Calendar No. 685

111TH CONGRESS
2d Session

SENATE

REPORT
111–361

CLEAN WATER RESTORATION ACT

DECEMBER 10, 2010.—Ordered to be printed

Mrs. BOXER, from the Committee on Environment and Public Works, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 787]

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred a bill (S. 787) to amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States, having considered the same, reports favorably thereon with amendment and recommends that the bill, as amended, do pass.

INTRODUCTION

Nearly four decades ago, pollution and destruction of our Nation's waters had reached crisis levels.[1] Major lakes, such as Lake Erie, were choked with pollution, killing off fish and aquatic vegetation. Rivers and streams across the country were little more than open sewers. The Cuyahoga River had caught fire. Wetlands were being destroyed at an increasing rate, depriving coastal areas and river valleys of critically important flood control protection and ecological benefits.[2]

[1] *See generally* A Legislative History of the Water Pollution Control Act Amendments of 1972, Ser. No. 93–1, 93rd Cong. (1973) (1972 Act Legisl. Hist.), at 1253–55.

[2] Frayer, *Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950s to 1970s,* U.S. Fish and Wildlife Service, National Wetlands Inventory (April 1983).

99–010

To address the water quality crisis, Congress passed the Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act. Congress replaced the prior system—a patchwork of ineffective state laws, and the Federal Water Pollution Control Act that dated to 1948, which had failed to adequately control the discharge of pollution into the Nation's waterways—with a comprehensive federal-state partnership to restore and maintain the biological, chemical and physical integrity of the Nation's waters. Support for the Clean Water Act has been bipartisan and far reaching. Large majorities of both parties in the Senate and House of Representatives voted for the major enactments in 1972 and 1977. President Richard Nixon vetoed the 1972 bill, but the reaction to the veto was swift and decisive. Congress overrode the veto just one day after it was issued, with overwhelming bipartisan margins in both houses of Congress.[3]

In its first three decades, from 1972 through 2001, the Clean Water Act achieved major progress, with more than 60% of lakes and more than 55% of rivers meeting water quality standards.[4] The regulated community successfully operated under the Clean Water Act framework for decades. However, two decisions of the U.S. Supreme Court, in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers,* 531 U.S. 159 (2001) *(SWANCC)* and *Rapanos* v. *United States,* 547 U.S. 715 (2006) *(Rapanos),* have caused substantial confusion and threaten to undermine key goals of the Act.

According to the U.S. Environmental Protection Agency (EPA), under the rulings in *SWANCC* and *Rapanos,* thousands of miles of streams and millions of acres of wetlands previously protected under the Act may be subject to uncontrolled industrial pollution and destruction, including discharges of chemicals, acids, toxics and other pollutants; discharges of raw human sewage and large volumes of animal wastes; uncontrolled oil spills; and dumping of other types of harmful liquid and solid wastes in our waters.

The heads of five federal agencies have stated that there is an urgent need for Congress to pass legislation to reverse the Supreme Court's decisions, restore the protections of the Clean Water Act, and return to the scope of jurisdiction established in over a quarter century of implementation prior to 2001.[5]

S. 787 as reported by the Committee achieves the objective of restoring the scope of the Clean Water Act to that which existed prior to *SWANCC.*

Background and Need for Legislation

The 1972 Clean Water Act

In 1972, Congress revised the legal framework of water pollution control, through the Federal Water Pollution Control Act Amendments (P.L. 92–500) (1972 Act), commonly referred to as the Clean Water Act. Congress concluded that the existing patchwork of state

[3] *See* 118 Cong. Rec. 36,879 (Senate vote of 52 to 12); id. 37060–61 (House vote of 247 to 23).
[4] U.S. EPA, *National Water Quality Inventory: 2002 Report,* September 2002.
[5] Letter dated May 21, 2009 to Chairman Boxer, Senate Environment and Public Works Committee from Nancy Sutley, Chair of the White House Council on Environmental Quality; Lisa Jackson, Administrator of the Environmental Protection Agency; Tom Vilsack, Secretary of the Department of Agriculture; Ken Salazar, Secretary of the Department of the Interior; and Terrence Salt, Acting Assistant Secretary of the Army for Civil Works.

and federal laws and efforts was ineffective at addressing the serious threats facing the Nation's waters from uncontrolled industrial pollution, which resulted in rivers, such as the Cuyahoga in Ohio, catching fire, algae blooms forty miles long in the Great Lakes, and oil spills off the California coast.[6] As floor manager Senator Edmund Muskie told the Senate when introducing the bill:

> The Committee on Public Works, after 2 years of study of the Federal water pollution control program, concludes that the [existing] national effort to abate and control water pollution is inadequate in every vital aspect.[7]

The first sentence of the 1972 Act stated: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[8] This Committee recognized, in reporting the bill that would become the 1972 Act, that: "[w]ater moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source."[9] Accordingly, the Act redefined the term "navigable waters"—which was held over from prior versions of the Federal water laws dating back to 1899—to mean all "waters of the United States."[10] When considering amendments to the Act in 1977, Congress maintained the comprehensive nature of the Act and rejected a number of proposals to significantly narrow its scope.

In its first three decades, action under the Clean Water Act restored thousands of lakes, rivers, streams and wetlands, protecting the water supply for American families and businesses and providing essential habitat for fish, birds and other wildlife. The quality of the Nation's waters improved dramatically. More than 60% of lakes and 55% of rivers were brought up to meet the Act's water quality standards for fishing and swimming by 2003.[11]

The Act achieved these successes while respecting the needs of farmers, ranchers, other businesses and communities to make productive use of water resources. Through amendments to the Act in 1977 and additional agency regulations and interpretations, numerous categories of waters and activities were classified as exempt from permit requirements under the Act.[12]

The 1972 Act and the 1977 amendments also recognized and fostered the role of the states. It created a new federal-state partnership comprised of a uniform federal standard with a majority of the states ultimately taking the lead in implementing and enforcing clean water requirements.

The Supreme Court's Opinions in SWANCC and Rapanos

The ability to meet the national objective of the Clean Water Act and provide certainty and predictability has been undermined by the Supreme Court's decisions in *SWANCC* and *Rapanos*. In

---

[6] *See* 1972 Act Legisl. Hist. at 1253–55.
[7] 117 Cong. Rec. 17397 (daily ed. Nov. 2, 1971).
[8] 33 U.S.C. 1251.
[9] S. Rep No. 92–414 at 717, 92nd Cong. 77 (1971), 1972 Act Legisl. Hist. at 1415.
[10] *See* House consideration of the Report of the Conference Committee, Oct. 4, 1972, 1972 Act Legisl. Hist. at 250–251.
[11] U.S. EPA, *National Water Quality Inventory: 2002 Report,* September 2002.
[12] *See* U.S. EPA, *Clean Water Section 404 Program Definition and Permit Exemptions, Final Rule,* 53 Fed. Reg. 20764 (June 6, 1988) and U.S. Army Corps of Engineers, *Final Rule for Clean Water Act Regulatory Program,* 51 Fed. Reg. 41206 (November 13, 1986) (EPA and Corps permit regulations describing categories of waters generally not within the scope of "waters of the United States").

SWANCC, the Clean Water Act's jurisdiction over certain "isolated" waters was questioned. *Rapanos* involved a further challenge to Clean Water Act protection of wetlands located near tributaries of navigable waters.

Rather than providing clarity regarding the scope of the Act's jurisdiction, in *Rapanos* the Court's plurality decision created even further confusion, failing to provide any single opinion with a majority of the justices joining. Four of the justices in *Rapanos,* in an opinion by Justice Scalia, said that the Act should only protect "relatively permanent waters" connected to traditionally navigable water bodies, as well as wetlands with a "continuous surface connection" to other protected waters. Justice Scalia's opinion relied on an interpretation of a 1954 dictionary definition of the word "waters." That interpretation was a departure from the clear intent of Congress and the long-standing views of the implementing agencies.

In a lone concurring opinion, Justice Kennedy took another approach, which would require that certain wetlands be found to have a "significant nexus" to traditional navigable waters in order to be protected. But he gave little guidance as to what such a "significant nexus" would be.

Under both Justice Scalia's and Justice Kennedy's approaches, a *case-by-case* test would be applied to each water body in question to determine jurisdiction. This constitutes a complicated and unclear new way of determining jurisdiction under the Act and is a significant departure from the approach that had been used for decades.

Impacts of the SWANCC and Rapanos Decisions

In considering legislation to restore the scope of Clean Water Act protection, the Committee received briefings and data from EPA and the Corps of Engineers, as well as extensive testimony from hearing witnesses, regarding the adverse impacts of the Court's decisions. These impacts include (1) threats to water bodies; (2) impaired enforcement capabilities; and (3) confusion, delays, increased costs, uncertainty and litigation.

Threats to Waters of the United States

The Committee has held multiple hearings and briefings on the impacts of the *SWANCC* and *Rapanos* cases. On June 10, 2003, the Committee held a hearing on the *SWANCC* case at which multiple witnesses described the negative implications of the case for protecting and restoring the Nation's wetlands. In addition, the Committee held a hearing in the wake of the *Rapanos* decision on August 1, 2006. Federal agencies, legal experts, and stakeholders described the various impacts of this case ranging from lost wetlands protection to the uncertainty created by the Supreme Court's decision. In particular, the Department of Justice noted the lack of clarity in the wake of *Rapanos* and the case-by-case approach that the lower courts were taking in determining Clean Water Act jurisdiction.

On June 1, 2009, EPA staff briefed the Committee regarding the Clean Water Act after *SWANCC* and *Rapanos*. EPA's briefing described in detail the reduced protection of waters of the United

States following the Court's decisions, as well as the adverse impacts on the CWA enforcement program.

EPA reported its finding that, under the rulings in *SWANCC* and *Rapanos*, at a minimum, approximately *59% of the Nation's stream miles* and *20% of its remaining wetlands* are at risk of losing protections.[13] These lost protections are occurring in states throughout the country. Thousands of miles of streams and millions of acres of wetlands could be subject to uncontrolled industrial pollution and damage.

