CONGRESS SHOULD NOT RUSH TO CHANGE THE JURISDICTIONAL REACH OF THE CLEAN WATER ACT

Issue:

The Waters Advocacy Coalition opposes any legislative efforts which would expand federal Clean Water Act (CWA) jurisdiction over all waters within the United States, including all intrastate waters.

Background:

- While the Supreme Court decision, Rapanos v. United States, failed to set forth one clear standard for CWA jurisdiction, the unifying theme of all Justices was not that the Clean Water Act needed to be amended but rather that the Corps of Engineers and the EPA should issue new regulations. As Justice Breyer who sided with the dissent observed, the agencies should “write new regulations, and speedily so.”

- Legislation introduced in the House and Senate in the 109th Congress would:
  - Grant EPA and the Corps virtually unlimited regulatory control over all “intrastate waters” – essentially all wet areas within a state including groundwater, ditches, pipes, streets, gutters, and desert features.
  - Grant EPA and the Corps unrestricted authority to regulate all activities (private or public) that may affect intrastate waters, regardless of whether the activity is occurring in or may impact water at all.
  - Eliminate the existing regulatory limitations authorized by both Democratic and Republican administrations allowing commonsense uses such as prior converted cropland and waste treatment systems.
  - Fail to clarify any limits on federal authority.

Concerns with Legislation:

- EPA and the Corps of Engineers will exercise unlimited regulatory authority over all intrastate waters, including, for example, waters now considered entirely under state jurisdiction. Enormous resources will be needed to expand and defend the federal regulatory program, exacerbating an existing CWA funding gap and leading to longer permitting delays.

- Increased delays in securing permits will impede a host of economic activities commercial -- and residential real estate development, agriculture, electric transmission, transportation, mining will all be affected. Based upon Coalition members’ experiences, it takes on average between 2-3 years to obtain an individual permit. The current backlog for individual permits is estimated between 15,000 and 30,000.

- An expanded federal water program would impose an unfunded mandate on States by increasing the number of waters subject to water quality standards, the setting of Total Maximum Daily Loads (TMDLs), and expanding the permitting workload under various aspects of the state-administered programs.

- Expanded federal jurisdiction would pre-empt state and local governments from making local land and water use decisions and alter balance of federal and state authority established when the Clean Water Act was first enacted and reaffirmed during subsequent reauthorizations.

- Litigation will increase as the government and stakeholders struggle to clarify the uncertain scope of constitutional authority.

Recommendations:

- Congress should not rush to change the jurisdictional reach of the Clean Water Act.

- The members of WAC are committed to the protection and restoration of America’s wetlands resources. WAC does not believe, however, that it is in the nation’s interest to regulate ditches, culverts and pipes, desert washes, dry arroyos, farmland and treatment ponds as “waters of the United States” and therefore subjecting such waters to all of the requirements of federal regulation.

About the Waters Advocacy Coalition:

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For more information contact Virginia Albrecht or Deidre Duncan at Hunton & Williams, LLP, at 202-955-1943.
Congress Should Oppose Expansion of the Definition of Waters of the United States

Introduction

In the wake of Supreme Court decisions in both SWANCC and Rapanos, legislative efforts to address the jurisdictional scope of the Clean Water Act have been discussed, including a proposal to eliminate the word “navigable” from the CWA and replace it with a new definition of the term “waters of the United States.” If proposals similar to this, and others introduced in the 109th Congress, become law, the end result would be the most significant legislative expansion of the CWA since its adoption in 1972.

Contrary to assertions by proponents, prior legislative proposals do not “reaffirm” or “clarify” the original intent of Congress or clearly define that “waters of the United States” are subject to the CWA. Instead, eliminating ‘navigable’ from the statute and replacing it with previously proposed definitions would significantly expand the reach of the CWA by premising its jurisdiction on “the legislative power of Congress under the Constitution.” In reality, such a premise would serve only to significantly broaden the jurisdiction of the CWA in a fashion even more ambiguous than current regulations. If proposals such as this were to become law, the only way to answer whether a “water” is subject to CWA’s jurisdiction would be thorough costly and time consuming litigation.

Inevitably, such litigation would involve not just the scope of the CWA but the scope of Congress’ Constitutional authority, because that is the only limit such proposals clearly acknowledge (but do not define).

