Legislative Approaches to Defining "Waters of the United States"

Claudia Copeland
Specialist in Resources and Environmental Policy

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Summary

In the 111th Congress, legislation was introduced that sought to clarify the scope of the Clean Water Act (CWA) in the wake of Supreme Court decisions in 2001 and 2006 that interpreted the law's jurisdiction more narrowly than prior case law. The Court's narrow interpretation involved jurisdiction over some geographically isolated wetlands, intermittent streams, and other waters. The two cases are *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)* and *Rapanos v. United States*.

Bills to nullify the Court's rulings have been introduced repeatedly since the 107th Congress, but none had advanced until the 111th Congress. In June 2009, a Senate committee approved S. 787, the Clean Water Restoration Act. Companion legislation in the House, H.R. 5088 (America's Commitment to Clean Water Act), was introduced in April 2010. No further legislative action occurred on either bill.

Under current law, the key CWA phrase which sets the act's reach is the phrase "navigable waters," defined to mean "the waters of the United States, including the territorial seas." Proponents of the current legislation contend that the Court misread Congress's intent when it enacted the CWA, and consequently the Court's ruling unduly restricted the scope of the act's water quality protections. Both S. 787 and H.R. 5088 would have replaced the phrase "navigable waters" in the CWA with "waters of the United States" and would have installed a definition of "waters of the United States," not found in the law now. The bills differed in how they would define the phrase. The Senate committee bill included a definition drawn from one paragraph of existing federal regulatory text, while H.R. 5088 included a longer definition based on the same regulatory language, but with some modifications. Both bills also included provisions affirming the constitutional basis for the act's jurisdiction. These provisions were intended to address the concern that the Court's rulings, while decided on statutory grounds, raised related questions about the outer limits of Congress's power to regulate waters with little or no connection to traditional navigable waters under the Commerce Clause of the Constitution.

Proponents of the legislation, including many states and environmental advocacy groups, contended that the Court's ruling in these cases, and subsequent regulatory guidance by federal agencies, have unsettled several decades' worth of case law, misreading or ignoring congressional intent, and thus reinterpreting and narrowing the jurisdictional scope of the act. Supporters said that the intention was to return to the CWA regulatory jurisdiction that prevailed before the Court's rulings. On the other hand, critics, including many industry groups and development and home builder organizations, contended that the legislation would greatly expand federal regulatory jurisdiction of the CWA beyond interpretations that existed before the two Supreme Court rulings, not simply reaffirm congressional intent. They were concerned that the legislation, were it enacted, had the potential to be interpreted far more broadly than what was previously understood to be jurisdictional—thus causing more uncertainty, rather than clarifying the issue.

Between proponents and critics, there was wide disagreement whether the new statutory definition proposed in either bill, coupled with other changes, would achieve the objective of clarity and certainty that has been broadly desired. In light of the differing views on the issues, future prospects for similar legislation in the 112th Congress are highly uncertain. The legal and policy questions associated with the *SWANCC* and *Rapanos* cases—concerning the outer geographic limits of CWA jurisdiction and consequences of restricting that scope—have challenged regulators, landowners and developers, and policymakers for more than 35 years.

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Introduction

In the 111th Congress, legislation was introduced that sought to clarify the scope of the Clean Water Act (CWA) in the wake of two Supreme Court decisions that interpreted the law's jurisdiction more narrowly than prior case law. The Court's narrow interpretation involved jurisdiction over some geographically isolated wetlands, intermittent streams, and other waters. These cases dealt specifically with CWA section 404, the so-called "dredge and fill" program, under which permits are required for discharges of dredged or fill material. But the decisions are significant for the act as a whole, since the regulatory definitions at issue govern not only section 404, but also many other provisions and requirements of the law, including section 402 (permit program for point source discharges into navigable waters), section 303 (water quality standards for navigable waters), and section 311 (discharges of oil and hazardous substances into navigable waters).

First, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), the Court addressed the issue of CWA jurisdiction over "isolated waters"—waters that are not traditional navigable waters (sometimes called navigable-in-fact waters), are not interstate, are not tributaries of the foregoing, and are not hydrologically connected to navigable or interstate waters or their tributaries. The Court held 5-4 that the scope of jurisdiction under the CWA does not extend to isolated, nonnavigable, intrastate waters in cases where jurisdiction is asserted purely on the ground that they are or might by used by migratory birds that cross state lines. However, the ruling created uncertainty about what isolated waters and wetlands would no longer be subject to federal regulation, because scientists and regulators recognize that many types of isolated wetlands that provide important ecological functions are not physically adjacent to navigable waters.

