



● **Board of Directors**
Communications and Legislation Committee

July 14, 2009 Board Meeting

8-8

Subject

Express support, if amended, for S. 787 (Feingold, D-WI), the Clean Water Restoration Act of 2009

Description

Summary

S. 787, the Clean Water Restoration Act, seeks to amend the Federal Water Pollution Control Act, commonly known as the Clean Water Act (“CWA”) by removing the term “navigable waters” within the CWA, and substituting, instead, the phrase “waters of the United States” and by expanding the current scope of jurisdiction to effectively reverse two Supreme Court decisions that have limited federal jurisdiction under the Act.

Background and Analysis

S. 787 sets forth two primary purposes:

- to reaffirm the original intent of Congress in enacting the CWA Amendments of 1972 to restore and maintain the chemical, physical, and biological integrity of the waters of the United States; and
- to clearly define the waters of the United States that are subject to CWA jurisdiction.

As recently amended, the bill seeks to clarify what it describes as Congress’ original intent by returning the extent of CWA jurisdiction and enforcement to that in effect in 2001, prior to two Supreme Court decisions¹ that limited federal jurisdiction to regulate wetlands under the CWA.

The bill also purports to clarify the CWA scope of jurisdiction by eliminating the phrase, “navigable waters” from the Act entirely and replacing it with the phrase, “waters of the United States” that the bill defines as:

“(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 water, including lakes, rivers, streams (including intermittent streams), mud flats, sand flats, 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 the jurisdiction under this Act remains the Environmental Protection Agency.

¹ In *Solid Waste Agencies of Northern Cook County v. U.S. Army Corps of Engineers* (2001), the Supreme Court, citing Constitutional limitations of Congress’ authority under the Commerce Clause, invalidated U.S. Army Corps of Engineers regulations regarding the delineation of wetlands and held that CWA jurisdiction did not extend to isolated wetlands even if they provided habitat for migratory birds or endangered species. In *Rapanos v. U.S.* (2006), a divided Supreme Court held that a “significant nexus” between a traditionally defined navigable water of the U.S. and the regulated wetland was required to justify federal jurisdiction.

“(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.”

Although much is made of the substitution of the term “waters of the U.S.” for “navigable waters,” the CWA has traditionally defined “navigable waters” as “waters of the United States, including the territorial seas.” The rest of the proposed new definition of “waters of the U.S.” in the bill comes from U.S. Environmental Protection Agency rules that were in effect prior to 2001² that the bill specifically references as guides for future regulations.

Important to water supply agencies, the bill also contains language affirming CWA section 101(g) recognizing, “the authority of each State to allocate quantities of water within its jurisdiction” and a further statement that “It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.”

Effect on Metropolitan

By expanding federal CWA jurisdiction to include isolated intrastate waters that are not hydrologically connected to other waterways, Metropolitan would likely be required to obtain additional CWA Section 404 permits for maintenance and construction projects within its service area. This would result in additional time and expense for some projects and the potential delay of critical maintenance work.

Recommended amendments

Suggested changes (see [Attachment 1](#)) would, for the most part, support the proposed definition of “waters of the United States” and the clarification that Congress did not intend to require the “significant nexus” test set forth in the *Rapanos* decision as a limitation for wetlands jurisdiction under the CWA. The proposed amendments would exclude isolated intrastate areas with no connection to other water bodies from federal CWA jurisdiction. And finally, Metropolitan would propose an exclusion for certain water conveyance facilities, similar to those proposed for prior converted cropland and waste treatment systems.

Current Legislative Status

Senator Russ Feingold (D-Wisconsin) introduced S. 787 this year. Opposition kept the legislation from moving beyond the Committee debate level, until recently, when Senator Barbara Boxer (Chair, Senate Committee on Environment and Public Works), after consulting with other Members of the Senate, and some water interest groups, significantly amended S. 787 which was reported favorably out of full Committee on June 18.

In the House, the Committee on Transportation and Infrastructure has circulated the text of an original House bill, H.R. 2421 (Oberstar), with municipal drinking water organizations, agricultural irrigation groups and various other stakeholders, but there has been no action on the legislation.

² 53 Fed. Reg. 20764 (June 6, 1988) and 51 Fed. Reg. 41206 (November 13, 1986).

Policy

Although the Board has, in the past, adopted principles supportive of the goals set forth in the CWA, no adopted policy principle specifically addresses the amendments proposed by S. 787.

California Environmental Quality Act (CEQA)

CEQA determination for Options #1, #2, and #3:

The proposed action is not defined as a project under CEQA because the proposed action involves continuing administrative activities such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to the provisions of CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #4:

None required

Board Options

Option #1

Adopt the CEQA determination and authorize the General Manager to express Metropolitan's support for S. 787 if amended.