Previous legislation introduced regarding this matter contains several major flaws:

I. It expands the regulatory authority of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers to include all “intra-state waters” – essentially all wet areas within a state including impoundments, groundwater, ditches, pipes, streets, gutters, and desert features.

The proposed definition of waters of the United States provides unequivocally that “all interstate and intra-state waters and their tributaries” are subject to CWA regulation, “including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, lakes, natural ponds . . .”

Courts and federal agencies generally do not consider use of the word “including” in a statute as limiting the meaning to the enumerated items. Instead, such wording is likely to be read to mean the listed types of waters are simply examples – i.e., a non-exclusive list. Therefore, ditches, pipes, streets, gutters, man-made ponds, ephemeral
drainages, desert washes and other features could be regulated as “intrastate waters” even though they are not specifically listed.

The proposed definition also includes all “impoundments of the foregoing,” regardless of whether the impoundment is natural or man-made. The new definition would nullify existing regulations that interpret the current definition, thus wiping out various regulatory exclusions, such as waste treatment systems. The new definition would likely regulate all treatment ponds associated with any industrial activity, requiring the development of expensive new treatment systems. Read broadly, it could be applied to include any accumulation and storage of waters that otherwise would not be regulated, thus extending the reach of the statute to waters that, after thoughtful consideration by Executive Branch agencies, have been withdrawn from regulation as waters of the United States.

Finally, if all intrastate waters are regulated, the language could be interpreted to include every wet area within a state, including groundwater, which has always been regulated at the state level. Indeed, the legislation does not give any limitation on what should or should not be considered as a “water,” and therefore all waters of any kind located within any state could be swept into jurisdiction.

II. Grants EPA and the Corps authority to regulate virtually all activities (private or public) that may affect “waters of the United States,” regardless of whether the activity is occurring in or may impact water at all.

The proposed definition first broadly defines “waters of the United States” subject to the law, and then authorizes regulation “to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.” The definition of “activities affecting these waters” does not exist in current law or regulations. A reference to “activities” in the definition of “waters” diverges from the format of the CWA, which prohibits the “discharge of any pollutant” (section 301) and authorizes permits for discharges of pollutants from point sources (section 402) and discharges of dredged and fill material (section 404), not “activities.” This creates significant ambiguity. For example, this language could be read broadly to allow the regulation of all activities that “affect” waters. In other words, regardless of whether an activity is discharging a pollutant from a point source or discharging dredged and fill material into a water of the United States, the fact that the activity may impact a “water” would allow the activity to be regulated under the CWA. The introduction of undefined terminology such as “activities” and “affecting” provides federal agencies and courts with considerable room for expansive interpretation.

III. Eliminates the existing regulatory limitations authorized by both Democratic and Republican administrations allowing common sense uses, such as prior converted cropland and waste treatment systems.

The proposed definition does not include any regulatory limitations, nor does it acknowledge the agencies’ authority to create limitations. The enactment by Congress of a broad statutory definition of the term “waters of the United States” without acknowledgement of any specific limitations or of the agencies’ authority to create such limitations would make it difficult, if not impossible, for the agencies to carve out future regulatory limitations. The omission of any limitations is particularly important because
the existing rules acknowledge two important limitations covering prior converted cropland and waste treatment systems designed to meet CWA requirements. The regulated community has come to depend on both limitations and would be severely impacted by their loss.

IV. Fails to clarify any limits on federal authority.

The legislation would regulate the activities affecting these waters "to the fullest extent" of Congress' authority under the Constitution. This is an expansion of the existing CWA and its regulations, which link coverage under the Act to Congress' authority under the Commerce Clause. Thus, anything subject to the Treaty Power or reachable through the Property Clause and the Necessary and Proper Clause or other parts of the Constitution could provide a basis for jurisdiction under the legislation. The reach of such power is far from clear. Supreme Court justices and constitutional scholars have been debating the scope of each of these constitutional clauses since 1789.