Second, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court addressed CWA jurisdiction over "adjacent wetlands," specifically wetlands adjacent to tributaries of traditional navigable waters. The Court issued a split 4-1-4 ruling. A four-justice plurality opinion, written by Justice Scalia, adopted a test restricting jurisdiction under section 404 of the act to relatively permanent bodies of water and wetlands with a continuous surface connection to waterbodies that are themselves waters of the United States. In a concurring opinion, Justice Kennedy proposed a case-by-case test to establish a significant nexus to waters of the United States for jurisdiction over adjacent wetlands to exist under the act. A wetland, he declared, has the requisite significant nexus if, alone or in combination with similarly situated lands in the region, it significantly affects the chemical, physical, and biological integrity of traditional navigable waters.[1] These ecological functions include flood retention, pollutant trapping, and filtration. Under Kennedy's opinion, the waters that perform these functions may be intermittent or ephemeral, and they need not have a surface hydrological connection to other waters. When, in contrast, their effects on water quality are speculative or insubstantial, the wetland is beyond section 404's reach.[2] Because no single opinion in *Rapanos* commanded the support of five or more Justices, the scope of CWA jurisdiction has remained unsettled, and lower courts have diverged as to the rule of decision to be applied in specific cases.[3]

[1] 547 U.S. at 780.

[2] *Id.*

[3] For more information on and implications of the Court's rulings, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA) Is Revisited by the Supreme Court: Rapanos v. United States*, by Robert Meltz and (continued...)

Bills to nullify *SWANCC*, or in later versions *SWANCC* and *Rapanos*, and reinstate the interpretation of "waters of the United States" prevailing before those decisions, have been introduced in recent Congresses, but none had advanced until the 111th Congress. Obama Administration officials have supported the need for legislative clarification of these issues, marking the first time that the Administration has done so. In May 2009, the heads of the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps), the Department of Agriculture, the Department of the Interior, and the Council on Environmental Quality jointly wrote to congressional leaders to express that view and to identify certain principles that might help guide legislative and other actions.[4]

The 111th Congress legislation introduced in response to these rulings was S. 787 (the Clean Water Restoration Act), introduced by Senator Feingold and approved, with amendments, by the Senate Environment and Public Works Committee in June 2009,[5] and H.R. 5088 (America's Commitment to Clean Water Act), introduced by Representative Oberstar on April 21, 2010. Proponents of the legislation contended that the Court's rulings in these cases, and subsequent regulatory guidance issued by the Corps and EPA in 2003, 2007, and 2008, have unsettled several decades' worth of case law, misreading or ignoring congressional intent, and thus reinterpreting and narrowing the jurisdictional scope of the act. The rulings and agency responses, they said, have removed regulatory protection from some waters and wetlands and thereby weakened protection of the nation's water quality. Supporters stated that the intention of the legislation was to return to the CWA regulatory jurisdiction that was recognized before the Court's 2001 and 2006 rulings. Both S. 787 and H.R. 5088 shared that objective, but they would have done so in somewhat different ways, as described in this report.

On the other hand, critics contended that the bills would greatly expand federal regulatory jurisdiction of the CWA over the pre-*SWANCC* interpretation, not simply reaffirm congressional intent. They were concerned that the proposed definition of "waters of the United States" was ambiguous, and that the changes proposed by the bills would have the potential to be interpreted far more broadly than what was understood to be jurisdictional before 2001—thus causing more uncertainty, rather than clarifying the issue.

In general, supporters of the bills included many states and state environmental organizations, environmental and conservation advocacy groups, as well as a number of outdoor, hunting, fishing, and sporting organizations, who argued that enactment of the bills would provide needed strengthening of CWA protection for water quality and wetlands. In general, critics and opponents included many manufacturing industry groups and agricultural interests, as well as land development and home builder organizations, who contended that the bills would fundamentally alter the regulatory reach and balance of federal and state authority under the CWA.

(...continued)

Claudia Copeland. A majority of the federal regional circuits have addressed the issue.

[4] See http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=64739ae3-802a-23ad-4c30-36fc58cc1014&Region_id=&Issue_id=.

[5] The committee's report on the bill (S.Rept. 111-361) was filed in December 2010, nearly 18 months after the committee's approval of the legislation.

S. 787

The bill approved by the Senate Committee on Environment and Public Works was an amended version of legislation introduced by Senator Feingold in April 2009.[6] **Section 1** was the Short Title of the bill, and **Section 2** described two purposes: "to reaffirm the original intent of Congress" in enacting the CWA in 1972 (P.L. 92-500; 33 U.S.C. §§ 1257-1387) and to "clearly define the waters of the United States" subject to the CWA as the phrase was interpreted in applicable regulations and guidance in effect prior to the *SWANCC* ruling.