Fiscal Impact: Unknown

Business Analysis: If adopted as currently drafted, S. 787 may result in additional permitting costs and delays for Metropolitan construction and maintenance projects.

Option #2

Adopt the CEQA determination and authorize the General Manager to express Metropolitan's support for S. 787.

Fiscal Impact: Unknown

Business Analysis: If adopted as currently drafted, S. 787 may result in additional permitting costs and delays for Metropolitan construction and maintenance projects.

Option #3

Adopt the CEQA determination and authorize the General Manager to express Metropolitan's opposition to S. 787.

Fiscal Impact: Unknown

Business Analysis: If adopted as currently drafted, S. 787 may result in additional permitting costs and delays for Metropolitan construction and maintenance projects.

Option #4


Do not take a position on S. 787.

Fiscal Impact: Unknown


Business Analysis: If adopted as currently drafted, S. 787 may result in additional permitting costs and delays for Metropolitan construction and maintenance projects.

Staff Recommendation

Option #1


Linda Waade
Deputy General Manager, External Affairs

7/1/2009
Date


Jeffrey Kightlinger
General Manager

7/1/2009
Date

Attachment 1 – S. 787 (Feingold, D-WI), as proposed to be amended by Metropolitan

BLA #6809

As amended June 18, 2009 by Senate
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S. 787

To amend the Federal Water Pollution Control Act to clarify the jurisdiction over waters of the United States.

SECTION 1. SHORT TITLE.

This Act may be cited as the “Clean Water Restoration Act”.

SEC. 2. PURPOSES.

The purposes of this Act are—

(1) to reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92–500; 86 Stat. 816) to restore and maintain the chemical, physical, and biological integrity of the waters of the United States;

and

(2) to clearly define the waters of the United States that are subject to the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) ~~as those features that were treated as such pursuant to the final rule (including the preamble to that final rule) published at 53 Fed. Reg. 20764 (June 6, 1988) and 51 Fed. Reg. 41206 (November 13, 1986), and other applicable rules and interpretations as in effect on January 8, 2001.~~

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SEC. 3. FINDINGS.

Congress finds that—

(1) water is transported through interconnected hydrological cycles, and the pollution, impairment, or destruction of any part of an aquatic system may affect the chemical, physical, and biological integrity of other parts of the aquatic system;

(2) “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;

(3) the ability to meet the national objective of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) has been undermined by the decisions of the United States Supreme Court in ~~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. 715 (June 19, 2006), which have **has** resulted in confusion, permitting delays, increased costs, litigation, and reduced protections for waters of the United States;

(4) this Act reaffirms Federal jurisdiction over all waters of the United States, as the Federal Water Pollution Control Act was applied and interpreted in the regulations, guidance, and interpretations of the Environmental Protection Agency and Corps of Engineers prior to the rulings of the United States Supreme Court in ~~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. 715 (June 19, 2006), and overturns the decisions of the Court in ~~those~~ **that** cases;

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(5) Congress supports the policy in effect under section 101(g) of the Federal Water Pollution Control Act (33 U.S.C. 1251(g)), which states that “the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.”;

(6) protection of **certain** intrastate waters, ~~including geographically isolated waters~~, is necessary to restore and maintain the chemical, physical, and biological integrity of all waters in the United States;

(7) the regulation of discharges of pollutants into **certain** intrastate waters is an integral part of
the comprehensive clean water regulatory program of the United States;

(8) small and intermittent streams, including ephemeral streams, which have been jeopardized by the decisions referred to in paragraph (3)—

(A) comprise the majority of all stream miles in the United States;

(B) serve critical biological and hydrological functions that affect entire watersheds;

(C) reduce the introduction of pollutants to large streams and rivers;

(D) provide and purify drinking water supplies;

(E) are especially important to the life cycles of aquatic organisms; and

(F) aid in flood prevention, including reducing the flow of higher-order streams;

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(9) the pollution or other degradation of waters of the United States, individually and in the aggregate, has a substantial relation to and effect on interstate commerce;

(10) protection of intrastate waters is necessary to prevent substantial harm to interstate commerce and sustain a robust system of interstate commerce in the future;

(11)

(A) waters, including streams and wetlands, provide protection from flooding; and

(B) draining or filling intrastate wetlands and channelizing or filling intrastate streams can cause or exacerbate flooding that causes billions of dollars of damages annually, placing a significant burden on interstate commerce;

(12) millions of individuals in the United States depend on streams, wetlands, and other waters of the United States to filter water and recharge surface and subsurface drinking water supplies, protect human health, and create economic opportunity;

