ADVANCING THE REFORM AGENDA ★ REFORM BRIEF

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Making Government Work: Achieving Regulatory Certainty under the Clean Water Act

Recent Supreme Court decisions have led critics to call on Congress to modify how our Nation's waterways are defined and regulated through enforcement of the Clean Water Act. Although the potential effects that the proposed modifications to the Clean Water Act would have on private land owners are difficult to quantify, there is a growing consensus that redefining "waters of the United States" would impact the Nation's economy negatively. These potentially adverse effects could be avoided through the proper administration of the Clean Water Act by the Army Corps of Engineers and the Environmental Protection Agency.

Congress enacted the Clean Water Act (CWA) in 1972, in part to restore and maintain the chemical, physical and biological integrity of the Nation's waters. The CWA is viewed widely as a success and a model for "cooperative federalism" that balances the interests of the states and federal government. Since enactment of the legislation, the annual rate of wetland loss has been reduced from an estimated 290,000 acres per year in the 1970's to a net gain of approximately 32,000 acres of wetlands per year during the period between 1998 and 2004. Over the past four years approximately 3 million acres of wetland have been restored, improved and protected.

However, the successful cooperation of state and federal governments in protecting our Nation's waterways is at risk. By failing to issue regulations that clearly define what waters to which CWA jurisdiction applies, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) have encouraged legislation that would disrupt this delicate balance and dramatically expand a lengthy and expensive building permit process to thousands of new business and landowners.

Proposed legislation redefining 'waters of the United States' to cover all interstate and intrastate waters, including storm sewers, ditches and drainages (currently outside CWA jurisdiction), in addition to mudflats, sandflats, prairie potholes, wet meadows, and dry lake beds who would have a dramatic effect on how land development takes place in this

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country.[i] Land developers, farmers, ranchers, and other private land owners would be required to submit to a permitting process where none previously exist. These individuals should have the opportunity to be heard by the regulating agencies through the proper rulemaking process.

Litigating the Clean Water Act

Of all the successes achieved since CWA enactment, the inability of the EPA and USACE to conduct and complete a rulemaking updating their jurisdictional regulations under the Act has been a constant failure of administration and the origin of considerable litigation. Updated regulations were deemed necessary by many experts following the Supreme Court decision *United States v. Lopez* that raised questions over the federal government's use of the commerce clause.[ii] According to Congressional testimony of Jonathan Adler, Professor of Law at Case Western Reserve University, "[e]ven supporters of broad federal regulatory jurisdiction recognized the potential vulnerability of federal environmental regulation . . . [Y]et neither the Army Corps nor the EPA sought to revise their jurisdictional regulations, and numerous legal challenges ensued."[iii]

The agencies inaction led to *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* in 2001. There, the Supreme Court considered whether "isolated waters" or ponds that are not traditionally navigable or interstate, nor tributaries thereof, nor adjacent to any of these waters fall under federal jurisdiction if migratory birds land on them from time to time. The Court held that the use of isolated non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal CWA jurisdiction.[iv] In 2006, the Court again considered the meaning of the term "waters of the United States" in *Rapanos v. United States.*[v] The case involved whether federal CWA jurisdiction extends to pollutant discharges into wetlands adjacent to non-navigable tributaries of traditional navigable waters.[vi] The Court reaffirmed the statutory limitations to the scope of EPA and USACE's enforcement of the CWA and called for new regulations to provide jurisdictional certainty.

In response to these Court decisions some critics have called for Congress to act. According to a House Committee on Transportation and Infrastructure hearing memorandum prepared by the majority staff, "legislation is necessary to restore the comprehensive protections provided by the Clean Water Act in meeting its goals of 'fishable and swimmable water,' and restore the regulatory certainty that existed for almost three decades prior to the *SWACC* and *Rapanos* decisions."[xii] But calling on Congress for a partisan legislative solution

fails to properly address the real problem of regulatory malfeasance and would more than likely spur additional lawsuits, and permitting the EPA and USACE to continue neglecting their regulatory obligations.

As is often the case, well intentioned but misguided legislation can have serious unintended consequences, particularly when partisan politics is involved. Settling the matter of regulatory jurisdiction under CWA would best be achieved when conducted through the proper rulemaking process. According to Professor Alder, "the surest way to bring greater certainty to the scope of federal regulation under the CWA is for the Army Corps and EPA to undertake a notice and comment rulemaking to more clearly define when, and under what conditions, waters and wetlands constitute a part of the 'waters of the United States'"[xiii] as encouraged by three of the opinions in *Rapanos*.

Overwhelming the Permitting Process

The Secretary of the Army, acting through the Chief of Engineers, is authorized to issue permits for the discharge of dredged or fill material into waters of the United States including any rock, sand, or dirt used to construct land for site development, roadways, erosion protection, etc.

USACE receives over 80,000 permit applications a year requesting permission to begin construction projects on lands that fall within CWA jurisdiction. To reach a decision on a request to begin construction, the USACE generally relies on one of three authorizations under the 404 permitting process: "standard" permits (including individual permits), "general" permits (nationwide and regional), and letters of permission.