Section 3 would have made 24 findings, including several about the economic and ecological importance of protecting intrastate waters and wetlands, and others about the importance of protecting small and intermittent streams from pollutant discharges. It also included findings that the legislation would overturn the Supreme Court's *SWANCC* and *Rapanos* rulings and reaffirm federal jurisdiction over all waters of the United States as the CWA was applied and interpreted in rules, guidance, and interpretations of EPA and the Corps prior to those decisions. The findings as approved by the Senate committee significantly modified findings in the bill as introduced, deleting many from the original bill and adding new findings. It should be noted that the findings in a statute are not binding, operative provisions, although they may influence to varying degrees agencies' regulatory decisions and the judicial interpretation of the operative provisions elsewhere in a statute or a court's assessment of a statute's constitutionality.[7]

Section 4 was the important definitional provision of the bill, because it would have affected the key CWA phrase which sets the act's reach, and which legislative history, regulations, and cases all attempt to interpret—the phrase "navigable waters." The current CWA defines "navigable waters" to mean "the waters of the United States, including the territorial seas."[8] S. 787 would have struck this term and its definition and installed "waters of the United States" as the direct jurisdictional phrase, a term that is defined in EPA and Corps regulations, but currently not in statute (see **Table A-1** which compares existing regulatory text and proposed statutory text).[9] Section 4 would have defined the term "waters of the United States" in the CWA to mean

> all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters, and all impoundments of the foregoing.

Section 4 also would have excluded from the new statutory definition two terms that currently are excluded from jurisdiction by regulation only: prior converted cropland, and waste treatment systems. Prior converted cropland means a wetland that was manipulated or used to produce an agricultural commodity before December 23, 1985.[10] Waste treatment systems refer to treatment ponds or lagoons designed to meet the requirements of the CWA, including only manmade bodies of water which neither were originally created in waters of the United States (such as disposal

[6] Senator Feingold also sponsored similar but not identical legislation in each Congress since the 107th.

[7] See, e.g., Gonzales v. Raich, 545 U.S. 1 (2005) (describing congressional findings as "helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident ...").

[8] CWA § 502(7); 33 U.S.C. § 1362(7).

[9] 33 CFR § 328.3 (Corps); 40 CFR § 122.2 (EPA).

[10] 7 CFR § 12.2.

areas in wetlands), nor resulted from the impoundment of such waters.[11] These two exemptions, not in S. 787 as introduced, were included in an amendment adopted during committee markup.

Section 5 would have conformed the changes resulting from section 4 of the bill with the CWA as a whole by replacing the phrases "navigable waters of the United States" or "navigable waters" wherever they currently appear in the CWA with "waters of the United States."

Section 6 was the Savings Clause. A savings clause is typically included in order to declare that the legislation preserves—or would not affect—provisions, such as exemptions, granted under existing law. Section 6 expressly would have preserved CWA permit exemptions found in two provisions of the act. First, subsections (6)(1) and (2) would have preserved two exemptions in CWA section 402(l), which is titled "Limitation on Permit Requirement." Section 402 is the section that authorizes National Pollutant Discharge Elimination System (NPDES) permits for point source discharges from, for example, municipal sewage treatment facilities and manufacturing plants. CWA section 402(l) prohibits the Administrator of EPA from requiring an NPDES permit for discharges composed entirely of return flows from irrigated agriculture, or for discharges of stormwater runoff from oil or gas mining operations. Complementing the exclusion of irrigated agricultural return flows in section 402(l) is this existing exclusion in the Definitions provision of the act: "This term ['point source'] does not include agricultural stormwater discharges and return flows from irrigated agriculture."[12]

Second, the legislation would have preserved six permit exemptions specified in CWA section 404(f)(1). As noted previously, section 404 authorizes the Corps to issue permits for dredged or fill materials into the navigable waters, including wetlands. Subsections 6(3) through (8) of S. 787 would have preserved the existing section 404 exemptions for normal farming, ranching, and silviculture; maintenance of currently serviceable structures; construction or maintenance of farm or stock ponds or irrigation and drainage ditches; temporary sedimentation basins on construction sites; farm or forest roads or temporary roads for moving mining equipment; and activities under a state program for placement of dredged or fill material (a program that is approved under CWA section 208(4)(B)).[13]

As approved by the committee, Section 6 only referenced the eight saved provisions by statutory citation. During markup, the committee adopted an amendment that dropped language in the bill as introduced that additionally would have paraphrased each provision. Critics of the legislation had argued that the paraphrasing language added confusion, rather than clarity.

Section 7 would have directed EPA and the Corps, within 18 months of enactment, to promulgate such regulations as necessary to implement the legislation and amendments made by the legislation. Section 7 also stated that the term "waters of the United States" shall be construed consistently with the scope of federal jurisdiction under the CWA as interpreted and applied by

[11] 40 CFR § 122.2. This regulatory exemption allows mining projects, for example, to use a portion of a natural stream to direct water to a sediment pond or other treatment system without having to obtain a permit.

