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**The Clean Water Authority Restoration Act:  
A Primer of Background Material**

by

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## The Clean Water Authority Restoration Act: A Primer of Background Material

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### Introduction

The Senate Committee on the Environment and Public Works approved the Clean Water Restoration Act (S. 787) (CRWA).<sup>1</sup> This proposed legislation will amend the Clean Water Act's (CWA) jurisdiction.<sup>2</sup> The proposal would replace the term "navigable waters" with "waters of the United States."<sup>3</sup> Under the CWRA, the CWA would now cover not only interstate waters, but also now for the first time include intrastate waters.<sup>4</sup> This proposal could have major implications for the agricultural sector since it would augment the current jurisdictional scope of the CWA.<sup>5</sup>

This brief article is a reference resource designed to provide a basic background on the current legislative proposal and is not an exhaustive treatment of the subject.<sup>6</sup> The article provides language for the previous bills introduced, the current language, statements made by supporters of the legislation, relevant articles written on the subject, and references to blogs and blog postings. For additional updates on CWRA developments,

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<sup>1</sup> [Clean Water Restoration Act of 2009](#), S. 787, 111th Cong. (2009). The Senate Committee on the Environment and Public Works approved the legislation June 18, 2009 by a vote of 12 to 7. See Darrell A. Hughes, *Environment Groups Praise Senate Panel for New Clean Water Bill*, Wall Street Journal, June 18, 2009, available at <http://online.wsj.com/article/BT-CO-20090618-713693.html>

<sup>2</sup> The [Clean Water Act](#) is located at 33 U.S.C. §§ 1251 – 1387 (2008).

<sup>3</sup> The CWA defines "navigable waters" at 33 U.S.C. § 1362(7) (2008).

<sup>4</sup> Intrastate waters would include farm ponds, to storm water retention basins, to roadside ditches, to desert washes, to streets and gutters, even to a puddle of rainwater.

<sup>5</sup> This proposed change would bring farmers' and ranchers' activities under more scrutiny due to the number of normal farming activities that would now be subject to the CWA's citizen suit provision. See, American Farm Bureau Federation, *AFBF: Even Rainwater would be Regulated Under the CWA*, June 12, 2009, available at <http://www.fb.org/index.php?fuseaction=newsroom.newsfocus&year=2009&file=nr0612.html>. The CWA's citizen suit provision is found at 33 U.S.C. § 1365 (2008).

<sup>6</sup> For a look at Clean Water Act, views on the Act, other publications, please see The Center's [Clean Water Act Reading Room](#). For a current list of Clean Water Act cases decided after January 1, 2002, please see the Center's [Clean Water Act Case Law Index](#).

please visit [The United States Agricultural & Food Law and Policy blog](#) and the [Clean Water Act Reading Room](#).

### **Current Jurisdictional View of the Clean Water Act**

Currently, the CWA covers “navigable waters.”<sup>7</sup> The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.”<sup>8</sup> Courts have struggled with the term “navigable waters,” and what bodies of water are covered by the definition of “navigable waters.”<sup>9</sup>

While CWA jurisdiction has been the subject of countless legal articles and much public debate, two Supreme Court decisions are the pillars of current discussion. In *Solid Waste Agency of North Cook County (SWANCC)*, the Supreme Court found that the Army Corps of Engineers’ rule extending the definition of “navigable waters” to include intrastate waters used by the migratory birds exceeded the authority granted the Corps by the CWA.<sup>10</sup> In *Rapanos v. United States*, a plurality of the Court found that wetlands to fall within the CWA needed “a continuous surface connection to bodies that are “waters of the United States”[.]”<sup>11</sup>

In these two decisions, the Court for the most part has taken a narrow view of what constitutes waters protected under the CWA, and has narrowed the scope of the CWA from its broadest possible interpretation.<sup>12</sup> In *SWANCC*, the Court held that waters with

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<sup>7</sup> See, 33 U.S.C. § 1251(a) (2008).