"General" permits include both nationwide permits issued by USACE headquarters to authorize activities with minimal impacts across the country and regional permits issued by division or district engineers to authorize activities in particular geographic areas. Letters of permission are issued where it is determined by the district engineer that the proposed work would be minor and have no significant impact on the environment. The majority of decisions for these permits are reached within 30 days.

The most time-consuming permitting process and the one most likely to be negatively affected by policies that expand lands covered under CWA are the "standard" permits that require a higher threshold for approval. The "standard" permit process requires a public notice, opportunity for public hearing, an analysis of project alternatives, and completion of an

Environmental Assessment. According to USACE, "standard" permit decisions are generally made within 187[xiv] days, although some "standard" permit applications that require an Environmental Impact Study average over three years to process and can often take longer. [xv]

Because the USACE permitting process is an absolutely critical step in protecting our Nation's waterways and wetlands it is important that it be run efficiently in order to provide environmental protections while avoiding unnecessary harm to commerce. A number of recent USACE permit application cases show how easily valuable development projects can be delayed for years. Under the current "standard" permitting process a proposed nanotechnology site near the State University of New York Institute of Technology (SUNYIT) have cost developers in excess of $300,000 in engineering, legal, and other expenses over seven years.[xvi] In South Florida it took over five years for approval of a 313-acre site near Boynton Beach for a veteran's cemetery.[xvii] Cases like these are not atypical and would almost certainly increase under an expanded CWA, resulting in increased costs and delays to small business owners, farmers, ranchers, and developers.

Expanding the definition of "waters of the United States" to include currently intrastate and unregulated water ways like storm sewers, ditches and drainages, would almost certainly have significant repercussions for business, owners of privately held lands, and state and local governments that will have increased wait times for permit approvals.

The dramatically increased workload that USACE would encounter for being responsible for traditionally state or county matters has the potential to cripple a currently overwhelmed permit process. During a congressional hearing in 2008, Assistant Secretary of the Army John Paul Woodley asked members of Congress rhetorically, " [w]hat would be the budgetary, workload, and processing time implications for the Corps regulatory program, as well as the Clean Water Act regulatory programs of other Federal, Tribal, and State agencies if they were suddenly faced with a significant increase in CWA permit applications for activities and resources with no significant nexus to navigable waters?"[xviii]

Calls for Updated Regulations

To continue protecting our Nation's waterways, both EPA and USACE should conduct a comprehensive rulemaking to better define "waters of the United States" and help resolve the outstanding issues following *SWANCC* and *Rapanos*. Supreme Court Justice Breyer dissenting opinion in

Rapanos stated, "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. That is not the system Congress intended. Hence I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."[xx] Additionally, Chief Justice Roberts reiterated that following *SWANCC* decision, "the goal of the agencies was to develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA."[xxi]

In contrast, the issuance of interpretive guidance by the EPA and USACE following *Rapanos* has left many affected parties unsatisfied. It is estimated that new guidance has quadrupled the time needed to make a jurisdictional call and left the jurisdictional lines in "100 shades of gray." By creating a confusing, and complicated jurisdictional determination form that no one really understands.[xxii]

Failing to issue new regulations that address the core jurisdictional concerns of the CWA and clearly define what waters are included under "waters of the United States," the EPA and USACE continue to place an unnecessary burden on the judicial and legislative systems. Doing so has required these entities to craft technical solutions for problems that are outside of their normal expertise.

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[i] The 'Clean Water Restoration Act' (S.1870 and H.R. 2421) would redefine "navigable waters" to mean 'waters of the United States' defined as '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.'

[ii] *United States v. Lopez,* 514 U.S. 549 (1995).

[iii] Jonathan H. Adler, Professor of Law, Director, Center for Business Law and Regulation, Case Western Reserve University School of Law, Testimony before the House Committee Transportation and Infrastructure, April 16, 2008.

[iv] *Solid Waste Agency of Northern Cook County v. United States Army corps of Engineers,* 531 U.S. 159, 166-174 (2001) (SWANCC)

[v] 126 S. Ct. 2208 (2006).

[vi] *Id.* at 2219
[xii] Subcommittee on Water Resources and Environment Majority Staff, *Summary of Subject Matter*, Hearing on Clean Water Restoration Act of 2007, April 11, 2008.
[xiii] *Ibid*, Adler.
[xiv] U.S. Army Corps of Engineers Regulatory Program: *FY 2003 Average Evaluation Days*. http://www.usace.army.mil/cw/cecwo/reg/2003webcharts.pdf
[xv] U.S. Army Corps of Engineers Regulatory Program: Overview. http://www.usace.army.mil/cw/cecwo/reg/oceover.htm
[xvi] Gamela, Renee. *Nanotech's Permit Cost:$300,000.* UticaOD.com. January 21, 2008.
[xvii] Associated Press. *Long-delayed veterans cemetery approved.* St. Petersburg Times. March 14, 2006.
[xviii] John Paul Woodley, Assistant Secretary of the Army, Testimony before the House Committee on Transportation and Infrastructure, April 16, 2008.
[xx] 126 S. Ct. at 2266 (Breyer, J., dissenting)
[xxi] 126 S. Ct. at 2235 (Roberts, C.J., concurring)
[xxii] U.S. Environmental Protection Agency, *Draft EPA/Army Guidance Regarding CWA Jurisdiction after Rapanos*. Docket number EPA-HQ-OW-2007-0282

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