[12] 33 USC § 1362(14). The CWA prohibits the discharge of a pollutant into navigable waters from a point source, except in compliance with permit requirements of the act.

[13] 33 USC § 1342(f)(1). The specified activities also are protected from regulation under section 301 or section 402 of the CWA (except for toxic effluent standards). Regulations to implement the 404(f)(1) exemptions are located at 40 CFR § 232.3(c).

EPA and the Corps prior to January 9, 2001 (the date of the *SWANCC* ruling),[14] and "the legislative authority of Congress under the Constitution."

H.R. 5088

The bill introduced by Representative Oberstar on April 21, 2010, was a modified version of legislation that he had introduced previously.[15] Like the Senate measure, **Section 1** was the Short Title of the bill, and **Section 2** described the purposes of the legislation. It included two purposes similar to S. 787: to "reaffirm the original objective of Congress" in enacting the CWA and to "reaffirm the definition of the waters of the United States" that are subject to the CWA consistent with interpretations prior to the two Supreme Court rulings. H.R. 5088 included a third purpose: to protect the "waters of the United States" as authorized by specific constitutional powers—section 8 of article I (scope of legislative power, including the Commerce Clause), section 2 of article II (presidential power, including treaties), and section 3 of article IV (congressional power over U.S. property) of the U.S. Constitution.

Section 3 would have made 12 findings, for example about the importance of protecting small and intermittent streams, including seasonal streams and their headwaters, which can affect the introduction of pollutants to larger rivers and streams. It also included findings about the importance of water for agriculture, transportation, energy production, recreation, fishing and shellfishing, and municipal and commercial uses. Findings in H.R. 5088 would have stated that the *SWANCC* and *Rapanos* rulings impair the statutory protection of U.S. waters, contrary to congressional intent.

Section 4 was the important definitional provision of the bill. Like the Senate committee bill, it would have affected the key CWA phrase which sets the act's reach. Also like the Senate committee bill, H.R. 5088 would have struck the term "navigable waters" and install "waters of the United States" as the direct jurisdictional phrase. A key difference between the bills, however, was that while S. 787 would have inserted the fairly short text quoted above, H.R. 5088 would have inserted a longer definition based closely on existing regulatory language of the Corps and EPA, but with some modifications (see **Table A-1** which compares existing regulatory text and proposed statutory text). Section 4 of H.R. 5088 would have defined the term "waters of the United States" in the CWA as including

> (i) all waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;
>
> (ii) all interstate and international waters, including interstate and international wetlands;
>
> (iii) all other waters, including 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 does or would affect interstate or foreign commerce, the obligations of the United States under a treaty, or the territory or other property belonging to the United States;

[14] This provision mirrored provisions in both the Purposes and Findings sections of S. 787.

[15] Representative Oberstar sponsored bills in each Congress from the 107th through the 110th Congresses.

(iv) all impoundments of waters otherwise defined as waters of the United States under this paragraph;

(v) tributaries of waters identified in clauses (i) through (iv);

(vi) the territorial seas; and

(vii) waters, including wetlands, adjacent to waters identified in clauses (i) through (vi).

Section 4 of H.R. 5088 also would have excluded from the new statutory definition two terms that currently are excluded from jurisdiction by regulation only: prior converted cropland, and waste treatment systems, and it would expressly define both terms. As noted above, S. 787 similarly would have excluded both terms, but it did not include definitions.

Section 5 would have conformed the changes resulting from section 4 of the bill with the rest of CWA as a whole by replacing the phrases "navigable waters of the United States" or "navigable waters" wherever they currently appear in the CWA with "waters of the United States."

Unlike S. 787, H.R. 5088 did not include a Savings Clause. The bill's principal sponsor said that creating a list of provisions not affected would be endless and of no legal value.[16] Further, H.R. 5088 did not include either a provision addressing statutory construction or a provision calling for regulations. New regulations would be unnecessary, according to the bill's sponsor, because the legislation largely would codify existing regulatory language.

Analysis

Both proponents and critics of S. 787 and H.R. 5088 wanted to achieve predictability and certainty concerning what constitutes the geographic reach of CWA regulatory jurisdiction—that is, which waters are protected by the act and are subject to regulation, and which are not. Proponents worried that some waters are no longer protected, as a result of court rulings, while regulated entities said that uncertainties about interpreting the rulings have led to costly and time-consuming delays in obtaining jurisdictional determinations. But between the proponents and critics, there was wide disagreement whether the new statutory definition proposed in either bill, coupled with removing the word "navigable" from current law and other changes, would achieve the objective of clarity and certainty.