EPA also reported that there are many instances of serious water pollution, ranging from oil spills to industrial waste discharges, that as a result of the Court's decisions are no longer subject to effective control under the Act.[14]

Waters at risk under the Court's decisions include streams that supply public drinking water systems serving more than 111 million Americans, a total of 5,646 public water supply systems.[15] For example, under *Rapanos*, an industrial polluter could build a factory on a stream from which local drinking water supplies are withdrawn and discharge toxic pollutants without restriction, if the portion of the stream itself is not suitable for navigation and whatever contamination is released cannot be definitely linked to an impairment in a navigable segment of the same water body, farther downstream.[16]

EPA has estimated that at a minimum, 16,730 individual Clean Water Act permitted facilities, or approximately 40 percent of all existing permitted facilities, are located in headwater, intermittent, or ephemeral streams that are at risk under *Rapanos*.[17] This number includes approximately 4,600 permits for publicly-owned treatment works, 1,500 permits for other sewerage systems (not publicly owned), 64 permits for petroleum facilities, and 55 industrial chemical facilities. Many of these facilities, which historically met Clean Water Act requirements to protect human health and water quality standards, could assert that they no longer need to comply as a result of *Rapanos*.

Dredging or filling streams, and draining and filling wetlands, can cause or exacerbate flooding downstream. These activities have important adverse economic impacts. A single acre of wetland can store approximately 1 million gallons of flood water.[18] EPA has reported that it would cost $1.5 million annually to replace the natural flood control functions of a 5,000 acre tract of drained Minnesota wetlands.[19] Under *SWANCC*, however, major portions of the Nation's wetlands are at risk, with serious implications for public health, flood control and water supply. For example, large swaths of wetlands stretching across Iowa, Minnesota, South Dakota, North Dakota and Montana are among the estimated 20 million wetland acres that are at risk of losing protection under *SWANCC*. These waters are crucially important habitat for waterfowl and

---

[13] U.S. EPA Briefing for U.S. Senate Staff, June 1, 2009 (EPA Senate Briefing).

[14] *Id.*

[15] *See* Letter from Benjamin H. Grumbles, Assistant Administrator, U.S. EPA, to Jeanne Christie, Association of State Wetland Managers, at 2 (Jan. 9, 2006).

[16] *Id.* at 2.

[17] *See* Letter from Linda Boornazian, U.S. EPA to Joan Mulhern, Earthjustice, dated May 18, 2007 (FOIA No. HQ–RIN–00684–07).

[18] U.S. EPA *Wetlands: Protecting Life and Property from Flooding.* EPA843–F–06–001 at 1 (May 2006).

[19] U.S EPA Wetlands Fact Sheet, EPA842–F–95–001 (Feb. 1995).

other wildlife. They also feed directly into the Ogallala Aquifer. Irrigation from this aquifer forms the base of the economy in the region, with farming accounting for 94 percent of the groundwater use, supporting nearly one-fifth of the wheat, corn, cotton, and cattle produced in the United States[20] EPA estimates that prairie potholes and playa lakes, two of the major categories of waters at risk under *SWANCC*, contribute between 80 and 95% of the total water recharged to the Ogallala Aquifer.[21]

Reduced and Impaired Agency Enforcement Capabilities

Prior to *SWANCC*, applicability and enforcement of the Clean Water Act were well developed and understood by the regulated community. As a result of the splintered and vague tests announced by the Court, following *SWANCC* and *Rapanos*, EPA and the Corps have been forced to spend hundreds or even thousands of hours attempting to protect waters that formerly were clearly protected under the Act. Consequently, enforcement of the Act has been substantially curtailed. EPA has been unable to pursue polluters in many cases involving direct dumping into streams and other valuable waters, resulting in direct threats to human health.[22]

A March 2008 analysis by EPA's Office of Enforcement and Compliance Assurance (OECA) stated: "a significant portion of the CWA enforcement docket has been adversely affected."[23] According to the head of OECA, the *Rapanos* decision is having a "significant impact on enforcement" and has "created uncertainty about EPA's ability to maintain an effective enforcement program with respect to other [Clean Water Act] obligations."[24] In fact, the *Rapanos* decision "negatively affected approximately 500 enforcement cases" in just nine months, about half of all the enforcement cases under the Clean Water Act in one year.[25]

Confusion, Delay, Uncertainty and Litigation

Before *SWANCC* it was clear what categories of waters were protected. In rulemakings in the 1970s and 1980s, the Corps and EPA had set forth in detail those categories of waters that generally were deemed to be within the scope of "waters of the United States," and those categories of waters that generally would not be viewed as within the scope of jurisdiction under the Act.[26]

Prior to *SWANCC*, the courts held that the term "waters of the United States" was to be interpreted broadly, consistent with the Corps and EPA regulations. For example, in *United States* v. *Riverside Bayview,* 474 U.S. 121 (1985) the Supreme Court held that the jurisdiction of the Act under the definition of "waters of the United States" was not limited to navigable waters, but extended to non-navigable waters adjacent to navigable waters.

---

[20] http://www.waterencyclopedia.com/Oc-Po/Ogallala-Aquifer.html
[21] EPA Senate Briefing June 2009.
[22] *Id.*
[23] U.S. EPA, Memorandum from Granta Y. Nakayama, EPA's Assistant Administrator for Enforcement and Compliance Assurance, to Benjamin Grumbles, EPA's Assistant Administrator for Water (Mar. 4, 2008).
[24] *Id.*
[25] *Id.*
[26] *See* U.S. EPA, *Clean Water Section 404 Program Definition and Permit Exemptions, Final Rule,* 53 Fed. Reg. 20764 (June 6, 1988) and U.S. Army Corps of Engineers, *Final Rule for Clean Water Act Regulatory Program,* 51 Fed. Reg. 41206 (November 13, 1986).

The Supreme Court's opinions in *SWANCC* and *Rapanos* have left the scope of the law unclear. The Court's rulings invalidated major aspects of historical regulatory interpretation, but did not provide any clear direction going forward on the scope of "waters of the United States." Consequently, the lower courts applying *Rapanos* have applied different tests and combinations of tests from the decision. The 8th, 1st and 6th Circuit Courts of Appeal have held that either the approach announced by Justice Scalia or the approach announced by Justice Kennedy may be used to establish jurisdiction. The 11th Circuit has ruled that only the Kennedy approach may be used. In the 7th and 9th Circuits, the courts have held that waters qualifying for protection under the "significant nexus" test are covered, but it is unsettled whether the other test may be used. The 5th Circuit and 2nd Circuit have yet to rule on the issue. The Supreme Court itself has declined to take up a number of cases since *Rapanos* in which parties have requested clarification of the Court's rulings. The one overarching impact has been extensive delays and uncertainty, both for the agencies and regulated entities alike.

The Role of the States

The majority of State authorities support the comprehensive scope of the Clean Water Act that was intended by Congress in the 1972 Act. In the *Rapanos* case, for example, a coalition of 34 States and the District of Columbia [27] filed a brief supporting the position of the Bush Administration, which defended the broad scope of "waters of the United States." The States noted the following major points:

- "[W]ater flows downhill, and each of the lower 48 States has water bodies that are downstream of one or more other States."
- "[O]ver the past three decades, the States have come to rely on the Clean Water Act's core provisions and have structured their own water pollution programs accordingly."
- "Comprehensive coverage under the Clean Water Act is necessary to maintain the balance between federal and State authority established by the Act. The Act preempts certain common-law remedies traditionally used to address interstate water pollution, leaving the federal statutory provisions as the primary mechanism for protecting downstream States from the effects of upstream pollution. Curtailing the Act's coverage would also unfairly require States to impose disproportionate limits on in-state sources to offset unregulated upstream discharges."
- "Many States rely on the Act as the sole source of legal protection for adjacent wetlands. Other States rely in part on the federal law and resources, augmenting them with state laws and resources, including in some instances state water-pollution-control laws."

For the same reasons, numerous associations representing the interests of States have called for restoring the historic scope of the Clean Water Act. The following State associations have expressly

[27] The coalition included New York, Michigan, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Washington, and Wisconsin, along with District of Columbia, the Pennsylvania Department of Environmental Protection, and the International Association of Fish and Wildlife Agencies.

endorsed the amended version of S. 787 as reported by the Committee: Association of Fish & Wildlife Agencies, Association of State and Interstate Water Pollution Control Administrators, Association of State Floodplain Managers, Association of State Wetland Managers, the Coastal States Organization, and the Environmental Council of the States.[28]

Historic Bipartisan Support for Comprehensive Clean Water Act Protection

Comprehensive protection of our Nation's waters has enjoyed long-standing bipartisan support. When the Clean Water Act was first enacted in 1972, this Committee favorably reported the bill by a vote of 16–0.[29] The vote on adoption of the conference report (S. 2770) was overwhelming in the House (366–11)[30] and without opposition in the Senate (74–0).[31]

The Clean Water Act of 1977 (S. 1952), which, as discussed below, affirmed protection of all of the waters of the United States without regard to navigability,[32] was reported by this Committee by a unanimous vote of 15–0.[33] The bill initially passed the House by a vote of 361–43. The amended version passed the Senate on a vote of 96–0 and the adoption of the conference report was approved in the full Senate by a voice vote.[34]

Under President George H.W. Bush, in 1990 the Corps and EPA entered into a Memorandum of Agreement to implement President Bush's policy of no-net-loss of the Nation's wetlands.[35] This policy relied on the comprehensive scope and regulatory mechanisms of the Clean Water Act to protect waters of the United States, including wetlands and intermittent streams.

The goal of no-net-loss was embraced and expanded on by President Bill Clinton. His Administration's Clean Water Action Plan set a goal of attaining a net increase of 100,000 acres of wetlands per year by 2005.[36] The no-net-loss and increase in wetlands goals also were adopted by the Administration of George W. Bush.[37] Moreover, in the 2006 *Rapanos* case before the Supreme Court, the Bush Administration forcefully defended the Federal agencies' historic interpretation of the scope of the Clean Water Act.[38]

---

[28] *See* Letter from Steven Brown, Executive Director, Environmental Council of the States, et al., to EPW Committee Chairman Senator Barbara Boxer, June 10, 2009.

[29] 1972 Act Legisl. Hist. at 1509.

[30] 118 Cong. Rec. 33,767 (1972).

[31] *Id.* at 33,718.

[32] *See* Section-by-section analysis below at 23–26.

[33] Sen. Rep. 95–370 at 83, 4 Legislative History of the Clean Water Act of 1977, Ser. No. 95–14 (95th Cong. 1978) ("1977 Amendments Legisl. Hist.") at 716. Committee members Senators Randolph (D–WV), Muskie (D–ME), Gravel (D–AK), Bentsen (D–TX), Burdick (D–ND), Culver (D–IA), Hart (D–CO), Anderson (D–MN), Moynihan (D–NY), Stafford (R–VT), McClure (R–ID), Domenici (R–NM), Wallop (R–WY), and Chaffee (R–RI) voted to report the bill favorably. While the Committee Report attached Additional Views, including those of Senator McClure (R–ID) in the minority, the Additional Views did not take any issue with the Report's statement that the scope of jurisdiction over the "Nation's waters" under the Act would remain comprehensive, "to the fullest constitutional extent" of Congress's authority. *Id.* at 708.