(13) source water protection areas containing small or intermittent streams provide water to public drinking water supplies serving more than 110,000,000 individuals in the United States;

(14)

(A) millions of individuals in the United States enjoy recreational activities that depend on intrastate waters, such as waterfowl hunting, bird watching, fishing and photography; and

(B) those activities and associated travel generated hundreds of billions of dollars of income each year for the travel, tourism, recreation, and sporting sectors of the economy of the United States;

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(15) activities that result in the discharge of pollutants into waters of the United States are commercial or economic in nature, and, in the aggregate, have a substantial effect on interstate commerce;

(16) a substantial number of the sources regulated under the Federal Water Pollution Control Act discharge into headwater streams that may be intermittent or seasonal;

(17) more than 40 percent of those sources, or 14,800 facilities with individual permits issued in accordance with the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), including industrial plants and municipal sewage treatment systems, discharge into small or intermittent streams;

~~(18) protecting the quality of and regulating activities affecting the waters of the United States is a necessary and proper means of implementing treaties to which the United States is a party, including treaties protecting species of fish, birds, and other wildlife;~~

~~(19) approximately half of North American migratory birds depend upon or are associated with wetlands and small and intermittent streams, including ephemeral streams;~~

~~(20) approximately half of all threatened and endangered species in the United States depend on wetlands;~~

~~(21) for those reasons, the protection of wetlands and other waters providing breeding, feeding, and sheltering habitat for migratory birds and endangered species is essential to enable the United States to fulfill the obligations of the United States under international treaties for the conservation of those species.~~

(22) protecting the quality of and regulating activities affecting the waters of the United States is a necessary and proper means of protecting Federal land, including

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hundreds of millions of acres of parkland, refuge land, and other land under Federal ownership and the wide array of waters encompassed by that land; and

(23) protecting the quality of and regulating activities affecting the waters of the United States is necessary to protect Federal land and waters from discharges of pollutants and other forms of degradation.

SEC. 4. DEFINITIONS OF WATERS OF THE UNITED STATES.

Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) is amended —

- (1) by striking paragraph (7);
- (2) by redesignating paragraphs (8) through (25) as paragraphs (7) through (24), respectively; and
- (3) by adding at the end of the following:

“(25) WATERS OF THE UNITED STATES.—

“(A) IN GENERAL.—The term ‘waters of the United States means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters, and all impoundments of the foregoing.

“(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

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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 impoundment of waters of the United States.”.

“(iii) Water Systems. -- Waters of the United States do not include manmade water conveyance systems, including pipelines, aqueducts, canals and associated facilities.

SEC. 5. CONFORMING AMENDMENTS.

The Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) is amended —

- (1) by striking “navigable waters of the United States” each place it appears and inserting “waters of the United States”;
- (2) in section 304(1)(1) by striking “NAVIGABLE WATERS” in the heading and inserting “WATERS OF THE UNITED STATES”; and
- (3) by striking “navigable waters” each place it appears and inserting “waters of the United States”.

SEC. 6. SAVINGS CLAUSE.

Nothing in this Act (or an amendment made by this Act) affects the applicability of the following provisions of the Federal Water Pollution Control Act:

- (1) Section 402(1)(1) (33 U.S.C. 1342 (1)(1),
- (2) Section 402(1)(2) (33 U.S.C. 1342(1)(2),
- (3) Section 404(f)(1)(A) (33 U.S.C. 1344 (f)(1)(A),
- (4) Section 404(f)(1)(B) (33 U.S.C. 1344(f)(1)(B),

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(5) Section 404(f)(1)(C) (33 U.S.C. 1344(f)(1)(C),

(6) Section 404(f)(1)(D) (33 U.S.C. 1344(f)(1)(D),

(7) Section 404(F)(1)(E) (33 U.S.C. 1344(f)(1)(E),

(8) Section 404(f)(1)(F) (33 U.S.C. 1342(f)(1)(F).

SEC. 7. REGULATIONS.

(a) Promulgation.—Not later than 18 months after the date of enactment of this Act, the Administrator of the Environmental Protection Agency and the Secretary of the Army shall promulgate such regulations as are necessary to implement this Act and the amendments made by this Act.

(b) Rules of Construction.—Subject to the exclusions in paragraph (25)(B) of section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362), the term “waters of the United States” shall be construed consistently with—

(1) the scope of Federal jurisdiction under that Act, as interpreted and applied by the Environmental Protection Agency and the Corps of Engineers prior to ~~January 9, 2001 (including pursuant to the final rules and preambles published at 53 Fed. Reg. 20764 (June 6, 1988) and 51 Fed. Reg. 41206 (November 13, 1985))~~ **June 19, 2006**; and

(2) the legislative authority of Congress under the Constitution.