V. Burdens State and Local Governments.

This broad expansion of the CWA's jurisdiction would unnecessarily burden state and local governments, even the federal government, and the regulated community. When read in tandem with other sections of the statute that apply to waters of the United States, the legislation would impose significant new administrative responsibilities. For example, states would be required to adopt water quality standards, to monitor and report on the quality of those waters and ensure attainment of applicable standards, including preparation of total maximum daily loads and allocations where necessary. Because most states now possess National Pollutant Discharge Elimination System (NPDES) permitting authority, they will also need to issue many new NPDES permits for any point source discharges to the expanded inventory of "waters" and potentially devise regulatory programs for "activities affecting these waters." The consequences on state non-point source control programs are difficult to determine, but they could be equally dramatic. Nothing in the bills suggests that the proponents have considered the wisdom of imposing such requirements or how to pay for them.

Local governments will also bear a heavier burden because they are both the regulator and regulated party. Many states require, as part of their state water acts, primary implementation at the local level (i.e. coastal zone management acts in Alaska and California – fresh water acts in Massachusetts, Connecticut, Florida and Maryland and state coastal wetlands acts in Virginia).

Changes at the state level would impact comprehensive land use plans, floodplain regulations, building and/or special codes, watershed and stormwater plans, etc. Local governments, both large and small, are also responsible for a number of public infrastructure projects that will be impacted by proposed changes, including water supply, solid waste disposal, road and drainage channel maintenance, stormwater detention, mosquito control and construction projects. Local government efforts to carry out maintenance of government-owned buildings (hospitals, schools, municipal offices, etc.) could also be adversely impacted.
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FREQUENTLY ASKED QUESTIONS ABOUT CLEAN WATER ACT JURISDICTION

Q1: What was the first United States Supreme Court case to examine Clean Water Act (CWA) jurisdiction?

A1: On December 4, 1985, the United States Supreme Court in a unanimous decision, United States v. Riverside Bayview Homes Inc., 474 U.S. 121 (1985) (Riverside Bayview), upheld the United States Army Corps of Engineers’ (Corps’) rulemaking decision to include “wetlands adjacent to navigable waters or interstate waters and their tributaries” within the definition of “waters of the United States.” Id. at 129. The Court found “Congress chose to define the waters covered by the Act broadly.” Id. at 133. The Court deferred to the Corps’ rulemaking conclusion determining adjacent wetlands that are “inseparably bound up with the ‘waters of the United States’” are themselves jurisdictional. Specifically, the Court concluded:

In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment [in the rulemaking] about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

Id. at 134.

Q2: What was the status of agency assertions of jurisdiction under the CWA prior to the United States Supreme Court’s decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al., 531 U.S. 159 (2001) (SWANCC)?

A2: In 1986, the Corps issued the “Migratory Bird Rule” extending federal CWA jurisdiction beyond “interstate waters” to all “intrastate waters” which “are or could be used as habitat” by migratory birds. In other words, CWA jurisdiction was based upon the potential presence of birds only. Moreover, under the “bird rule,” the agencies did not need to identify whether a waterbody was an “adjacent” wetland or a tributary. The sole test was potential bird use. The “bird rule” was ultimately challenged and rejected by the United States Supreme Court in the SWANCC decision. Furthermore, the Court believed that the “bird rule” raised serious constitutional questions
under the Commerce Clause of the U.S. Constitution. Therefore, legislation that purports to "restore" jurisdiction to that which was in existence prior to SWANCC would likely authorize federal control as broad or broader than the "bird rule" -- and would likely be unconstitutional.

Q3: How did the United States Supreme Court in SWANCC describe Congress's intent regarding jurisdiction under the CWA?

A3: On January 9, 2001, the United States Supreme Court issued the SWANCC decision rejecting the Corps' assertion of jurisdiction over isolated ponds (former gravel pits that collected rainwater) based upon the Migratory Bird Rule. The Court noted that Riverside Bayview concerned "adjacent" wetlands; whereas the SWANCC case concerned "isolated" ponds. The Court distinguished the wetlands in Riverside Bayview from the isolated ponds in SWANCC, emphasizing that it was the "significant nexus between the wetlands and navigable waters" that informed our reading of the CWA in Riverside Bayview." Id. at 167. While the SWANCC Court acknowledged that the word "navigable" was not to be construed in a traditional or literal sense, Chief Justice Rehnquist cautioned "it is one thing to give a word limited effect and quite another to give it no effect whatever." Id. at 172.