[34] *Id.* at 947.

[35] U.S. EPA and U.S. Army Corps of Engineers Memorandum of Agreement Concerning Mitigation of Wetland Losses, Feb. 6, 1990.

[36] 64 Fed. Reg. 14109 (Mar. 24, 1998).

[37] White House Fact Sheet: *President Announces Wetlands Initiative on Earth Day,* April 22, 2004 http://georgewbush-whitehouse.archives.gov/ news/releases/2004/04/print/20040422-1.html

[38] *See* Brief for the United States, *Rapanos* v. *United States*, No. 04–1034, dated January 2006.

Maintaining the Historic Scope of the Clean Water Act

In considering this legislation, the Committee rejected amendments that sought to undermine the Clean Water Act and narrow the scope that has existed for decades.

• An amendment offered by Senator Vitter to give the President the authority to waive the requirements of the bill in the event of an emergency or natural disaster was rejected because there is already ample authority in law to address emergency situations, making the amendment unnecessary.

• An amendment offered by Senator Vitter that would modify the definition of a "pollutant" under the Clean Water Act to exclude the application of a pesticide was rejected. Water quality impacts resulting from pesticides have been a major concern under the Clean Water Act since 1972. Pesticide discharges were addressed in the recent case of *National Cotton Council* v. *EPA,*[39] which ruled that pesticide residues can be pollutants under the Act subject to permit requirements. EPA obtained a stay of the ruling in *National Cotton Council* for a period of two years, during which time EPA will develop its regulatory approach to this issue in consultation with affected stakeholders.

• Multiple amendments were rejected that would have removed Clean Water Act protections for specific water bodies, such as streams, mudflats, and prairie potholes. These water bodies have been protected under the Clean Water Act since the mid-1970s and are critical to restoring and maintaining the physical, biological and chemical integrity of our Nation's waters. Therefore, these amendments were contrary to the purposes and long-standing scope of the Clean Water Act and were rejected.

• Amendments offered by Senator Barrasso creating new exemptions for certain agricultural activities were rejected because they were unnecessary and contrary to the long-standing scope of the Clean Water Act. As described in detail later in this report, sections 402(l) and 404(f)(1) of the Clean Water Act outline the numerous agricultural activities that are subject to exemptions under the Act. By restoring the status quo as it existed prior to *SWANCC* and *Rapanos,* this legislation provides clarity that these exemptions are maintained and assurance that federal jurisdiction will not be expanded.

• An amendment offered by Senator Barrasso that would have exempted groundwater was rejected because the bill already sets forth the finding that: "ground waters" are treated separately from "waters of the United States" for purposes of the Federal Water Pollution Control Act and are not considered "waters of the United States" under this Act. Therefore, this amendment was unnecessary.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 provides that the bill may be cited as the "Clean Water Restoration Act."

---

[39] *National Cotton Council* v. *EPA,* Slip Op. No. 06–4630 (6th Cir. Jan. 7, 2009).

Section 2. Purposes

Summary

Section 2 describes the purposes of the bill.

Discussion

The purpose of S. 787, as amended and reported by the Committee, is to reinstate the scope of Clean Water Act protection as originally intended by Congress and as implemented by EPA and the Corps over more than a quarter century prior to *SWANCC*. The bill provides for the continued primary role of the States, and also explicitly maintains long-standing exemptions, including:

- Section 402(l)(1), exempting discharges composed entirely of return flows from irrigated agriculture.
- Section 402(l)(2), exempting discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.
- Section 404(f)(1)(A), exempting discharges of dredged or fill materials from normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.
- Section 404(f)(1)(B), exempting discharges of dredged or fill materials for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.
- Section 404(f)(1)(C), exempting discharges of dredged or fill materials for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance of drainage ditches.
- Section 404(f)(1)(D), exempting discharges of dredged or fill materials for the purpose of construction of temporary sedimentation basins on construction sites, which do not include placement of fill material into navigable waters.
- Section 404(f)(1)(E), exempting discharges of dredged or fill materials for the purpose of construction or maintenance of farm roads or forest roads or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.
- Section 404(f)(1)(F), exempting discharges of dredged or fill materials resulting from activities with respect to which a State has an approved program under section 208(b)(4) of the Act (33

U.S.C. 1288(b)(4)) meeting the requirements of subparagraphs (B) and (C) of that section.

This bill does not expand the scope of federal jurisdiction. In the 110th Congress, concerns were raised with respect to whether the version of the Clean Water Restoration Act as then introduced (S. 1870) could be interpreted to result in an expansion in the scope of federal jurisdiction under the Act. S.787, as reported, includes a number of provisions assuring that there will be no such expansion. The reported substitute amendment:

- Includes findings stating clearly that the intent of the legislation is to restore the jurisdiction of the Clean Water Act to the extent that existed prior to the *SWANCC* decision in January 2001.
- Strikes language from the prior version of the bill that would have established jurisdiction over all waters "to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution," which some argued would have expanded the Act beyond its original scope.
- Codifies long-standing regulatory exemptions for waste treatment systems and prior converted cropland.
- Adds new legislative language requiring that the definition of "waters of the United States" will be construed consistently with the scope of the Act prior to *SWANCC.*
- Requires the EPA and the Corps to promulgate regulations within 18 months as needed to implement the provisions of the bill.
- Ensures that current statutory exemptions for Section 402 and 404 permits remain in place.

These provisions ensure that the bill will restore the scope of Clean Water Act protection that existed prior to the *SWANCC* and *Rapanos* cases, without expanding federal jurisdiction. They ensure that permit requirements post-enactment of S. 787 will be the same as they were prior to *SWANCC* in 2001. The bill returns the Clean Water Act to the status quo, protecting our environment, strengthening long-standing exemptions, and providing regulatory predictability and efficiency.

Section 3. Findings

Summary

Section 3 describes the findings of the Committee regarding the need to restore comprehensive Clean Water Act protections and the basis for the assertion of Congress's authority to protect waters of the United States under the Constitution. The findings make explicit that the bill overturns the Supreme Court's decisions in *SWANCC* and *Rapanos,* and describe certain ways that the Act applied pre-*SWANCC.* The findings specifically reaffirm the long standing authority of States to make decisions relating to water allocation.

Discussion

The Supreme Court's decision in *SWANCC* emphasized the need for Congress to provide a clear statement regarding the scope of federal jurisdiction established by the Clean Water Act, given that such authority must be grounded in a power granted to Congress

under the Constitution.[40] A principal source of Constitutional authority for federal laws protecting the environment is the Commerce Clause.[41] The Supreme Court has made clear that Congress is empowered to regulate activities that affect interstate commerce.[42]

Substantial evidence exists to establish the Constitutional authority for federal jurisdiction under S. 787, as reported by the Committee, which restores the scope of Clean Water Act jurisdiction to that existing prior to *SWANCC.* In addition to the findings set forth in the text of Section 2 of the bill, the Committee evaluated substantial additional evidence of the economic and interstate commerce impacts associated with protection of waters of the United States.

The findings in Section 2 of the bill and additional findings summarized below confirm that protection of "waters of the United States" as defined in the bill has numerous important interstate commerce impacts. While the loss of functions associated with any particular water body, taken alone, might not significantly affect commerce, the Supreme Court has made clear that where in the aggregate such impacts will affect interstate commerce, the Commerce Clause provides Congress authority to regulate.[43] This is particularly true where the activities being regulated are fundamentally economic in nature, as is the case under the Clean Water Act.[44] Pollution or destruction of waters within any of the categories of "waters of the United States" as defined in the bill unquestionably has substantial effects on interstate commerce.[45]

Economic Value and Uses of Clean Water

Each of the categories of "waters of the United States" protected under the Act, as reaffirmed by S. 787, provides economic, health, safety, welfare, and recreational services that have important and substantial interstate commerce values and impacts. Waters of the United States support and are used for numerous activities that affect the Nation's economic well-being.

Economic activities that rely on or use waters protected by the Act include:

- sites for transportation and infrastructure development;
- residential, commercial, and municipal construction and site development;
- discharge of pollutants for industrial production;
- agricultural production and irrigation;
- silviculture;
- municipal uses;

---

[40] *See SWANCC,* 531 U.S. at 172–73; *Rapanos,* 547 U.S. at 738.

[41] U.S. Const. Art. I, section 8, clause 3.

[42] *Hodel v. Virginia Surface Mining,* 452 U.S. 264, 276–83 (1981).

[43] *See Gonzales* v. *Raich,* 125 S. Ct. 2195, 2207–09 (2005); *Perez* v. *United States,* 402 U.S. 146, 154 (1971); *Wickard* v. *Filburn,* 317 U.S. 111, 127–128 (1942).

[44] By contrast, the two more recent cases in which the Supreme Court has found limits on Commerce Clause authority both involved regulation of activities that were not commercial. *See United States* v. *Morrison,* 529 U.S. 598 (2000) (law prohibiting violence against women); *United States* v. *Lopez,* 514 U.S. 549 (1995) (law prohibiting gun possession near schools).

[45] In addition, many species of migratory birds are protected under international treaties to which the United States is a party. Prior to *SWANCC,* EPA and the Corps had noted that use of waters as habitat by migratory birds protected under such treaties was a basis for establishing jurisdiction. *See* 51 Fed. Reg. 41,206, 41,216 (Nov. 13, 1986). That longstanding basis for Clean Water Act jurisdiction is supported under the Treaty clause, U.S. Const. Art. II, Sec. 2, cl. 2.

- resource extraction;
- energy production;
- production of peat;[46] and
- fishing and shellfishing.

The economic value of the small freshwater streams put at risk by *Rapanos* is substantial. One study calculated the average value of fresh water bodies to be $146 per acre-foot for the entire U.S.[47] A small stream flowing as little as 1 cubic foot per second (cfs) carries a volume of almost two acre-feet of water—648,000 gallons every 24 hours. Using these values, the Chesapeake Bay, which is fed by approximately 100,000 streams, is receiving an annual economic benefit of $9.5 billion in flows from those streams.

Clean water supplies promote economic growth and human health. A 2000 *Money* magazine survey found that clean water is one of the most important factors Americans consider in choosing a place to live.[48] Studies show a correlation between water quality and property values. For example, improvements in total suspended solids and dissolved inorganic compounds along the St. Mary's River in the Chesapeake Bay watershed increased median values of residential property by $1,086 and $17,642 respectively.[49]

The economic value of a particular body of water is not constrained to the State within which it is located. Rather, other States, regions and the Nation as a whole have economic and commercial interests in the categories of waters protected under the Clean Water Act.