The proposed definition of "waters of the United States" in both bills would have identified specific kinds of waters and wetlands that Congress intends be regulated. For example, prairie potholes and playa lakes are types of wetlands that typically are hydrologically isolated. Supporters said that including these as examples in the legislation would give a clear indication of congressional intent that the act's jurisdiction extends to hydrologically isolated waters—those waters that were the subject of the *SWANCC* ruling.

[16] "How *America's Commitment to Clean Water Act* Addresses Comments to Prior Legislation," http://transportation.house.gov/Media/file/water/ACCWA/Comparison%20to%20Prior%20Legislation.pdf. Note, however, that prior versions of House legislation did include a Savings Clause; see, for example, H.R. 2421, the Clean Water Restoration Act, in the 110th Congress.

The definitions in both bills were based on the existing Corps and EPA regulations, unchanged since 1993 (see footnote 9). Some stakeholder groups have urged Congress to codify the agencies' regulations verbatim in the statute in order to provide the greatest clarity of intent, but bill sponsors in the Senate rejected this approach and, instead, crafted a definition from several parts of the regulatory text (see **Table A-1**). Some said that complete regulatory codification alone would not solve all of the problems created by the Supreme Court's rulings, since those rulings were largely interpretations of those regulations.

However, in a major change from the approach in prior House bills, the authors of H.R. 5088 in the 111th Congress chose to include a statutory definition that more closely follows the full existing Corps-EPA regulatory language.[17] Yet it also would have extended the regulatory definition in ways that some might criticize. In particular, H.R. 5088 would have included in the definition of "waters of the United States" "all ... international waters, including ... international wetlands," which are not included in the Corps-EPA regulations. Including "international waters" would seemingly extend the reach of the CWA beyond the traditional boundaries of national jurisdiction[18] and could lead to disputes about whether particular international waters and wetlands are or should be regulated by the act. In another change from the regulatory definition, H.R. 5088 would have included in the term "waters of the United States" waters whose use, degradation, or destruction does or would affect "the obligations of the United States under a treaty, or the territory or other property belonging to the United States."

One particular problem that both bills sought to remedy centers on the Court's discussion of "navigable waters." Proponents argued that the bills would restore the original intent of Congress when it enacted the Clean Water Act, which the Court misread, they contended. The conference report accompanying enactment of the CWA in 1972 contains this oft-quoted statement:

> The conferees fully intend that the term 'navigable waters' be given the *broadest possible constitutional interpretation* unencumbered by agency determinations which have been made or may be made for administrative purposes.[19]

For many supporters of S. 787 and H.R. 5088, the core problem resulting from the Supreme Court's two rulings is the Court's discounting of the Corps' and EPA's broad interpretation of the word "navigable" in the statute. In *SWANCC*, the Court said, "the term 'navigable' in the statute has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[20] Further, the Scalia plurality opinion in *Rapanos* took a narrow view of jurisdiction, limiting the CWA's coverage to "those relatively permanent, standing or continuously flowing bodies of water: and "only those wetlands with a continuous surface connection to [other regulated wetlands.]"[21] Environmentalists say that this would cut off jurisdiction for numerous waters and wetlands that may not be continuously, hydrologically connected to nearby waters and would put many upper-reach tributaries at risk of losing federal

[17] See, for example, H.R. 2421 in the 110th Congress.

[18] The current CWA defines "navigable waters" to mean "the waters of the United States, including the territorial seas." The term "territorial seas" is defined in the act as extending a distance of 3 miles seaward from the baseline; the baseline generally means the land or shore.

[19] S. Rept. 92-1236, at 144 (1972) (emphasis added).

[20] 531 U.S. at 172.

[21] 547 U.S. at 732-733.

protection from pollution and destruction. In response, the 111th Congress legislation was intended to clarify that Congress's primary concern in 1972 was to protect and broadly conserve waters from pollution. By removing the word "navigable" entirely from the statute, supporters said, the bills were intended to make clear Congress's original intent, while also following long-standing interpretation of the Corps and EPA.

To supporters of the legislation, removing the word "navigable" is central to restoring the authority of the Clean Water Act. But *retaining* "navigable" is equally important to those who opposed the legislation. Critics contended that "navigability" is a term that has well recognized meaning. Without it, the scope of the law and federal jurisdiction would be overly broad, in their view, thus raising serious federalism issues, as a broadened CWA would conflict with the primary responsibility of states to manage and regulate water resources, including with regard to water allocation. The critics were not satisfied that the finding in section 2(5) of S. 787, saying that Congress supports the policy in CWA section 101(g) regarding state authority over water rights and water allocation, would have addressed this concern. H.R. 5088 did not include a similar finding.