The Court also noted there were "significant constitutional questions raised by" the Corps' assertion of jurisdiction over all intrastate waters based upon the potential use for migratory birds. Id. at 174. Indeed, the SWANCC Court determined that claiming jurisdiction "over ponds and mudflats would result in a significant impingement of the States' traditional and primary power over land and water use." Id. Further, the Court cited the CWA's own language as expressing a desire to "recognize, preserve, and protect the primary responsibilities of States... to plan the development and use... of land and water resources..." Id. (citing 33 U.S.C. § 1251(b) of the CWA).

Q4: Why was there confusion after the SWANCC decision?

A4: Prior to SWANCC, federal agencies had been regulating all waters, isolated, adjacent, or otherwise, based upon the potential use by migratory birds. Since birds land in almost all water in the United States, the agencies did not need to make detailed factual findings about whether a water was "isolated," "adjacent," or a "tributary." Instead, if a bird could use the area, the area was subject to federal control. SWANCC invalidated reliance on the bird rule. Therefore, the agencies were forced to rely on their existing regulations to establish jurisdiction. These regulations broadly cover all "adjacent wetlands" and "tributaries." However, the term "adjacent" was vaguely defined, and the term "tributary" had no regulatory definition. Without definitions, the agencies after SWANCC stretched the meaning of these vague or undefined terms to reach previously "isolated" waters.
Q5: What did the Bush Administration do in response to the SWANCC decision?

A5: On January 15, 2003, the Environmental Protection Agency (EPA) and the Corps issued an “Advance Notice of Proposed Rulemaking (ANPRM) on the Clean Water Act Regulatory Definition of ‘Waters of the United States.’” 68 Fed. Reg. 1991 (January 15, 2003). The ANPRM was not a proposed rule. Rather, it did nothing more than solicit public comment on whether a rulemaking was necessary. In this regard, the ANPRM noted “SWANCC eliminates CWA jurisdiction over isolated, intrastate, non-navigable waters where the sole basis for asserting jurisdiction is the actual or potential use of the waters as habitat for migratory birds . . .” Id. at 1994. Indeed, this is the same statement of the holding of the case made by the Clinton Administration in their guidance memorandum on SWANCC dated January 30, 2001. The agencies’ next step was to seek comments on whether there were other factors that could be used in asserting jurisdiction over these waters. In so doing, the agencies asked if there should be a definition of “isolated waters” and, if so, what factors should be used in determining whether a water is isolated or not.

Attached to the ANPRM was a “Joint Memorandum” providing guidance on SWANCC. The agencies noted because SWANCC limited use of the migratory bird rule, “it has focused greater attention on CWA jurisdiction generally, and specifically over tributaries to jurisdictional waters and over wetlands that are ‘adjacent wetlands.’” Id. at 1996. In other words, a water was not considered “isolated” if it was “adjacent” to a “tributary.” Therefore, such an analysis raised the question what do “adjacent” and “tributary” mean?

Q6: Did the ANPRM or Joint Memorandum limit the agencies’ jurisdiction to traditional navigable waters?

A6: No. The Joint Memorandum unequivocally stated that “[f]ield staff should continue to assert jurisdiction over traditional navigable waters and adjacent wetlands and, generally speaking, their tributary systems and adjacent wetlands.” Id. at 1998. Any statistics based upon the assumption that the Joint Memorandum limited jurisdiction to traditional navigable waters are similarly false. In short, the Joint Memorandum did NOT itself find SWANCC as holding that CWA jurisdiction is limited to traditional navigable waters, nor did the Joint Memorandum limit jurisdiction to traditional navigable waters as a matter of policy. Instead, the Joint Memorandum merely surveyed cases that had interpreted SWANCC, some of which found broad jurisdiction and others of which found narrow jurisdiction. The Joint Memorandum ultimately concluded that field staff should not assert jurisdiction “over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the Migratory Bird Rule.” Id. at 1997. In addition, the Joint Memorandum stated that field staff should seek formal project-specific headquarters approval prior to
asserting jurisdiction over waters based on other factors listed in the regulations.

The agencies ultimately withdrew the ANPRM and decided not to propose a rule to amend their regulations to address key terms.