Drinking Water Supply

Small streams, wetlands and other waters recharge surface and subsurface drinking water supplies, and filter and remove pollutants from surface run-off before that water is released to groundwater. EPA reports that "at least a half-million cases of illness annually can be attributed to microbial contamination in drinking water."[50] Protecting water quality can save substantial amounts that would be spent on water treatment. For example, a 2007 Brookings Institution study estimated the direct benefits of Great Lakes clean up and restoration from reducing water treatment costs to be $50–125 million.[51] Each of the categories of "waters of the United States" protected by the Clean Water Act, as restored by this bill, supports provision of safe and adequate drinking water supplies.

---

[46] In 1993, the United States produced 612,000 metric tons of peat with a value of $16.8 million. Peat is harvested directly from wetlands, and is both exported and sold in interstate commerce. *See* U.S. Department of the Interior, Bureau of Mines, *Survey Methods and Statistical Summary of Nonfuel Minerals,* 1993.

[47] Frederick, et al., *Economic Values of Freshwater in the United States,* Resources for the Future No. 7–03 (1997).

[48] U.S. EPA, *Liquid Assets 2000: America's Water Resources at a Turning Point ("Liquid Assets")* at 2, 16.

[49] Restore America's Estuaries, *The Economic and Market Value of Coasts and Estuaries: What's At Stake?* 127–28 (May 2008), (*"Value of Estuaries"*) available at http://www.estuaries.org/ assets/documents/ FINAL%20ECON%20WITH%20COVER%20PDF%205-20-2008.pdf.

[50] *Liquid Assets* at 2.

[51] Brookings Institution, *Healthy Waters, Strong Economy: The Benefits of Restoring the Great Lakes Ecosystem* (Sept. 2007) (*"Healthy Waters"*) at 8.

Fishing, Hunting and Other Recreation

Waters of the United States also support substantial commercial activities associated with fishing, hunting, wildlife watching, and recreation, each of which generate significant interstate commerce that depends on protection of waters of the United States.

In 2006, 87.5 million Americans 16 years old and older, 29% of the U.S. population, enjoyed recreational activities relating to fish and wildlife. Expenditures by this group were $122.3 billion, about 1% of the nation's Gross Domestic Product (GDP).[52] According to another study, beach visitation and recreational fishing contribute $16 billion to $56 billion to the U.S. economy annually.[53]

Almost 34 million people fished and hunted in 2006. They spent $76.7 billion on their activities, including $24.6 billion on trip expenses, nearly $41 billion on equipment, and $11.1 billion on licenses and fees, magazines, membership dues and contributions, and land leasing and ownership. On average, each sportsperson spent $2,256 in 2006.[54] Anglers spent more than $42 billion on trips, equipment, licenses, and other items to support their fishing activities in 2006. The average annual expenditure per angler was $1,400.[55]

More than 71 million people 16 years old and over participated in observing, feeding, or photographing wildlife in 2006, 23 million of whom took trips away from home for the primary purpose of enjoying wildlife. In 2006, wildlife-watching participants spent $45.7 billion on such trips, equipment, magazines, membership dues, and contributions made to conservation or wildlife-related organizations.[56]

The cost of water pollution impacts in the Great Lakes region illustrates the economic importance of the Clean Water Act. A 2007 Brookings Institution study estimated the direct economic benefits of Great Lakes clean up and restoration from tourism, fishing and recreation at $6.5 to $11.8 billion.[57]

Impacts Involving Sale of Fish and Shellfish

Waters of the United States, including intrastate waters, play an important role in supporting the substantial commerce associated with the sale of fish and shellfish in interstate or foreign commerce. Commercial fishing and shellfishing industries need clean wetlands and coastal waters to stay in business.[58]

Wetlands and estuaries play essential roles in the lifecycles of 75 percent of fish and shellfish commercially harvested and up to 90 percent of fish recreationally caught in the United States.[59] In 2004 the value of landed crab, shrimp, and salmon alone was

---

[52] U.S. Fish and Wildlife Service, 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation National Overview, Preliminary Findings ("FWS 2006 Survey") at 4.

[53] *Value of Estuaries* at 60–61, 165.

[54] FWS 2006 Survey at 4.

[55] *Id.* at 4, 8.

[56] *Id.* at 5.

[57] *Healthy Waters* at 6. The study notes that: "With 8 million swimmers and 80 million swimming days annually in the Great Lakes, the economic benefit from a 20 percent reduction in beach closings and advisories would be $130 to $190 million per year, which translates into a present value of about $2 to $3 billion dollars. . . . The benefits related to fish abundance alone are conservatively estimated at $1.1 to $5.8 billion dollars." *Id.*

[58] *Liquid Assets* at 2.

[59] EPA, *Economic Benefits of Wetlands* (2006), available at http://www.epa.gov/owow/wetlands/pdf/EconomicBenefits.pdf

placed at $1.2 billion.[60] Estuary-dependent species such as menhaden, Gulf shrimp, Pacific salmon, blue crab, oysters, and clams generated an ex-vessel harvest worth almost $1.4 billion.[61]

Uncontrolled pollution and destruction of water bodies, including small streams, wetlands, and so-called "isolated" waters, has direct negative economic impacts on productivity of fishing and shellfishing.[62] According to EPA, in 2008 there were 4,249 fish advisories or bans warning against adverse health effects due to consumption of fish caught in contaminated waters.[63]

Flood Control and Protection

Wetlands help ameliorate floods by storing and slowing the force of flood waters. A typical one-acre wetland can store up to 1 million gallons of water. These characteristics of wetlands allow them to lower flood heights and help reduce the destructive potential of flood waters.[64] The cumulative loss of wetlands over time has increased flooding and flood damage.

Economic impacts associated with reduced flood control values are substantial. In Fiscal Years 2004 and 2005, direct non-coastal flood damages in the United States were estimated at $15.647 billion and $44.951 billion, respectively, and total Hurricane Katrina-related flood losses in 2005 were estimated at $125 billion.[65] The tremendous losses caused by Hurricane Katrina were due in part to the extensive loss of coastal wetlands that has occurred in Southern Louisiana and Mississippi.[66]

After the Great Midwest Flood of 1993, one of the most costly U.S. natural disasters in history, thousands of Americans were displaced, 48 people lost their lives and flood-related damages reached an estimated $21 billion.[67] Only 15 years later, there were more than $15 billion of agricultural and property losses, major displacements occurred, and 24 people lost their lives in the May-June 2008 flooding, again in these Midwest States.[68]

The natural value of floodplain land for services other than flood control has been estimated at $8,177 per acre. Flood water storage services on these lands is worth about $52,340 per acre, so the total value of these ecosystem services is around $60,517 per acre.[69] Thus, protection of wetlands, streams and other water bodies that, taken alone, may be viewed as "isolated," "intermittent," "ephemeral," or "small," is vital to reducing the substantial economic costs and damage of flooding in the U.S.

---

[60] *Id.*

[61] *Value of Estuaries* at 66.

[62] *See* Kier, W., *Fisheries, Wetlands, and Jobs, The Value of Wetlands to America's Fisheries* at 6 (1998).

[63] U.S. EPA, *National Listing of Fish Advisories,* Technical Fact Sheet: 2008 Biennial Listing, EPA–823–F–09–007 (September 2009).

[64] U.S. EPA, *Wetlands: Protecting Life and Property from Flooding,* EPA843–F–06–001 at 1 (May 2006).

[65] National Oceanic and Atmospheric Administration, National Weather Service, Hydrologic Information Center, 2009 Flood losses: Compilation of Flood Loss Statistics, http://www.weather.gov/hic/flood_stats/Flood_loss_time_series.shtml

[66] *See* Tim Hirsh, *Katrina Damage Blamed on Wetland Loss, available at http://news.bbc.co.uk/2/hi/americas/4393852.stm; see also CRS Report to Congress, Hurricane Katrina and Rita and the Coastal Louisiana Ecosystem Restoration*, RS22276 (Sept. 2005).

[67] *Billion Dollar U.S. Weather Disasters,* 1980–2008. National Climatic Data Center, Asheville, NC, 01/01/09. http://www.ncdc.noaa.gov/oa/reports/billionz.html.

[68] *Id.*

[69] National Research Council, *Valuing Ecosystem Services: Towards Better Environmental Decision Making* 170 (2005).

Use as Habitat for Threatened and Endangered Species and Migratory Birds

Waters of the United States provide habitat used for breeding, rearing, and feeding for numerous threatened and endangered species of birds, fish, amphibians, mammals, reptiles, clams, snails and plants. Many of these species provide direct economic benefits. For example, coho salmon are valuable in both recreational and commercial fisheries.[70] Coho spend approximately the first half of their life cycle rearing and feeding in streams and small freshwater tributaries. Their spawning habitat is small streams with stable gravel substrates.[71]

Wetlands and other waters also play a critical role in providing habitat for migratory birds. According to FWS, all migratory waterfowl and nearly half of all threatened or endangered species depend on wetlands and associated habitat for their survival.[72] The FWS has found that the loss of wetland and associated upland habitat is the most significant problem facing North American migratory bird populations.[73]

The economic value of healthy migratory bird populations is substantial. According to the FWS, migratory bird hunting generated $1.3 billion in expenditures in 2006, of which $691 million was spent on hunting trips.[74]

Section 4. Definition of waters of the United States

Summary

Section 4 defines the term "waters of the United States" and establishes two categories of waters that are excluded from that definition.

Discussion

In Section 4, the term "waters of the United States" is defined to mean the categories of waters that generally were protected by the Act under the agencies' interpretations for over 25 years prior to *SWANCC*. Regulations of EPA and the Corps going back to the mid–1970s included each of the listed categories as within the scope of jurisdiction under the Act. The definition in Section 4 of the bill reaffirms the Act's historic protection of these categories of waters. As stated in Section 2 (Purposes), this definition is intended to restore the scope of protection as the Act was applied prior to *SWANCC*. Section 7(b) of the bill, discussed below, further provides that the definition shall be construed consistently with the scope of jurisdiction established by the agencies prior to that decision.

Section 4 also codifies two exclusions that had been included in the agencies' regulations prior to SWANCC, relating to prior converted croplands and waste treatment systems.

---

[70] *See* 62 Fed. Reg. 24588 (1997); Reid and Ziemer, *Evaluating the Biological Significance of Intermittent Streams,* U.S. Department of Agriculture Forest Service (1994).

[71] National Oceanic and Atmospheric Administration, Office of Protected Species report, http://www.nmfs.noaa.gov/pr/species/fish/cohosalmon.htm.