<sup>8</sup> § 1362(7). “Territorial seas” is defined as “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.” 33. U.S.C. § 1362(8) (2008).

<sup>9</sup> For a discussion on the views taken by the courts of waters covered by the CWA, see Marjorie A. Shields, Annotation, *What are “Navigable Waters” Subject to Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251 et seq.)*, 160 A.L.R. FED. 585 (2000).

<sup>10</sup> See, *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001).

<sup>11</sup> *Rapanos v. United States*, 547 U.S. 715, 742 (2006).

<sup>12</sup> For a general look at the Supreme Court’s jurisprudence on the CWA, see, Claudia Copeland & Jeffrey A. Zinn, *Wetlands: An Overview of Issues* (Updated to July 8, 2008); Jenny L. Routheaux, Note, *Western Wetlands in Jeopardy After Rapanos v. United States: Congressional Action Needed to Define “Navigable Waters” Under the Clean Water Act*, 8 NEV. L.J. 1045 (2008); Jeffery G. Mil Robert Meltz, *The Wetlands Coverage of the Clean Water Act is Revisited by the Supreme Court: Rapanos and Carabell* (Feb. 2, 2006); ler, *The Supreme Court’s Water Pollution Jurisprudence: Is The Court All Wet?*, 24 VA. ENVTL. L.J. 125 (2005). For more on the *SWANCC* and *Rapanos* decisions see, Robin Kundis Craig, *Justice Kennedy and Ecosystem Services: A Functional Approach to Clean Water Act Jurisdiction After Rapanos*, 38 ENVTL. L. 635 (2008); Stacy Kooistra, *United States v. Rapanos: The Future of Wetlands Jurisdiction has Arrived*, 8 GREAT PLAINS NAT. RESOURCES J. 55 (2004); Talene Nicole Megerian, Comment, *Federal Regulation of Isolated Wetlands: To Be or Not To Be*, 13 VILL. ENVTL. L.J. 157 (2002).

no connection to interstate commerce other than, as a resting place for migratory birds did not fall within their interpretation of the CWA.<sup>13</sup> Likewise, in *Rapanos*, the Court focused on the word “waters” and ruled that the term did not include dry channels or intermittent streams.<sup>14</sup>

Justice Kennedy offered in a concurrence, the “significant nexus” test as deciding when waters were navigable under the CWA.<sup>15</sup> The “significant nexus” test requires “that to constitute “‘navigable waters’” under the Act, a water or wetland must possess a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made.”<sup>16</sup>

Federal agencies have also outlined what they believe to be the extent of their jurisdiction with regards to the CWA. A joint memorandum by the EPA and the Corps of Engineers lists the instances in which the agencies would assert jurisdiction, when they might assert jurisdiction, and when they would generally not assert jurisdiction.<sup>17</sup> Currently, agencies will assert jurisdiction in the case of traditional navigable waters, wetlands adjacent to

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<sup>13</sup> See, *Solid Waste Agency of N. Cook County*, 531 U.S. at 174.

<sup>14</sup> See *Rapanos*, 547 U.S. at 732-33.

But “the waters of the United States” is something else. The use of the definite article (“the”) and the plural number (“waters”) show plainly that § 1362(7) does not refer to water in general. In this form, “the waters” refers more narrowly to water “[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,” or “the flowing or moving masses, as of waves or floods, making up such streams or bodies.” Webster’s New International Dictionary 2882 (2d ed.1954). On this definition, “the waters of the United States” include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in “streams,” “oceans,” “rivers,” “lakes,” and “bodies” of water “forming geographical features.” *Ibid*. All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition’s terms, namely “streams,” connotes a continuous flow of water in a permanent channel-especially when used in company with other terms such as “rivers,” “lakes,” and “oceans.” None of these terms encompasses transitory puddles or ephemeral flows of water.

*Rapanos*, 547 U.S. at 732-33.

<sup>15</sup> *Id.* at 759.