Q7: **How did the Bush Administration interpret the SWANCC decision in litigation?**

A7: The Bush Administration asserted the broadest possible view of jurisdiction following SWANCC. It argued, as did the Clinton Administration before it, that the SWANCC case was limited to invalidating the assertion of jurisdiction over isolated waters based upon the migratory bird rule. In turn, the Bush Administration argued that if a wetland was “hydrologically connected” to navigable waters, no matter how tenuous, remote, or speculative the connection, it was considered an “adjacent” wetland and therefore covered by the CWA. Similarly, most non-wetland features connected hydrologically in some form over some distance to traditional navigable waters were deemed tributaries and therefore not isolated. Indeed, ditches which were previously non-jurisdictional were now deemed “tributaries,” and wetlands “adjacent” to the ditches were “adjacent wetlands.”

Q8: **What did the Rapanos Court decide?**

A8: The consolidated cases of Rapanos v. United States (Rapanos) and Carabell v. U.S. Army Corps of Engineers (Carabell), Rapanos v. United States, 126 S.Ct. 2208 (2006), once again examined the extent of federal jurisdiction under the CWA. Rapanos rejected the agencies “any hydrological connection” theory of jurisdiction. The case involved three wetland parcels (two adjacent to a ditch, one adjacent to a river) located twenty miles away from the nearest navigable-in-fact water. Carabell involved a wetland about a mile away from traditional navigable water. The wetland was near an upland ditch that is part of the municipal storm drainage system, and a berm separated the wetland from the ditch. In both cases, the Bush Administration argued that the wetlands at issue were not “isolated” but rather “adjacent” jurisdictional waters because some “hydrological connection” to traditional navigable waters could be discerned.

All nine Justices rejected arguments that the CWA regulated only traditional navigable waters. Therefore, it is clear that, even under the most conservative Justices’ view, CWA jurisdiction extends well beyond traditional navigable waters.

Importantly, a majority of the Justices rejected the Corps’ “any hydrological connection” theory of jurisdiction. Those five Justices, however, did not agree on what the proper scope for determining jurisdiction is. Although there is much debate on how to determine the precise holding of the case, it is clear that Justice Kennedy’s opinion (which cast the necessary fifth vote to
reject the Government's theory) is critical to determine the extent of "navigable waters" covered by the CWA.

Justice Kennedy found the Government's "any connection" theory raised significant constitutional concerns. He found instead the "significant nexus" standard used in Riverside Bayview and SWANCC is the operative standard for determining whether a non-navigable water or wetland should be regulated under the CWA. "Absent more specific regulations ... the Corps must establish a significant nexus on a case-by-case basis. . . ."

Kennedy was not the only Justice to call for new agency regulations. Chief Justice Roberts noted rulemaking:

would have [given the agencies] plenty of room to operate in developing some notion of the outer bound to the reach of their authority. . . . Rather than providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot is another defeat for the agency.

Moreover, as Justice Breyer of the dissent also observed, the agencies should "write new regulations, and speedily so."

**Q9: Must Congress amend the CWA in response to the United States Supreme Court cases?**

**A9:** No. One of the few similarities among all sides of the Rapanos decision is the call for further regulation, not an alteration of the CWA itself. The CWA provides sufficiently broad authority to define jurisdictional waters and to control pollution in those waters. In this regard, the aforementioned Supreme Court cases uphold federal authority over "adjacent" wetlands (Riverside Bayview); reject authority to regulate "isolated" ponds (SWANCC); and reject limiting the CWA to traditional, navigable-in-fact waters (Rapanos). The Court also rejected the agencies' attempt to reach all intrastate waters with a hydrological connection, the position they asserted in Rapanos. Accordingly, the problem is not with the statute and its use of the term "navigable," but with the agencies' regulations which fail to clearly define the key terms under these cases: "isolated," "adjacent," "significant nexus," and "tributary." These terms, like the agencies' technical decision to regulate adjacent wetlands upheld in Riverside Bayview, should be defined by the agency through the notice and comment process of a rulemaking.