[72] U.S. Fish and Wildlife Service, *1994 Update to the North American Waterfowl Management Plan* at 20.

[73] *Id.*

[74] FWS 2006 Survey at 23, 25.

Prior Converted Croplands Exclusion

In the early 1990s, the agencies stated that "prior converted cropland" would not be considered "waters of the United States." The Corps initially created this exception as an interpretation of its regulatory definition of wetlands.[75] Thereafter, both EPA and the Corps amended their regulations to provide an exclusion from the regulatory definition of "waters of the United States" for such cropland.[76] Section 4 inserts the text of the regulatory prior converted cropland exclusion into the Act.

Waste Treatment Systems Exclusion

In 1980, EPA amended its Clean Water Act regulations to provide that:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) 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 a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.[77]

Section 4 inserts the text of the regulatory waste treatment system exclusion into the Act.

As EPA explained at the time, the exclusion was limited to manmade systems, since the Act "was not intended to license dischargers to freely use waters of the United States as waste treatment systems . . ."[78] Soon after the waste treatment system regulation was promulgated, however, EPA announced that it was suspending the provision that limited the exclusion only to "manmade bodies of water," out of concern that pre-existing treatment systems would be improperly brought into the regulatory system.[79] EPA made clear that this was not intended to allow uncontrolled dumping of pollutants in streams and lakes simply by calling them "waste treatment systems."[80] Section 4 returns to the regulatory provision as promulgated. However, this new section of the Act is only applicable on a prospective basis. Waste treatment units previously constructed in compliance with legal requirements, which relied on EPA's suspension of the man-made limitation, will not be subject to retroactive enforcement action. Going forward, EPA's regulations under Section 7 should address the extent to which discharges into waste treatment systems placed in waters of the United States pursuant to dredge and fill permits under Section

---

[75] U.S. Army Corps of Engineers, Regulatory Guidance Letter 90–7: *Clarification of the Phrase "Normal Circumstances" as it pertains to Cropped Wetlands* (Sept. 26, 1990).

[76] 58 Fed. Reg. 45,008, 45,031 & 45,036–37 (Aug. 25, 1993).

[77] *See W. Va. Coal Ass'n* v. *Reilly,* 728 F. Supp. 1276, 1290 (S.D. W. Va. 1989), *aff'd,* 932 F.2d 964 (4th Cir. 1991) (quoting 40 C.F.R. 122.3 (1980)).

[78] 45 Fed. Reg. 33,298 (May 19, 1980). As this Committee noted in reporting the bill that would become the 1972 Act, "[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable." S. Rep. No. 92–414, at 7 (1971), 1972 Act Legisl. Hist. at 1425.

[79] 45 Fed. Reg. 48,620 (July 21, 1980). EPA stated that it did not intend to allow new waste treatment systems in natural waters going forward. *See W. Va. Coal Ass'n* v. *Reilly,* 728 F. Supp. 1276, 1290 (S.D. W. Va. 1989), *aff'd,* 932 F.2d 964 (4th Cir. 1991).

[80] 45 Fed. Reg. 48,620 (July 21, 1980).

404 should be subject to or exempt from additional discharge permits under Section 402.

Section 5—Conforming amendments

Summary

Section 5 strikes the terms "navigable waters" and "navigable waters of the United States" where they appear in the Act and replaces them with the term "waters of the United States".

Discussion

The *SWANCC* majority and *Rapanos* plurality opinions departed from the long-standing interpretation of the term "navigable waters" and construed it to limit the scope of protection under the Clean Water Act. To provide clarity and avoid further confusion, Section 5 deletes the term "navigable waters" in each case it had previously appeared in the Act and replaces it with the defined term "waters of the United States."

From its early implementation in the mid–1970s until the *SWANCC* decision in 2001, the term "navigable waters," held over from prior water laws, was not a limitation on the scope of jurisdiction of the Clean Water Act. The purposes, structure, legislative history, agency interpretation, judicial interpretation, and subsequent action by Congress all made clear that the Act's scope of protection was not limited by any concept of navigability. Thus, replacing the term "navigable waters" with "waters of the United States" will not result in any expansion of the Act, but on the contrary will ensure that the Act remains consistent with the scope that existed for decades.

Import of the Term "Navigable Waters" in the Clean Water Act

Consistent with the goals of the 1972 Clean Water Act, which includes restoring the chemical, physical and biological integrity of the Nation's waters, Congress broadly defined the waters covered by the Act. In their respective bills, both the House and Senate borrowed the term "navigable waters" from the Rivers and Harbor Act, and included a definition that retained the term "navigable,"[81] but both bodies also made clear that the continued use of that term was not to narrow the scope of waters to be covered.

The House Public Works Committee stated:

> The Committee is reluctant to define the term "navigable waters." This is based on the fear that any interpretation would be read narrowly. This is not the Committee's intent. The Committee fully intends 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.[82]

[81] In the Senate, the definition read "the term navigable waters means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes. S. 2770, 92nd Cong. 502(h) (1971), 1972 Act Legisl. Hist. at 1698. The House bill's definition read "The term navigable waters' means the navigable waters of the United States, including the territorial seas." H.R. 11896, 92nd Cong. 502(8) (1971), 1972 Act Legisl. Hist. at 1069.

[82] H.R. Rep. No. 92–911 at 76–77 (1972), 1972 Act Legisl. Hist. at 818.

When the House and Senate met in Conference Committee, they took further measures to ensure that the definition of "navigable waters" was not limiting. As discussed in the Report of the Conference Committee, the House version of the definition was accepted into the final bill, but the word "navigable" was deleted from the definition.[83]

Describing this change, the Conference Report repeated Congress's intent that the term "must be given the broadest constitutional interpretation, unencumbered by agency determinations which have been made or may be made for administrative purposes." [84]

The debate on final passage of the Act confirmed this point. For example, Congressman John Dingell, who reported the Conference Committee bill to the House, explained:

> The conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws.

After reviewing the broad extent of the Commerce Clause authority invoked by Congress, Rep. Dingell went on to state:

> Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.[85]

Thus, it was clear from the outset that the term "navigable waters" was intended broadly.

The Regulatory Agencies' Treatment of the Term "Navigable Waters"

The U.S. Army Corps of Engineers historically had been responsible for issuing permits for discharges into navigable waters and their tributaries under the Rivers and Harbors Act. After passage of the 1972 Act, the Corps proposed to revise the existing regulations to incorporate the provisions of § 404 of the 1972 Act.

The Corps' initial proposed regulatory definition of "navigable waters" for purposes of the 404 program was narrow, applying only to traditionally navigable waters.[86] This definition did not attempt to define the new statutory term "waters of the United States." The Corps would not do so until July 1977.[87]

On June 19, 1974, EPA Administrator Russell Train sent a letter to the Corps asserting that the Corps' proposed narrow interpreta-

---

[83] Conf. Rep. No. 92–1236, 92nd Cong. 144 (1971), 1972 Act Legisl. Hist. at 327.

[84] *Id.*

[85] 118 Cong. Rec. 33,756–57 (Oct. 4, 1972).

[86] "The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce (See 33 C.F.R. § 209.260 for a more complete definition of these terms)." Importantly, the Corps' final rule of April 3, 1974, addressed only the geographic jurisdiction of the Corps' regulatory authorities, such as § 10 of the Rivers and Harbors Act of 1899 and § 404 of the 1972 Act. The Corps' 1974 final rule did not purport to address the geographic jurisdiction of any part of the FWPCA of 1972 other than § 404, nor of the FWPCA of 1972 as a whole.

[87] 42 Fed. Reg. 37127 (July 19, 1977).

tion was inconsistent with Congress's intent in the 1972 Act. Administrator Train said: "Our interpretation of 'navigable waters' within the meaning of the FWPCA does not conform to the Corps' recently issued regulation. We firmly believe that the Conference Committee deleted 'navigable' from the FWPCA definition of 'navigable waters' in order to free pollution control from jurisdictional restrictions based on navigability.'"[88]

In response to a lawsuit, the U.S. District Court for the District of Columbia held in *NRDC v. Calloway* that the Corps' definition was not what Congress intended. The court ordered the Corps to rescind the part of its regulation "which limits the permit (§ 404) jurisdiction of the Corps by definition or otherwise to other than the waters of the United States." The court ordered the Corps to expeditiously propose regulations which reflected the broad mandate to protect all waters of the United States, as provided by Congress in 1972.[89]

Responding to the court's order in *Callaway,* the Corps issued an interim final regulation in July 1975, defining the term navigable waters' to include:

> coastal waters, wetlands, mudflats, swamps, and similar areas, freshwater lakes, rivers, and streams that are used, were used in the past, or are susceptible to use to transport interstate commerce, including all tributaries to these waters; interstate waters, certain specified intrastate waters, the pollution of which would affect interstate commerce; and freshwater wetlands including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to the above described lakes, rivers, and streams, and that are periodically inundated and normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.

The Corps promulgated final regulations in 1977, which consolidated the numerous types of waters listed in the 1975 interim rule down to four categories:

> Category 1—Coastal and inland waters, lakes, rivers and streams that are navigable waters of the United States, including adjacent wetlands.
>
> Category 2—Tributaries to navigable waters of the U.S., including adjacent wetlands.
>
> Category 3—Interstate waters and their tributaries, including adjacent wetlands.
>
> Category 4—All other waters of the United States not identified in Categories 1–3, such as isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.[90]

---

[88] Letter from Russell E. Train to General William G. Gribble, Chief, Army Corps of Engineers (June 19, 1974).

[89] *NRDC* v. *Callaway,* 392 F. Supp 685 (D.D.C. 1975). A Corps official later stated that the Corps had knowingly misconstrued the requirements of the Act in its initial regulations, for political reasons. See Lance D. Wood, *Don't Be Misled: Clean Water Act Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands,* 34 ELR 10187, 10211–10212 (Feb. 2004).

[90] 42 Fed. Reg. 37127–37128 (July 19, 1977).

The Corps recognized, however, that this list was not all-inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category. The regulation therefore gave Corps officials authority to assert jurisdiction over "other waters," such as intermittent and ephemeral streams, tributaries and perched wetlands, in order to protect water quality.[91]

EPA had promulgated regulations implementing the 1972 Act, which also defined the scope of protected waters broadly to include non-navigable waters with specified interstate commerce connections.[92] Thus, the basic approach to defining waters of the United States broadly and without regard to navigability, as intended by Congress in 1972, was adopted into regulations by mid-1977.

