



## **OPPOSE EXPANDING CLEAN WATER ACT JURISDICTION**

**Issue:** The Waters Advocacy Coalition ("WAC") opposes efforts to expand federal jurisdiction of the Clean Water Act ("CWA") to allow federal agencies to regulate ditches, culverts and pipes, desert washes, sheet flow, erosional features, and farmland and treatment ponds as "waters of the United States," subjecting such waters to all of the requirements of the CWA.

**Background:** Since 1972, the CWA has been instrumental in dramatically improving the quality of the nation's waters. Fundamental to that progress has been the federal-state partnership which recognizes that not all waters need be subject to federal jurisdiction; the states should have the jurisdiction to regulate waters within their individual boundaries.

Key to establishing the boundary between state and federal jurisdiction has been the term "navigable waters." The term "navigable waters" is defined in the statute to mean "the waters of the United States." Any waters satisfying this definition are under federal jurisdiction. EPA and the Corps have provided varying regulatory definitions of "the waters of the United States" over the past 30 years. The United States Supreme Court has examined the scope of the CWA three times:

- ***Riverside Bayview*** (1985): Upheld the agencies' authority to regulate wetlands adjacent to navigable waters.
- ***SWANCC*** (2001): Rejected the agencies' authority to regulate isolated waters based upon the potential presence of migratory birds (the Migratory Bird Rule). The Court said that asserting jurisdiction over such waters raised "significant constitutional concerns."
- ***Rapanos*** (2006): Affirmed that CWA jurisdiction extends beyond strictly navigable waters, but does not extend to all areas with a mere "hydrological connection" to navigable waters. The unifying theme of the Justices was not that the CWA needed to be changed but rather that the Corps and EPA should issue new regulations. As Justice Breyer, who sided with the dissent, observed, the agencies should "write new regulations, and speedily so."

**Legislation:** The U.S. Supreme Court's decisions in *SWANCC* and *Rapanos*, coupled with the recent Army Corps of Engineers ("Corps") and Environmental Protection Agency ("EPA") guidance implementing *Rapanos*, have added a degree of uncertainty to the world of CWA jurisdiction. However, all three Supreme Court decisions, in addition to the earlier *Riverside Bayview* decision, highlight the importance of retaining a distinction between federal and state jurisdiction.

The leading legislative proposal deletes the term "navigable" from the CWA and proposes to regulate all "intrastate waters" and all "activities affecting these waters" to the furthest extent of Congress's authority. These amendments will inject uncertainty in the CWA to the detriment of the 44 states that administer the NPDES program and those whose operations must comply with the statute. They will not restore the original intent of the CWA and will not make it easier to protect truly important waters. In fact, the amendments will:

- Delete the word "navigable" from the CWA and consequently erase any distinction between state and federal waters.

- Conflict with CWA sections 101(b) and 101(g) which state Congressional intent to “recognize, preserve, and protect the primary responsibilities and rights of the States” to control the development and use of local land and water resources and to “allocate quantities of water within [State] jurisdiction.”
- Eliminate the existing regulatory exemptions which were authorized by both Democratic and Republican administrations for prior converted cropland and waste treatment systems.
- Place critical regulatory decisions in the hands of constitutional lawyers and result in costly litigation regarding the scope of CWA jurisdiction, the extent of “activities affecting these waters,” and the limit of Congress’s authority under the Constitution.

**Recommendation:** Any legislative effort to clarify the scope of the CWA should, at a minimum, be based on the following principles:

- Maintain the distinction between federal and state waters by retaining the term “navigable waters.”
- Adhere to the fundamental principle that states retain primary jurisdiction over water and land use within their individual boundaries.
- Clarify jurisdiction without expanding it. Jurisdiction should be clear, unambiguous, and practical.
- Define important terms used in the CWA. Since passage of the CWA in 1972, the regulated community, and even the Supreme Court, has requested definitions of key terms like “tributary,” “adjacent,” “impoundment,” and “traditional navigable waters.”
- Avoid creating more confusion.

**About the Waters Advocacy Coalition:** *Statement of Policy:* The members of WAC are committed to the protection and restoration of America’s wetlands resources. WAC does not believe, however, that it is in the nation’s interest to have federal agencies regulate ditches, culverts and pipes, desert washes, sheet flow, erosional features, and farmland and treatment ponds as “waters of the United States,” subjecting such waters to all of the federal regulatory requirements of the CWA. *Members include:* American Farm Bureau Federation®; American Forest & Paper Association; American Iron and Steel Institute; American Road and Transportation Builders Association; Associated General Contractors of America; CropLife America; Edison Electric Institute; The Fertilizer Institute; Foundation for Environmental and Economic Progress; Industrial Minerals Association-North America; International Council of Shopping Centers; National Association of Flood and Stormwater Management Agencies; National Association of Home Builders; National Association of Industrial and Office Properties; National Association of Manufacturers; National Association of REALTORS®; National Association of State Departments of Agriculture; National Cattlemen’s Beef Association; National Corn Growers Association; National Council of Farmer Cooperatives; National Mining Association; National Multi Housing Council; National Pork Producers Council; National Stone, Sand and Gravel Association; Public Lands Council; Responsible Industry for a Sound Environment; Southern Crop Production; United Egg Producers; and Western Business Roundtable.