Critics further contended that, by following the Corps' and EPA's long-standing interpretation, the legislation would have failed to do what its supporters asserted: rather than clarifying congressional intent, it would have expansively interpreted which waters are jurisdictional under the CWA. Both S. 787 and H.R. 5088 would have codified the regulatory encroachment that had developed in the years before the *SWANCC* ruling and that the Supreme Court sought to reverse, they said.

Many environmentalists and other supporters of S. 787 and H.R. 5088 also were concerned that the Court's *SWANCC* and *Rapanos* rulings, while decided on statutory grounds, raised related questions about the outer limits of Congress's power to regulate waters with little or no connection to traditional navigable waters under the Commerce Clause of the Constitution.[22] In particular, in the *SWANCC* ruling, the majority opinion stated: "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[23] In response, some commentators have argued that if Congress were to enact legislation to reverse the two rulings, it should definitively protect the nation's waters by explicitly stating the constitutional basis for the act's jurisdiction. Otherwise, they argue, future courts could build on past rulings to further challenge and limit Congress's authority in this area under the Constitution. One noted, "if Congress amends the CWA, it should include a clear jurisdictional element, even if that provision states only that the Act extends to the limits of, but not beyond, Congress' Commerce Clause power."[24] As described above, section 7 of S. 787 would have included a Rule of Construction provision stating that the term "waters of the United States" shall be construed consistently with "the legislative authority of Congress under the Constitution."[25] H.R. 5088 would have addressed this concern in section 2(3), stating that one of the purposes of the legislation was to define the term "waters of the United States" and to

[22] U.S. Const. Art. I, § 8, cl. 3.

[23] 531 U.S. at 172.

[24] Robin Kundis Craig, *The Clean Water Act and the Constitution, Legal Structure and the Public's Right to a Clean and Healthy Environment*, 2nd ed. (Environmental Law Institute, 2009), p. 146.

[25] S. 787 as introduced included language stating that the bill's definition of "waters of the United States" would apply "to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." The committee-approved bill does not include this precise language.

protect such waters, as authorized by provisions of the Constitution, including the Commerce Clause. Further, the definition in H.R. 5088 also would have applied to waters whose use, degradation, or destruction does or would affect U.S. treaty obligations (section 2 of article II) or U.S. territory or property (section 3 of article IV).

However, legislative language addressing Congress's constitutional authority to regulate waters raised strong objections from critics who said that the language, together with eliminating "navigability" from the act, would have effectively expanded the law's reach, not simply clarified original congressional intent. Critics of the current legislation acknowledged that in the CWA Congress did broaden the federal regulatory authority over the nation's waters, but they contended that Congress intended to exercise its commerce power over navigation, and not its power over all things affecting interstate commerce. In response, supporters of S. 787, who disputed the critics' narrow interpretation of the CWA's legislative history, pointed to another Rule of Construction provision in section 7 of that bill, which would have limited the term "waters of the United States" to the scope of federal jurisdiction under the CWA as interpreted and applied by EPA and the Corps prior to January 9, 2001 (the day of the *SWANCC* ruling). Likewise, section 3(12) of H.R. 5088 would have stated that the legislation would not affect the authority of the Corps or EPA under the provisions of the CWA as interpreted or applied by those agencies as of January 8, 2001 (the day before the *SWANCC* ruling). This point did not satisfy critics who were concerned that in the past the reach of the CWA has increased through "regulatory creep," and that this could well occur again in the future.

Concluding Thoughts

The legislation approved by the Senate Environment and Public Works Committee in June 2009 was a modified version of the bill as introduced by Senator Feingold. During markup, the committee adopted an amendment co-sponsored by Senators Baucus, Klobuchar, and Boxer, while it rejected several amendments offered by Senators Barrasso and Vitter that would have limited the bill's application by, for example, striking some terms in the substitute amendment's definition of "waters of the United States" (e.g., prairie potholes, mudflats, wet meadows, and natural ponds) and exempting livestock production and agricultural cropping practices from CWA permitting requirements.

Both before and after Senate markup, press accounts reported discussions about a number of legislative alternatives intended to, on the one hand, include additional permit exemptions sought by several industry groups, or, on the other hand, broaden bill language to more clearly assert constitutional authority to protect U.S. waters. Some of the requested exemptions were adopted (for example, for prior converted cropland), but others were not. The broadest possible language regarding constitutional authority, sought by many environmental groups, was not included in the bill as approved. After the committee's action, reports indicated that there continued to be great interest among both supporters and opponents in further changes to the bill.

When he introduced H.R. 5088, Representative Oberstar said that the House Transportation and Infrastructure Committee would not hold hearings on the bill, because it held three days of hearings on similar legislation in the 110th Congress. The 111th Congress bill reflected testimony at those hearings and subsequent comments, he said. No specific schedule for action on the bill was announced.