<sup>16</sup> *Id.*

<sup>17</sup> Memorandum from the Environmental Protection Agency and the Army Corps of Engineers to EPA regions and Army Corps of Engineers districts to provide guidance in implementing the *Rapanos* decision (Dec. 2, 2008). To view the memorandum click [here](#).

traditional navigable waters, non-navigable tributaries of navigable waters that typically flow year-round, and wetlands that are immediately adjacent to such tributaries.<sup>18</sup>

The agencies may assert jurisdiction in some cases if there is a “significant nexus” to traditional navigable waters with non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands that are adjacent to but that do not directly abut a relatively permanent non-navigable tributary.<sup>19</sup> The agencies will generally not assert jurisdiction in the case of swales or erosional features and ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.<sup>20</sup>

Some members of Congress have responded by introducing legislation to expand the view of “waters of the United States” in the 107<sup>th</sup>, 108<sup>th</sup>, 109<sup>th</sup>, 110<sup>th</sup>, and the current 111<sup>th</sup> Congresses.<sup>21</sup> The most recent proposal would overturn the Court’s decision in *SWANCC* and *Rapanos*, and expand the jurisdiction of the CWA.

The CWRA seeks to amend the current language of the CWA, broadening 33 U.S.C. § 1362 by adding the following language:

WATERS OF THE UNITED STATES- 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 and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.

The proposed changes have failed in each Congress that it was introduced in, but is being reconsidered in the 111<sup>th</sup> Congress.

## Legislation

The Clean Water Restoration Act of 2009, S. 787, 111th Cong. (2009), was introduced by Senator Russ Feingold of Wisconsin on April 2, 2009, and is a reintroduction of the same legislation he has introduced in the four preceding Congresses. The Senate Environment and Public Works Committee recently approved the bill. The bill also currently has twenty-four cosponsors.<sup>22</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> Memorandum, *supra* note 11.

<sup>20</sup> *Id.*

<sup>21</sup> [Clean Water Authority Restoration Act of 2002](#), S. 2780, H.R. 5194, 107th Cong. (2002); [Clean Water Authority Restoration Act of 2003](#), S. 473, H.R. 962, 108th Cong. (2003); [Clean Water Authority Restoration Act of 2005](#), S. 912, H.R. 1356, 109th Cong. (2005); [Clean Water Restoration Act of 2007](#), S. 1870, H.R. 2421 110th Cong. (2007).

<sup>22</sup> Co-sponsors are Senators Barbara Boxer (CA), Sherrod Brown (OH), Maria Cantwell (WA), Benjamin L. Cardin (MD), Thomas R. Carper (DE), Christopher J. Dodd (CT),

## Public Statements

The Obama Administration has written a letter the Senate Environment and Public Works Committee in support of this legislation to clarify the jurisdiction of the Clean Water Act.<sup>23</sup> In regards to this letter, Senator Boxer, the Chairman of the Committee, stated that

The Obama Administration has provided a clear call for legislation to ensure that the Clean Water Act continues to be an effective tool to keep America's waters clean and our families healthy. I look forward to working closely with the Administration and my colleagues in the Senate to enact legislation that protects rivers, lakes and wetlands and keeps Americans' drinking water safe while providing the clear guidance that farmers, businesses, federal agencies, and state and local governments need.<sup>24</sup>

In a press release by Senator Feingold, the Senator released the following statement.

I am pleased the administration understands the urgent need to protect our nation's waters and is calling for legislation to do so. Every day Congress fails to reaffirm Clean Water Act protections, more and more waters are stripped of their protections, jeopardizing wildlife habitats, recreational pursuits, agricultural and industrial uses, and the drinking water of millions of Americans. Congress should quickly respond to this call from the administration or risk leaving our waters and our wetlands unprotected.<sup>25</sup>

Senator James Inhofe, the Ranking Republican Member on the committee, released the following statement after the Senate Environment and Public Works Committee approved the legislation. In the statement Senator Inhofe said,

The superficial changes made to this bill don't change its underlying intention and ultimate effect: to radically expand federal power over farms, ranches, and private property... We heard plenty of talk about a