**Q10: Does removing the term "navigable" from the statute clarify the intent of Congress in passing the CWA in 1972?**

**A10:** No. It is clear that Congress intended to use the term "navigable waters" when it passed the CWA in 1972. The conference report specifically states that "Congress intends the term 'navigable waters' be given its broadest
possible constitutional interpretation unencumbered by agency
determinations which have been made or may be made for administrative
purposes.” S. Rep. No. 92-1236, at 144 (1972), reprinted in 1
CONGRESSIONAL RESEARCH SERVICE, LEGISLATIVE HISTORY OF THE WATER POLLUTION
CONTROL ACT AMENDMENTS OF 1972, at 327 (1973). Taking the term
“navigable” out of the statute would be the exact opposite of what Congress
intended, as their emphasis in 1972 was specifically on using the term
“navigable waters.” Deleting the term from the statute does not clarify the
original intent; it changes it.

Q11: What happens if the term “navigable” is removed from the CWA?

A11: Removing the term “navigable waters” from the statute would change the
original intent of Congress in enacting the CWA. Such an amendment would
also raise serious questions about its constitutionality, impair ordinary
permitting decisions made by Corps personnel in the field, and definitely lead
to more litigation raising Commerce Clause issues. Since 1824, it has been
well-settled law that the federal regulatory authority over “navigable waters”
is based on Congress’s power to regulate navigation under the Commerce
Clause. In making the statement in the conference report about regulating
navigable waters, Congress was exercising its authority under the Commerce
Clause. Maintaining the term “navigable waters” makes it clear that, while
Congress has asserted its broad authority under the Commerce Clause, this
jurisdiction is not limitless.

Moreover, deleting the term “navigable” from the statute would call into
question section 101(b) of the CWA declaring Congress’s intent for States to
have the primary responsibility for land and water decisions. If all waters are
subject to federal control, then few if any waters would be controlled by the
State. The term “navigable” preserves a balance with the States.

Q12: Does the CWA recognize the States’ primary rights and
responsibilities over land and water resources?

A12: Yes. CWA section 101(b) states that “[i]t 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, and to consult with the Administrator in the exercise of his
authority under this chapter.” CWA § 101(b). In SWANCC, the Court
decided to extend federal jurisdiction over ponds and mudflats falling within
the "Migratory Bird Rule" because to do so would result in a significant
impingement of the States’ traditional and primary power over land and
water use. The Court noted that regulation of land use is a function
traditionally performed by local governments, and Congress chose to
preserve and protect the primary responsibilities of the States in the CWA.
Proposals that would grant federal control over all “intrastate waters” would
readjust the federal-state balance of the CWA and suffer from the same legal
infirmities as the “bird rule.”

Q13: What does it mean to enact legislation that “restores CWA authority”
to that which existed prior to the decision in SWANCC?

A13: Prior to SWANCC, the agencies asserted jurisdiction based upon a
waterbody’s potential use for migratory birds. Accordingly, all water
everywhere that could be used by birds was subject to federal jurisdiction.
The Supreme Court found that there were significant constitutional questions
raised by the breadth of jurisdiction under this standard, in addition to ruling
that this standard went far beyond the jurisdiction established by Congress in
the CWA. Any legislation similar to the “migratory bird rule” would face
similar constitutional challenges and protracted, costly litigation, resulting in
future regulatory uncertainty hindering the Corps from making permitting
decisions.

Q14: Is the CWA sufficient to protect aquatic resources?

A14: Yes. The CWA is arguably the most comprehensive environmental law in the
nation. It regulates pollution at its source, whether it is a discharge of a
pollutant from an industrial pipe, a wastewater treatment plant, or a
concentrated animal feeding operation (CAFO). Congress devised a
comprehensive regulatory system at both the federal and state levels for
issuance of permits and state water quality standards. In addition, the
permit process has teeth, and can result in substantial fines or even jail for
those who violate the Act’s no discharge mandate. Moreover, individual
parts of the CWA protect specific aquatic resources, such as estuaries, the
Great Lakes, and beaches. Congress never envisioned that every
conveyance that could possibly carry water had to be regulated as a water of
the United States for the CWA to be protective. On the contrary, the existing
CWA broadly regulates pollution without federalizing all areas that are wet.

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For more information, contact Virginia Albrecht or Deidre Duncan at Hunton & Williams LLP at
(202) 955-1919.