The Clean Water Act of 1977 Rejected Proposals to Limit the Act to Navigable Waters

Congress debated amendments to the Clean Water Act in 1977, after EPA's and the Corps' regulations were finalized. One of the major issues debated was how to address concerns that had been raised with regard to how the Act was being applied, particularly with respect to farming and ranching activities.

During the 1977 debates two competing approaches were considered. The first approach was to modify the Act's permit program and add exemptions for activities such as farming and ranching. A second, alternative approach would have cut back on the scope of jurisdiction, by redefining the term "waters of the United States."

The first approach was taken in a bill reported out of this Committee (S. 1952). That bill refined and clarified several elements of the 404 permit program to address the concerns that had been raised, including by exempting farming and ranching activities from permit requirements, while leaving the Act's broad scope of jurisdiction in place.

The key exemptions in the bill reported by the Committee included:

- Section 402(m), exempting discharges composed entirely of return flows from irrigated agriculture.
- Section 404(e)(1)(A), exempting discharges of dredged or fill materials that result from normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.
- Section 404(e)(1)(C), exempting discharges of dredged or fill materials for the purpose of maintenance, including the construction of recently damaged parts, of currently serviceable structures, such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.
- Section 404(e)(1)(D), exempting discharges of dredged or fill materials that involve construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches.
- Section 404(e)(1)(E), exempting discharges of dredged or fill materials that involve construction of temporary sedimentation ba-

[91] *Id.*
[92] 38 Fed. Reg. 13527 (May 22, 1973).

sins on construction sites, which do not include placement of fill material into the navigable waters.

• Section 404(e)(1)(F), exempting discharges of dredged or fill materials that involve construction or maintenance of farm roads or forest roads or temporary roads for moving mining equipment where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.[93]

The Committee bill also authorized the Corps to establish a general permit program for categories of activities involving discharges that would have minimal adverse impact on the environment in Section 404(f), and it increased the role of the States in implementing the Act's water programs.[94]

The second approach that was considered in 1977 was to cut back on the scope of the "waters of the United States" protected by the Act. However, that approach was rejected by this Committee, and later by the full Senate and the House as well.

During the floor debate on the 1977 amendments, Senator Bentsen offered an amendment to the bill reported by the Committee that would have limited the scope of 404 to only traditionally navigable waters and their adjacent wetlands. The Congressional Record reflects an extensive debate before the Senate voted on the Bentsen amendment. It was clear that all of the participants understood that the scope of the Act since 1972 encompassed all waters of the United States—including intermittent and ephemeral streams and wetlands—and that the bill reported by the Committee, if passed, would continue to apply that comprehensive scope of protection.

As Senator Bentsen himself stated: "The committee has failed to recommend any reduction in the scope of the 404 permit program. The program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies."[95] Senator John Tower of Texas, who supported the Bentsen amendment, described the scope of jurisdiction under the 1972 Act similarly, as a "regulatory scheme which covers not just the rivers of the Nation but all surface waters and wetlands of the United States."[96]

Opponents of Senator Bentsen's amendment noted that the Committee's bill maintained the broad jurisdiction enacted in 1972, and argued why Senator Bentsen's amendment to reduce jurisdiction of the Act should be rejected.

Committee member Senator Robert Stafford (R–VT) explained:

> The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution. This decision was the result of extensive and careful study and debate. In its report on that legislation, the Senate Public Works Committee stated 'waters move in hydrologic cycles and it is essential that discharge of

[93] *See* Sen. Rept. 95–370, 1977 Amendments Legisl. Hist. at 575, 623–24.
[94] *Id.* at 626–28.
[95] *Id.* at 903.
[96] *Id.* at 930.

> pollutants be controlled at the source.'. . . After extensive deliberation, the committee amendment rejects the redefinition of navigable waters. Instead, the committee amendment insures continued protection of the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes and similar areas that lie outside the Corps program in the so-called 'Phase I waters.'" [97]

Senator Howard Baker (R–TN) noted:

> A fundamental element of the Water Act is broad jurisdiction over water for pollution control purposes?. Comprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless Federal jurisdiction is uniformly implemented for all waters, dischargers located on non-navigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors. Thus, artificially limiting the jurisdiction can create a considerable competitive disadvantage for certain discharges. . . . It is important to understand that toxic substances threaten the aquatic environment when discharged into small streams or into major waterways. . . . Continuation of the comprehensive coverage of this program is essential for the protection for the aquatic environment." [98]

Senator Bentsen's amendment was defeated.[99] Although the House had passed legislation amending the Act along the lines of the Bentsen amendment, when the House and Senate met in conference, the Senate approach was accepted and no reduction in the scope of the Act's jurisdiction was enacted.[100]

The 1977 debate thus makes clear that Congress fully understood the comprehensive scope of jurisdiction under the 1972 Act, and Congress expressly rejected proposed limitations on that jurisdiction. Rather than undermining the foundation of the Clean Water Act, Congress addressed concerns about the Act's scope and application by adding a number of exemptions for specific activities that remain in place and are reaffirmed by the reported text of S. 787, by expanding the authority for use of general permits, and by increasing the role of the States. As the Supreme Court itself recognized in its 1985 decision in *Riverside Bayview*, to the extent there had been any uncertainty in the mid-1970s, Congress's debates in 1977 confirmed the comprehensive scope of "waters of the United States." [101]

---

[97] *Id.* at 911
[98] *Id.* at 920–21.
[99] *Id.* at 947.
[100] *See id.* at 281–82, Conf. Rept. (95–830) at 97–98.
[101] *United States* v. *Riverside Bayview*, 474 U.S. 121 (1985).

Early Supreme Court Decisions Confirmed the Comprehensive Scope of the Act

In the 1980s the Supreme Court addressed the scope of the Clean Water Act in a number of cases, which consistently noted the Act's comprehensive definition of "waters of the United States."

In *Milwaukee* v. *Illinois*, 451 U.S. 304, 316 & n.12 (1981), for example, the Court held that the Act was so expansive as to preempt claims between States under federal common law. The Court stated:

> Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation. . . . No Congressman's remarks on the legislation were complete without reference to the "comprehensive" nature of the Amendments.

In *United States* v. *Riverside Bayview*, 474 U.S. 121 (1985) the Court held that the jurisdiction of the Act under the definition of "waters of the United States" was not limited to navigable waters, but extended to non-navigable waters adjacent to navigable waters. And in 1987 in *International Paper Company* v. *Ouellette*, a unanimous Supreme Court found that the Clean Water Act "applies to all point sources and virtually all bodies of water."[102]

Section 6. Savings clause

Summary

Section 6 provides that nothing in this bill affects the applicability of a number of listed provisions of the Federal Water Pollution Control Act.

Discussion

The savings clause expressly preserves the existing provisions in the Clean Water Act that have exempted farmers, ranchers and other regulated entities from permitting requirements. These exemptions, most of which have applied since 1977, include:

- Section 402(l)(1), exempting discharges composed entirely of return flows from irrigated agriculture.
- Section 402(l)(2), exempting discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.
- Section 404(f)(1)(A), exempting discharges of dredged or fill materials from normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.
- Section 404(f)(1)(B), exempting discharges of dredged or fill materials for the purpose of maintenance, including emergency re-

[102] *Intl. Paper Co* v. *Ouellete* 479 U.S. 481, 492 (1987)

construction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.

- Section 404(f)(1)(C), exempting discharges of dredged or fill materials for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance of drainage ditches.
- Section 404(f)(1)(D), exempting discharges of dredged or fill materials for the purpose of construction of temporary sedimentation basins on construction sites, which do not include placement of fill material into navigable waters.
- Section 404(f)(1)(E), exempting discharges of dredged or fill materials for the purpose of construction or maintenance of farm roads or forest roads or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.
- Section 404(f)(1)(F), exempting discharges of dredged or fill materials resulting from activities with respect to which a State has an approved program under section 208(b)(4) of the Act (33 U.S.C. 1288(b)(4)) meeting the requirements of subparagraphs (B) and (C) of that section.

The fact that Section 6 specifically refers to certain cited provisions of the Act is not intended to imply that any other exemptions, exclusions, or limiting interpretations under the Act are not preserved. To the contrary, as provided in Section 7(b), the bill is intended to restore the scope of jurisdiction as the Act was applied prior to *SWANCC*, including pursuant to regulatory qualifications and interpretations that are not referenced in Section 6.

Section 7. Regulations

Summary

Section 7 requires EPA and the Army Corps of Engineers to promulgate such regulations as may be necessary to implement the bill, and provides a rule of construction ensuring that the scope of "waters of the United States" shall be consistent with the agencies' interpretation prior to the decision in *SWANCC* and *Rapanos*.

Discussion

The Committee anticipates that the agencies may determine that additional regulations are necessary. Section 7 requires that any such regulations will be issued promptly.

The rule of construction established under Section 7 ensures that federal jurisdiction cannot expand through Agency rulemaking as a result of enactment of S. 787, by requiring that the term "waters of the United States" shall be construed consistently with the scope of jurisdiction pre-*SWANCC* and pre-*Rapanos* and with Congress's legislative authority under the Constitution. This also ensures that the agencies continue to maintain their historic interpretation of the scope of the Act. The rule of construction provided in Section

7(b) of the bill provides assurance that just as certain categories of waters generally were not previously subject to regulation under the Act, they will not be in the future. These waters include, but are not limited to:

- Non-tidal drainage and irrigation ditches excavated on dry land.
- Artificially irrigated areas which would revert to upland if the irrigation ceased.
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Water filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.[103]

LEGISLATIVE HISTORY

On June 10, 2003, the Committee held a hearing to receive testimony on Federal regulation of wetlands following the Supreme Court's decision in the case of *Solid Waste Agency of Northern Cook County* v. *the U.S. Army Corps of Engineers.*

On August 1, 2006, the Committee's Subcommittee on Fisheries, Wildlife, and Water held a hearing on Interpreting the Effect of the Supreme Court's Decision in the Joint Cases of *Rapanos* v. *United States* and *Carabell* v. *the U.S. Army Corps of Engineers* on "the Waters of the United States."

On December 13, 2007, the Committee held a hearing entitled "The Clean Water Act Following the Recent Supreme Court Decisions in Solid Waste Agency of Northern Cook County and Rapanos-Carabell."

On April 9, 2008, the Committee held a hearing entitled: "Legislative Hearing on S. 1870, the Clean Water Restoration Act of 2007," the predecessor bill to S. 787.

On June 18, 2009, the Committee held a business meeting at which S. 787, with amendments, was approved and ordered to be reported to the full Senate.