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Richard Durbin (IL), Kristen E. Gillibrand (NY), Edward E. Kaufman (DE), John F. Kerry (MA), Herb Kohl (WI), Frank R. Lautenberg (NJ), Patrick Leahy (VT), Carl Levin (MI), Joseph I. Lieberman (CT), Robert Menendez (NJ), Jeff Merkley (OR), Jack Reed (RI), Bernard Sanders (VT), Charles E. Schumer (NY), Jeanne Shaheen (NH), Debbie Stabenow (MI), Sheldon Whitehouse (RI), and Ron Wyden (OR).

<sup>23</sup> Letter from Nancy Sutley, Chair, Council on Environmental Quality, to Senator Barbara Boxer, Chairman of the Senate Committee on Environmental and Public Works (May 20, 2009) to view the letter, [click here](#).

<sup>24</sup> Press Release, Boxer Welcomes Obama Administration Letter of Need for Clean Water Act Legislation (May 21, 2009) [click here](#) for copy of press release.

<sup>25</sup> Press Release, Statement of U.S. Senator Russ Feingold on the Obama Administration's Support for Congressional Action to Clarify the Clean Water Act (May 21, 2009) [click here](#) for a copy of the press release.

grand compromise to address concerns from rural America. Yet in the end, the revised bill, which passed on a party-line vote, still lacks support from a large swath of rural stakeholders... This bill is further proof that Washington doesn't 'get rural America. The Democrats are moving a bill that amounts to the biggest bureaucratic power grab in a generation-- and it's directed right at America's heartland. In fact, this bill is a significant part of a hostile agenda-whether it's new energy taxes from cap-and-trade or more unfunded mandates from Washington-aimed squarely at rural America.<sup>26</sup>

Idaho Senator Mike Crapo has threatened to use every senatorial tool he has available, including the filibuster, to stall the bill on the Senate floor.<sup>27</sup>

### **Congressional Research Service Reports**

Congressional Research Service Reports that provide useful information pertinent to the CWRA are listed and linked to below. These Reports examine previous CWRA proposals and CWA jurisdictional issues before Congress in its previous sessions. To view the CRS Report, please click on the title of each report:

Claudia Copeland, *[Clean Water Act Issues in the 108th Congress](#)*, (updated to Oct. 25, 2004);

Claudia Copeland, *[Clean Water Act Issues in the 109<sup>th</sup> Congress](#)* (updated to Sept. 28, 2005);

Robert Meltz, *[The Wetlands Coverage of the Clean Water Act is Revisited by the Supreme Court: Rapanos and Carabell](#)* (Feb. 2, 2006);

Claudia Copeland, *[Water Quality Issues in the 110<sup>th</sup> Congress: Oversight and Implementation](#)* (Updated to Jan. 23, 2008);

Claudia Copeland & Jeffrey A. Zinn, *[Wetlands: An Overview of Issues](#)* (Updated to July 8, 2008).

### **Relevant Journal Articles**

As noted, many legal articles have been written relative to CWA jurisdiction and CWRA proposals. For a comprehensive listing of legal articles in this area, please visit

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<sup>26</sup> Press Release, Inhofe Leads Opposition to “Biggest Bureaucratic Power Grab in a Generation” (June 18, 2009) [click here](#) for a copy of the press release.

<sup>27</sup> Sally Schuff, *Senator pledges to block vote on bill expanding federal control over U.S. waters*, FEEDSTUFFS, June 18, 2009, <http://www.feedstuffs.com/ME2/dirmod.asp?sid=F4D1A9DFCD974EAD8CD5205E15C1CB42&nm=Breaking+News&type=news&mod=News&mid=A3D60400B4204079A76C4B1B129CB433&tier=3&nid=9060C94C49214845A6817A8BC7D995C7>

*Agricultural Law Bibliography* published on the National Agricultural Law Center web site. The following articles are recommended for background resources for CWA jurisdictional issues and the CWRA:

Kim D. Connolly, *Any Hope for Happily Ever After? Reflections on Rapanos and the Future of the Clean Water Act Section 404 Program*, VT. LAW SCH. LAND USE INST., 59-62 available at <http://www.vjel.org/books/pdf/PUBS10004.pdf>.