The Administration did not take an official position on the legislation, although, as noted above, EPA, the Corps, and other agencies joined in a May 2009 letter expressing support for legislative clarification of issues raised by the two Supreme Court rulings.

There was no further legislative action on either bill during the 111th Congress. In light of the widely differing views of proponents and opponents, future prospects for similar legislation are highly uncertain. Future action also is uncertain because both of the two principal sponsors, Senator Feingold and Representative Oberstar, were defeated for re-election in November 2010. Nevertheless, the desire among stakeholders for greater certainty over which waters are jurisdictional under the Clean Water Act remains and could continue to draw attention in the 112th Congress, although the direction of future legislation could differ from past proposals. One difficulty of legislating changes to the CWA in order to protect wetlands and other U.S. waters results from the fact that the complex scientific questions about such areas are not easily amenable to precise resolution in law.[26] The debate over revising the act highlights the challenges of using the law to do so.

The legal and policy questions associated with the *SWANCC* and *Rapanos* cases—concerning the outer geographic limit of CWA jurisdiction and the consequences of restricting that scope—have challenged regulators, landowners and developers, policymakers, and courts for more than 35 years. Ultimately, if Congress were to enact legislation like that in the 111th Congress or an alternative, the implications of defining "waters of the United States" and making other statutory changes proposed in the legislation would depend on several factors: the new statutory language itself, accompanying legislative history, new regulations that the Corps and EPA might promulgate to implement the legislation, and interpretive case law resulting from likely future legal challenge.

[26] For more information, see CRS Report RL33483, *Wetlands: An Overview of Issues*, by Claudia Copeland.

Appendix. Regulatory and Proposed Statutory Definitions of "Waters of the United States"

Table A-1. Definitions of "Waters of the United States"

(Underlined text in the legislation shown in the table also appears in U.S. Army Corps of Engineers and EPA regulations)

Current Corps/EPA Regulations (33 CFR § 328.3 and 40 CFR § 122.2)	America's Commitment to Clean Water Act—111th Congress (H.R. 5088 as introduced)	Clean Water Restoration Act—111th Congress (S. 787 as approved by Senate EPW June 2009)
PART 328_DEFINITION OF WATERS OF THE UNITED STATES—Table of Contents Sec. 328.3 Definitions. For the purpose of this regulation these terms are defined as follows: (a) The term waters of the United States means (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 including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate	Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) is amended— (2) by adding at the end the following: `(26) WATERS OF THE UNITED STATES-  (A) In General—The term `waters of the United States' includes— (i) all waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide; (ii) all interstate and international waters, including interstate and international wetlands; (iii) all other waters, including 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 does or would affect interstate or foreign commerce, the obligations of the United States under a treaty, or the territory or other property belonging to the United States; (iv) all impoundments of waters otherwise defined as waters of the United States under this paragraph; (v) tributaries of waters identified in clauses (i) through (iv); (vi) the territorial seas; and (vii) waters, including wetlands, adjacent to waters	Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) is amended— (3) by adding at the end the following: `(25) WATERS OF THE UNITED STATES- (A) In General—The term `waters of the United States' means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters, and all impoundments of the foregoing.

Current Corps/EPA Regulations (33 CFR § 328.3 and 40 CFR § 122.2)	America's Commitment to Clean Water Act—111th Congress (H.R. 5088 as introduced)	Clean Water Restoration Act—111th Congress (S. 787 as approved by Senate EPW June 2009)
commerce; (4) All impoundments of waters otherwise defined as waters of the United States under the definition; (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section; (6) The territorial seas; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.	identified in clauses (i) through (vi).	
(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.	(B) Exclusions.—The term 'waters of the United States' does not include— (i) waters that are all or part of a waste treatment system, including treatment ponds or lagoons designed to meet the requirements of this Act; or (ii) prior converted cropland, except that, notwithstanding the determination of an area's status as prior converted cropland by the Secretary of Agriculture, for the purposes of this Act, the final authority regarding jurisdiction under this Act remains with the Administrator	(B) Exclusions—(i) PRIOR CONVERTED CROPLAND.—Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of this Act, the final authority regarding jurisdiction under this Act remains with the Environmental Protection Agency.
Note: A regulatory definition of "waste treatment system" is found in EPA regulations, as follows: "Complete waste treatment system. A complete waste treatment system consists of all the treatment works necessary to meet the requirements of title III of the Act, involved in: (a) The transport of waste waters from individual homes or buildings to a plant or facility where treatment of the waste water is accomplished; (b) the treatment of the waste waters to remove pollutants; and (c) the ultimate disposal, including recycling or reuse, of the treated waste waters and residues which result from the treatment process. One complete waste treatment system would, normally, include one treatment plant or facility, but also includes two or more connected or	'(27) Waste Treatment System.— (A) In General.—The term 'waste treatment system' means a confined and discrete system or structure that is specifically designed and engineered to meet the requirements of this Act and that is determined by the Administrator to be documented by the applicable permitting authority under section 402 or 404. (B) Special Rule.—A system or structure may not be documented as a waste treatment system and the Administrator may not make a determination under subparagraph (A) if, after the date of enactment of this paragraph, such system or structure is created in waters of the United States or results from the impoundment of waters of the United States.	(ii) WASTE TREATMENT SYSTEMS.—Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of this Act (or other cooling ponds 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 areas in wetlands) nor resulted from the impoundment of waters of the United States.'