ROLL CALL VOTES

Substitute Amendment Approved

At the business meeting held on June 18, 2009, an amendment in the nature of a substitute was proposed by Senators Baucus, Klobuchar and Boxer. The proposed substitute amendment would modify the findings in S. 787 and the definition of "waters of the United States"; codify the existing regulatory exemptions for prior converted croplands and man-made waste treatment systems; ensure that existing statutory exemptions remain intact; provide for issuance of regulations as necessary by the EPA Administrator and

[103] 51 Fed. Reg. 41,206, 41,216 (Nov. 13, 1986).

Secretary of the Army; and establish a rule of construction for interpreting the scope of the term "waters of the United States."

The substitute amendment offered by Senators Baucus, Klobuchar and Boxer was adopted by voice vote.

Other Amendments Rejected

A total of 10 additional amendments to the bill were offered and not approved by the Committee, as follows:

1. Amendment that would give the President the authority to waive the requirements of the bill in the event of an emergency or natural disaster (offered by Senator Vitter) (rejected by voice vote).
2. Amendment that would clarify the definition of a "pollutant" under the Clean Water Act to exclude the application of a pesticide (offered by Senator Vitter) (rejected by a roll call vote of 7 yeas, 12 nays).
3. Amendment that would exempt "streams, including intermittent streams" from the provisions of the measure (offered by Senator Barrasso) (rejected by voice vote).
4. Amendment that would exempt "mudflats" from the provisions of the measure (offered by Senator Barrasso) (rejected by a roll call vote of 6 yeas, 13 nays).
5. Amendment that would exempt "prairie potholes" from the provisions of the measure (offered by Senator Barrasso) (rejected by a roll call vote of 6 yeas, 13 nays).
6. Amendment that would exempt "wet meadows" from the provisions of the measure (offered by Senator Barrasso) (rejected by voice vote).
7. Amendment that would exempt "natural ponds" from the provisions of the measure (offered by Senator Barrasso) (rejected by voice vote).
8. Amendment that would exempt individuals or entities from being required to obtain EPA permits for any agricultural practice (offered by Senator Barrasso) (rejected by voice vote).
9. Amendment that would exempt individuals or entities from being required to obtain EPA permits for livestock production (offered by Senator Barrasso) (rejected by voice vote).
10. Amendment that would exempt groundwater from the provisions in the measure (offered by Senator Barrasso) (rejected by a roll call vote of 7 yeas, 12 nays).

Final Committee Vote to Report

S. 787, as amended by the Baucus/Klobuchar/Boxer substitute amendment, was approved and ordered to be reported to the full Senate. The roll call vote to report the bill was 12 to 7 in favor (Senators Boxer, Baucus, Carper, Lautenberg, Sanders, Cardin, Whitehouse, Klobuchar, Udall, Merkley, Gillibrand and Specter voted yea, and Senators Inhofe, Voinovich, Vitter, Crapo, Alexander, Barrasso, and Bond voted nay).

REGULATORY IMPACT STATEMENT

In compliance with section 11(b)(2) of rule XXVI of the Standing Rules of the Senate, the Committee estimates that no regulatory impact is expected by the passage of the bill. The bill will not affect the personal privacy of individuals. The Committee notes the Congressional Budget Office has concluded that while the bill would

impose some private-sector mandates, "implementing S. 787 could alter, and possibly reduce, certain permitting and enforcement activities under the Clean Water Act."

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104–4), the Committee notes that the Congressional Budget Office has concluded the bill will impose intergovernmental and private-sector impacts but that it "has no basis for estimating whether the cost of the mandate would exceed the annual thresholds established in UMRA for intergovernmental or private-sector mandates ($69 million and $139 million in 2009, respectively, adjusted annually for inflation)."

AUGUST 7, 2009.

Hon. BARBARA BOXER,
Chairman Committee on Environment and Public Works, U.S. Senate, Washington, DC.

DEAR MADAM CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 787, the Clean Water Restoration Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jeff LaFave.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

CBO estimates that implementing S. 787 would have no significant impact on the federal budget.

Enacting the bill would not affect direct spending or revenues. S. 787 would amend the Clean Water Act to establish federal jurisdiction over certain bodies of water. The Clean Water Act requires that any person seeking to discharge certain material into waters under federal jurisdiction obtain a permit from the Army Corps of Engineers (the Corps). The Supreme Court has ruled that this provision of the Clean Water Act applies only to "relatively permanent, standing or flowing bodies of water."

S. 787 would expand federal jurisdiction to include intermittent and geographically isolated wetlands. Based on information from the Corps and the Environmental Protection Agency (EPA), CBO expects that implementing S. 787 could alter, and possibly reduce, certain permitting and enforcement activities under the Clean Water Act. CBO expects that S. 787 would restore federal jurisdiction over certain waters that were covered under the Clean Water Act prior to the Supreme Court decisions in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers (2001), Carabell* v. *United States (2006),* and *Rapanos* v. *United States (2006).* Both the Corps of Engineers and EPA have maintained the personnel levels for permitting and enforcement activities under

the Clean Water Act that existed prior to those decisions, and despite an increase in such activities, neither agency has received additional appropriations to carry out those activities. Under S. 787, CBO expects that the agencies would maintain existing personnel levels and that those personnel would be adequate to carry out permitting and enforcement activities under the bill.

CBO expects that implementing S. 787 could alter and possibly reduce litigation duties of federal attorneys. According to information from the Department of Justice, 45 federal court proceedings have arisen from jurisdictional determinations under the Clean Water Act since 2006. CBO estimates that the budgetary impact of reducing such litigation would be insignificant in any year given the small number of cases involved.

CBO also expects that implementing S. 787 would slightly increase receipts from permitting fees. The Corps charges corporations $100 and individuals $10 for standard permits issued under section 404 of the Clean Water Act. Following the Supreme Court decisions mentioned above, the number of standard permits issued by the Corps decreased 30 percent, but information from the Corps indicates that the decline is mainly attributable to weakening economic conditions. CBO estimates that under S. 787, fee receipts from permits would increase by less than $100,000 a year.

S. 787 would impose intergovernmental and private-sector mandates, as defined in the Unfunded Mandates Reform Act (UMRA), because it would require public and private entities to obtain permits and otherwise comply with restrictions for any activities that would affect the bodies of water added by the bill. The cost of the mandates would be the additional costs of obtaining permits (or designing projects to avoid having to obtain a permit), net of any savings that would result from a modified permitting process.

Information about the additional bodies of water that would be covered by the bill is scarce, and the number of activities that would require a permit is uncertain. Therefore, CBO has no basis for estimating whether the cost of the mandate would exceed the annual thresholds established in UMRA for intergovernmental or private-sector mandates ($69 million and $139 million in 2009, respectively, adjusted annually for inflation).

The CBO staff contacts for this estimate are Jeff LaFave (for federal costs) and Ryan Miller and Amy Petz (for the impact on state and local governments and the private sector). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

MINORITY VIEWS OF SENATORS INHOFE, VITTER, BARRASSO, AND CRAPO

Clean water is one of our nation's most valuable and cherished resources. For 37 years, the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), later amended in 1977 and commonly known as the Clean Water Act (CWA), has supported a federal-state partnership to clean up and properly care for our nation's navigable waters. This federal-state partnership has been a cornerstone of the CWA since its inception, successfully protecting waters of importance to the United States. The partnership has also given local and state governments important flexibility in meeting not only the goals of the CWA but the specific and distinct needs of local residents.

S. 787, the Clean Water Restoration Act, expands the scope of federal power to all "waters of the United States," stripping the states of much of their flexibility and subjecting our nation's waters to the blanket jurisdiction of federal bureaucracies. It also invalidates almost 40 years of congressional intent and case law by restoring a fundamentally flawed executive branch interpretation of the CWA, which defied congressional intent from the very beginning. Rather than improving water quality, this bill would create federal roadblocks to local storm water management, unduly delay development and maintenance of local infrastructure, increase permit requests and litigation, create higher compliance costs, exacerbate wait times for CWA permits, and raise costs for farmers, ranchers, landowners, communities and businesses. For these reasons, we oppose this legislation.

Proponents of the bill say it is designed merely to overturn two United States Supreme Court cases, *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (January 9, 2001) and *Rapanos* v. *United States*, 547 U.S. 71519 (June 19, 2006). The bill claims that these rulings have led to "confusion, permitting delays, increased costs, litigation, and reduced protections for waters of the United States."

In fact, these two Supreme Court decisions reined in the Environmental Protection Agency and the Army Corps of Engineers, which for years had stretched the interpretation of Congressional intent and exceeded their authority under the CWA to areas with little to no impact on the nation's waters which, in some cases, were dry much more often than they were wet. In response to these clear failures of the federal government to abide by the law, the Supreme Court properly set up tests to ensure federal agencies do not exceed the limits of the CWA, providing Americans greater protection against regulatory overreach.

The CWRA purportedly seeks "to reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972." In the FWPCA and its subsequent amend-

ments, however, the statute is clear that federal regulation is to extend only to "navigable" waters. Congress' use of the word "navigable" is deliberate: the term was used over 85 times in legislation considered by three separate Congresses during a span of four decades. The intentional reference to "navigable" waters serves to limit federal authority over smaller, intrastate waters. Yet the CWRA seeks to remove this distinction, thus changing the original aim of Congress and vastly expanding the scope of the CWA.

For supporters of this bill, the term "navigable" has been particularly troubling, since its origin rests with Congress' power to regulate interstate commerce under the Constitution. Although the limits of the Commerce Clause have been determined and reinforced over the decades through numerous judicial decisions, the bill's proponents want to remove this limitation on federal authority. That is why the CWRA would require implementing regulations to "be construed consistently (sic) with . . . the legislative authority of Congress under the Constitution," pointedly leapfrogging the limitations imposed by the Commerce Clause.

The CWRA also reverses Congress' long-standing support for a federal-state partnership for water protection. The CWA has long affirmed that "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." The CWRA would reverse this approach, removing states' authority over waters that are traditionally within their jurisdiction. It erases distinctions between federal, state, and private waters and categorizes all waters as "waters of the United States," subjecting nearly all waters to the jurisdiction of federal agencies.

The bill expands the definition of "waters of the United States" to include "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." With this expansion of regulatory authority this bill will have an especially significant impact on many western and rural communities.

In addition to giving federal agencies authority over wholly intrastate waters, including ephemeral and intermittent streams, the CWRA would for the first time in 37 years of clean water legislation open the door to the extension of federal regulatory authority over ground water. Even though the bill purports to exclude ground waters from federal jurisdiction, it then lays the foundation for a claim of jurisdiction over ground water by noting that "water is transported through interconnected hydrological cycles" and that "pollution . . . of any part of an aquatic system may affect . . . other parts of the aquatic system." This connectedness may ultimately prove irresistible to regulators, who would be able to tie above-ground activities to their impact on aquifers, springs, and wells. Although proponents contend this is not the case, it was revealing that the Committee's majority voted against an amendment by Senator Barrasso to make such a prohibition clear.

