Section 404/Wetlands

On May 22, Rep. James Oberstar (D-MN), Rep. John Dingell (D-MI) and Rep. Vernon Ehlers (D-MI) introduced the Clean Water Restoration Act (CWRA), H.R. 2421, to “reaffirm the original intent of Congress” in enacting the Clean Water Act (CWA) and to “clearly define the waters of the United States.” The bill reasserts CWA jurisdiction where recent Supreme Court decisions have narrowed its reach with regard to wetlands. Since its enactment in 1972, CWA permitting jurisdiction included “navigable waters” which are “the waters of the United States, including the territorial seas.” The new definition replaces “navigable waters” with “waters of the United States” and includes “...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.”

This change was prompted by *SWANCC v. Corps of Engineers* and *Rapanos v. United States*, recent decisions where the Supreme Court held the federal government lacked authority under Section 404 of the CWA to regulate dredging and filling of isolated ponds and wetlands. In *Rapanos*, a plurality of the Court determined that CWA permitting authority did not extend to “ordinarily dry channels through which water occasionally or intermittently flows.” Rather, the plurality concluded the CWA only extends to “relatively permanent bodies of water connected to traditional interstate navigable waters,” or to those wetlands where the wetlands are significantly connected on the surface with a body of water where it is “difficult to determine where the water ends and the wetland begins.” Further, the Court said “wetlands may not be considered adjacent to remote waters of the United States based on a mere hydrologic connection.” However, Justice Kennedy, in a concurring opinion, rejected this test and used a “significant nexus” test in determining whether the wetland was subject to CWA jurisdiction. The lack of a majority and Justice Kennedy’s reliance on the “significant nexus” test has left significant uncertainty as to which waters are subject to CWA jurisdiction.

Citing this confusion and uncertainty, Rep. Dingell said the Supreme Court misinterpreted the intent of the Congress, and H.R. 2421 will clarify which waters are subject to CWA jurisdiction. Rep. Ehlers added, “Congress is obligated to clarify the scope of the Clean Water Act following the regulatory confusion and lawsuits that have arisen out of recent Supreme Court decisions.” Rep. Oberstar said the Supreme Court has “muddied the jurisdictional understanding of the CWA” by focusing on the phrase “navigable waters,” and the bill seeks to “reestablish [a] commonly held understanding of the CWA prior to these rulings.” (T&I Committee, 5-22-07)

While the bill also includes a savings clause that retains existing CWA exemptions for industries like agriculture, mining and silviculture, it will face strong opposition from industry groups. Susan Asmus, Vice President of the National Associations of Home Builders, said the bill will lead to greater regulatory headaches, as it greatly expands CWA jurisdiction “by virtually saying that every drop of water is in.” Despite its 158 co-sponsors in the House, its fate is uncertain. On the Senate side, one Republican staffer said the bill would have a difficult time achieving a filibuster proof majority as “it does far more than the sponsors claim it does.” Go to <http://thomas.loc.gov> for a copy of bill.