Current Corps/EPA Regulations (33 CFR § 328.3 and 40 CFR § 122.2)	America's Commitment to Clean Water Act—111th Congress (H.R. 5088 as introduced)	Clean Water Restoration Act—111th Congress (S. 787 as approved by Senate EPW June 2009)
integrated treatment plants or facilities." (35 CFR § 35.905)	(C) Grandfather.—Notwithstanding subparagraph (B), a waste treatment system in existence and documented before the date of enactment of this paragraph may include a waste treatment system that was either originally created in or resultant from the impoundment of waters of the United States if the discharge from such system meets applicable standards and limitations at the point of discharge in a manner similar to other discharges under this Act. (D) Applicability.—The definition contained in this paragraph shall apply only for the purposes of paragraph (26).	
Note: The term "prior converted cropland" is included in the U.S. Department of Agriculture's regulatory definition of the term "wetland" (see 7 CFR § 12.2).	'(28) Prior Converted Cropland.—The term 'prior converted cropland' means a wetland as determined by the Secretary of Agriculture— (A) that has been converted by draining, dredging, filling,, leveling, or other manipulation (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulations described herein if— (i) such production would not have been possible but for the conversion; and (ii) before the conversion such land was wetland, farmed wetland, or farmed-wetland pasture; (B) on which such conversion occurred prior to December 23, 1985; (C) on which an agricultural commodity had been produced at least once before December 23, 1985; (D) that, as of December 23, 1985, did not support woody vegetation and met the following hydrologic criteria: (i) inundation was fewer than 15 consecutive days during the growing season or 10 percent of the growing	

Current Corps/EPA Regulations (33 CFR § 328.3 and 40 CFR § 122.2)	America's Commitment to Clean Water Act—111th Congress (H.R. 5088 as introduced)	Clean Water Restoration Act—111th Congress (S. 787 as approved by Senate EPW June 2009)
	season, whichever is less, in most years (50 percent chance or more); and (ii) if a pothole, playa, or pocosin, ponding was fewer than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was fewer than 14 consecutive days during the growing season most years (50 percent chance or more); and (E) that is devoted to an agricultural use.'	
	No similar provision.	'SEC. 6. SAVINGS CLAUSE. Nothing in this Act (or an amendment made by this Act) affects the applicability of the following provisions of the Federal Water Pollution Control Act: (1) Section 402(l)(1) (33 U.S.C. 1342(l)(1)). (2) Section 402(l)(2) (33 U.S.C. 1342(l)(2)). (3) Section 404(f)(1)(A) (33 U.S.C. 1344(f)(1)(A)), (4) Section 404(f)(1)(B) (33 U.S.C. 1344(f)(1)(B)). (5) Section 404(f)(1)(C) (33 U.S.C. 1344(f)(1)(C)). (6) Section 404(f)(1)(D) (33 U.S.C. 1344(f)(1)(D)). (7) Section 404(f)(1)(E) (33 U.S.C. 1344(f)(1)(E)). (8) Section 404(f)(1)(F) (33 U.S.C. 1344(f)(1)(F)).
	No similar provision.	'SEC. 7. REGULATIONS. (b) RULES OF CONSTRUCTION.—Subject to the exclusions in paragraph (25)(B) of section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) (as amended by section 4), the term "waters of the United States" shall be construed consistently with— (1) the scope of Federal jurisdiction under that Act, as interpreted and applied by the Environmental Protection Agency and the Corps of Engineers prior to January 9, 2001 (including pursuant to the final rules and preambles published at 53 Fed. Reg. 20764 (June 6, 1988) and 51 Fed. Reg. 41206 (November 13, 1986)); and (2) the legislative authority of Congress under the Constitution.'

Source: Compiled by CRS from text of H.R. 5088 as introduced, and S. 787 as approved with amendments by the Senate Environment and Public Works Committee.

Author Contact Information

Claudia Copeland
Specialist in Resources and Environmental Policy
ccopeland@crs.loc.gov, 7-7227