The CWRA not only states that all water is connected through "interconnected hydrological cycles," but that if any part of that cycle is subject to "pollution, impairment, or destruction," then all water can be affected. This concept is behind the bill's efforts to regulate "all waters" at the federal level, assuming that any waters left out of federal regulatory authority would be unprotected and could be irreparably damaged. This train of thought clearly implies that not only are states incapable of regulating any waters wholly within their borders, but that the federal government needs to regulate any body of water or piece of land that could potentially hold water in order to properly protect the "waters of the United States."

It also leads to an argument, already made in the original text of the CWRA, that "activities affecting" water bodies should be subject to regulation. This latter contention, repeatedly advanced by advocates of greater federal control, will logically lead to the conclusion that actions affecting air quality must also be regulated under the CWA, since air pollution can ultimately affect the hydrological cycle.

Private landowners as well as a wide range of industries and development will be negatively impacted if the CWRA becomes law. Building and road projects will see complications and delays, while private projects stall as they are subjected to new and unreasonable permitting procedures. Small businesses would face new financial burdens and suffer unnecessary losses in productivity. Farmers and ranchers would potentially be hit the hardest by this legislation, which would open the door for EPA regulation of ponds, irrigation and drainage ditches, and water retention systems. Even though "prior converted croplands" are purportedly not covered by the bill, it is telling that the language goes on to specify that "the final authority regarding jurisdiction under this act remains with the Environmental Protection Agency".

Uncertainty of how much the CWRA would increase costs for millions of Americans is expressed by the cost estimate prepared by the Congressional Budget Office (CBO). The CBO found that "S. 787 would impose intergovernmental and private-sector mandates, as defined in the Unfunded Mandates Reform Act" by requiring private and public entities to obtain permits and comply with new restrictions for "any activities that would affect the bodies of water added by the bill." Costs of these mandates would include either the time, money, and resources needed to obtain new permits, or the costs and resources associated with complying with the new regulations and avoiding the need for additional permitting. The CBO states that the information about the additional bodies of water that the bill would cover is insufficient and the number of new activities that would require permitting cannot be determined. Because of this inadequacy of information, CBO has no way of estimating whether the cost of the mandates would exceed the annual thresholds established for intergovernmental or private-sector mandates which could be in the hundreds of millions of dollars.

The federal-state partnership created by nearly 40 years of Clean Water Act legislation has worked to protect our nation's waters. The Clean Water Restoration Act would end this partnership and give Washington bureaucrats broadly expanded powers to regulate

America's waters. Proponents of the bill may argue there might not be specific language directing federal agencies to expand their authority to regulate groundwater, air pollutants and other water-related features. The bill, however, lays the foundation for such an interpretation, encouraging federal agencies to regulate any and all waters within the "hydrological cycle" at their discretion. The CWRA is, at the end, a federal power grab that should concern states, municipalities and property owners across the nation.

JAMES M. INHOFE.
DAVID VITTER.
JOHN BARRASSO.
MIKE CRAPO.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in [black brackets], new matter is printed in *italic*, existing law in which no change is proposed is shown in roman:

* * * * * * *

FEDERAL WATER POLLUTION CONTROL ACT

* * * * * * *

SEC. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

(1) * * *

* * * * * * *

SEC. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) * * *

* * * * * * *

INFORMATION AND GUIDELINES

SEC. 304. (a)(1) * * *

* * * * * * *

(l) INDIVIDUAL CONTROL STRATEGIES FOR TOXIC POLLUTANTS.—

(1) STATE LIST OF [NAVIGABLE WATERS] *WATERS OF THE UNITED STATES* AND DEVELOPMENT OF STRATEGIES.—Not later than 2 years after the date of the enactment of this subsection, each State shall submit to the Administrator for review, approval, and implementation under this subsection—

* * * * * * *

SEC. 311. (a) For the purpose of this section, the term—

(1) * * *

* * * * * * *

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the [navigable waters of the United States] *waters of the United States*, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

* * * * * * *

(26) "nontank vessel" means a self-propelled vessel that—

(A) is at least 400 gross tons as measured under section 14302 of title 46, United States Code, or, for vessels not

measured under that section, as measured under section 14502 of that title;

(B) is not a tank vessel;

(C) carries oil of any kind as fuel for main propulsion; and

(D) operates on the [navigable waters of the United States] *waters of the United States*, as defined in section 2101(17a) of that title.

(b)(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the [navigable waters of the United States] *waters of the United States*, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).

(2)(A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the [navigable waters of the United States] *waters of the United States* or adjoining shorelines or the waters of the contiguous zone or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B) The Administrator shall within 18 months after the date of enactment of this paragraph, conduct a study and report to the Congress on methods, mechanisms, and procedures to create incentives to achieve a higher standard of care in all aspects of the management and movement of hazardous substances on the part of owners, operators, or persons in charge of onshore facilities, offshore facilities, or vessels. The Administrator shall include in such study (1) limits of liability, (2) liability for third party damages, (3) penalties and fees, (4) spill prevention plans, (5) current practices in the insurance and banking industries, and (6) whether the penalty enacted in subclause (bb) of clause (iii) of subparagraph (B) of subsection (b)(2) of section 311 of Public Law 9209500 should be enacted.

(3) The discharge of oil or hazardous substances (i) into or upon the [navigable waters of the United States] *waters of the United States*, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), in such quantities as may be harmful as deter-

mined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

* * * * * * *

(m) ADMINISTRATIVE PROVISIONS.—

(1) FOR VESSELS.—Anyone authorized by the President to enforce the provisions of this section with respect to any vessel may, except as to public vessels—

(A) board and inspect any vessel upon the [navigable waters of the United States] *waters of the United States* or the waters of the contiguous zone,

(B) with or without a warrant, arrest any person who in the presence or view of the authorized person violates the provisions of this section or any regulation issued thereunder, and

* * * * * * *

SEC. 312. (a) For the purpose of this section, the term—

(1) "new vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters, the construction of which is initiated after promulgation of standards and regulations under this section;

(2) * * *

* * * * * * *

(h) After the effective date of standards and regulations promulgated under this section, it shall be unlawful—

(1) for the manufacturer of any vessel subject to such standards and regulations to manufacture for sale, to sell or offer for sale, or to distribute for sale or resale any such vessel unless it is equipped with a marine sanitation device which is in all material respects substantially the same as the appropriate test device certified pursuant to this section;

(2) for any person, prior to the sale or delivery of a vessel subject to such standards and regulations to the ultimate purchaser, wrongfully to remove or render inoperative any certified marine sanitation device or element of design of such device installed in such vessel;

(3) for any person to fail or refuse to permit access to or copying of records or to fail to make reports or provide information required under this section; and

(4) for a vessel subject to such standards and regulations to operate on the [navigable waters of the United States] *waters of the United States*, if such vessel is not equipped with an operable marine sanitation device certified pursuant to this section.

* * * * * * *

(l) Anyone authorized by the Secretary of the department in which the Coast Guard is operating to enforce the provisions of this section may, except as to public vessels, (1) board and inspect any vessel upon the [navigable waters of the United States] *waters of the United States* and (2) execute any warrant or other process issued by an officer or court of competent jurisdiction.

* * * * * * *

(n) UNIFORM NATIONAL DISCHARGE STANDARDS FOR VESSELS OF THE ARMED FORCES.—

(1) APPLICABILITY.—* * *

* * * * * * *

(7) ESTABLISHMENT OF STATE NO-DISCHARGE ZONES.—

(A) STATE PROHIBITION.—* * *

* * * * * * *

(C) APPLICABILITY TO FOREIGN FLAGGED VESSELS.—A prohibition under this paragraph—

(i) shall not impose any design, construction, manning, or equipment standard on a foreign flagged vessel engaged in innocent passage unless the prohibition implements a generally accepted international rule or standard; and

(ii) that relates to the prevention, reduction, and control of pollution shall not apply to a foreign flagged vessel engaged in transit passage unless the prohibition implements an applicable international regulation regarding the discharge of oil, oily waste, or any other noxious substance into the waters.

(8) PROHIBITION RELATING TO VESSELS OF THE ARMED FORCES.—After the effective date of the regulations promulgated by the Secretary of Defense under paragraph (4), it shall be unlawful for any vessel of the Armed Forces subject to the regulations to—

(A) operate in the [navigable waters of the United States] *waters of the United States* or the waters of the contiguous zone, if the vessel is not equipped with any required marine pollution control device meeting standards established under this subsection; or

(B) discharge overboard any discharge incidental to the normal operation of a vessel in waters with respect to which a prohibition on the discharge has been established under paragraph (7).

* * * * * * *

SEC. 501. (a) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act.

(b) * * *

* * * * * * *

SEC. 502. Except as otherwise specifically provided, when used in this Act:

(1) * * *

* * * * * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purpose is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

[(7) The term "navigable waters" means the waters of the United States, including the territorial seas.**]**

[(8)**]** *(7)* The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

[(9)**]** *(8)* The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

[(10)**]** *(9)* The term "ocean" means any portion of the high seas beyond the contiguous zone.

[(11)**]** *(10)* The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

[(12)**]** *(11)* The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

[(13)**]** *(12)* The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator,

cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

[(14)] *(13) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.*

[(15)] *(14)* The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

[(16)] *(15) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.*

[(17)] *(16)*The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

[(18)] *(17)* The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D—Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

[(19)] *(18)* The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

[(20)] *(19)* The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

[(21)] *(20)* COASTAL RECREATION WATERS.—

(A) IN GENERAL.—The term "coastal recreation waters" means—

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) EXCLUSIONS.—The term "coastal recreation waters" does not include—

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

[(22)] *(21)* FLOATABLE MATERIAL.—

(A) IN GENERAL.—The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) INCLUSIONS.—The term "floatable material" includes—

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

[(23)] *(22)* PATHOGEN INDICATOR.—The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

[(24)] *(23)* OIL AND GAS EXPLORATION AND PRODUCTION.—The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

[(25)] *(24)* RECREATIONAL VESSEL.—

(A) IN GENERAL.—The term "recreational vessel" means any vessel that is—

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) EXCLUSION.—The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that—

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(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.

(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.

(ii) WASTE TREATMENT SYSTEMS.—Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of this Act (other than 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.

* * * * * * *

○