Rebecca S. Finley, *Tulloch III or Congressional Solution?*, 22 NAT. RESOURCES & ENV'T 63 (2008).

Rob Fowler & Gretchen Morgan, *The Clean Water Restoration Act of 2007—Got a Permit for that Puddle?*, 10 NO. 2 ABA ENVTL. LITIG. & TOXIC TORTS COMM. NEWSL. 20 (June 2008).

Kenneth S. Gould, *Drowning in Wetlands Jurisdiction Determination Process: Implementation of Rapanos v. United States*, 30 U. ARK. LITTLE ROCK L. REV. 413 (2008).

Brandee Ketchum, *Like the Swamp Thing: Something Ambiguous Rises From the Hidden Depths of Murky Waters – The Supreme Court’s Treatment of Murky Wet Land In Rapanos v. United States*, 68 LA. L. REV. 983 (2008).

### **Related Blog Postings**

Blogs can be a useful resource for timely research and discussion of various opinions regarding the CWRA and CWA jurisdiction. Given the large number and diversity of blogs available, the following links to blog postings are recommended for their content as well as a reference to the blog itself for future reference:

Posting of Julie to Southeast Agnet, Chambliss Believes Clean Water Restoration Act is Unnecessary, <http://southeastagnet.com/2009/07/07/chambliss-believes-clean-water-restoration-act-is-unnecessary/> (July 7, 2009);

Posting of Elizabeth Barrette to Gaiatribe, S. 787: Clean Water Restoration Act, <http://gaiatribe.geekuniversalis.com/2009/06/29/s-787-clean-water-restoration-act/> (June 29, 2009);

Posting by Keith Good on farmpolicy.com, Climate Change; Biofuels (Indirect Land Use); Clean Water Act; and Ag Sector Issues, <http://www.farmpolicy.com/?p=1225> (June 19, 2009, 04:23);

Posting by RJ Smith on openmarket.org, Senators Act on Clean Water Restoration Act, <http://www.openmarket.org/2009/06/19/senators-act-on-clean-water-restoration-act/> (June 19, 2009);



Committee Considers “Clean Water Restoration Act”,  
<http://www.agandfoodlaw.com/2009/06/committee-considers-clean-water.html> (June 18, 2009);

Sen. Inhofe Predicts “Demise” of Clean Water Restoration Act,  
<http://enewsusa.blogspot.com/2009/06/sen-inhofe-predicts-demise-of-clean.html> (June 18, 2009);

Clean Water Restoration Act Gains Detractors,  
<http://www.environmentalleader.com/2009/06/17/clean-water-restoration-act-gains-detractors/> (June 17, 2009);

Administration Letter Demonstrates Support for Clean Water Act,  
<http://www.agandfoodlaw.com/2009/06/administration-letter-demonstrates.html> (June 1, 2009);

Is the Clean Water Restoration Act Constitutional,  
[http://rapanos.typepad.com/my\\_weblog/2009/06/plf-calls-clean-water-restoration-act-clearly-unconstitutional.html](http://rapanos.typepad.com/my_weblog/2009/06/plf-calls-clean-water-restoration-act-clearly-unconstitutional.html) (June 1, 2009, 09:22 PM).

## **Conclusion**

The CWA is arguably the most significant environmental law applicable to the agricultural sector. Consequently, any changes to the CWA are of great importance to the nation’s agricultural community. This is especially true for any modifications to the jurisdictional scope of the CWA whether they occur statutorily or through the regulatory framework.

As noted, the CWRA has been proposed several times in recent years and has resurfaced in the 111<sup>th</sup> Congress. Congress will likely continue debating this issue in the 111<sup>th</sup> Congress, and this article may be updated as warranted.