



***Legal Challenges to the Clean
Water Rule:***

Which Court?

What Questions?

What Timeframe?

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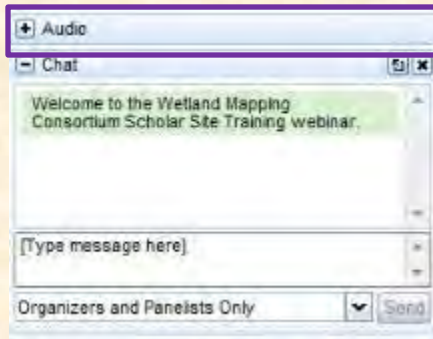
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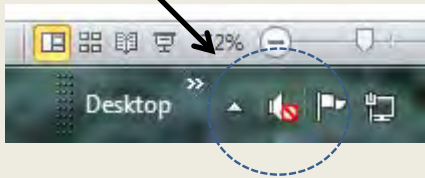


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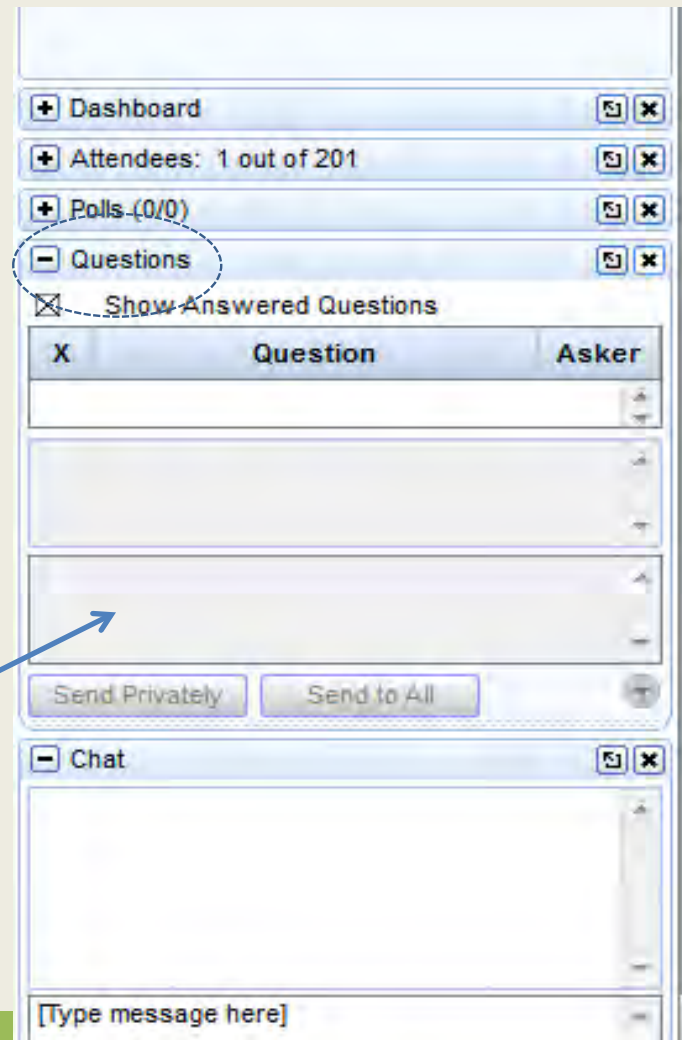


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Presenters



- **Roy Gardner, Professor of Law and Director, Institute for Biodiversity Law and Policy, Stetson University College of Law**
- **Kim Diana Connolly, Professor, Director of Clinical Legal Education, Vice Dean for Legal Skills, SUNY Buffalo Law School**

Moderator



- **Jeanne Christie, Executive Director, Association of State Wetland Managers**

Today's Agenda



- Introductions, Jeanne Christie (10 Minutes)
- How We Got Here- Clean Water Act Jurisdiction 1899 to June 2015, Kim Diana Connolly (15 Minutes)
- Clean Water Rule Litigation, Roy Gardner (25 Minutes)
- Riders to Appropriations Bills to Stop the Clean Water Rule, Kim Diana Connolly (10 Minutes)
- Discussion, All (20 Minutes)

Which Waters are Jurisdictional?

A quick history (spanning from 1899 to this June)



Historic - Rivers and Harbors Act of 1899

- 33 U.S.C. 403. **"Construction of bridges, causeways, dams or dikes generally; exemptions.** That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited..."



RHA “Navigability” (33 C.F.R. § 329.4)

- “Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.”

Clean Water Act Section 404 (1972)

Section 404(a) "The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites."

Understanding “Navigable Waters”



Clean Water Act, § 502

General Definitions

“(7) The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”

- So....different from traditional notions of navigability under the Rivers and Harbors Act (33 C.F.R. Pt. 329)

Early Interpretation of CWA § 404 Breadth

- **NRDC v.
Callaway
(DDC 1975)**

- “By defining ‘navigable waters’ in the Federal Water Pollution Control Act Amendments of 1972 to mean ‘waters of the United States,’ Congress intended to assert federal jurisdiction over the nation's waters to the maximum extent possible under the commerce clause.”

“Waters of the United States”

33 C.F.R. § 328(a)

The term **“waters of the United States”** means

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - i. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - iii. Which are used or could be used for industrial purpose by industries in interstate commerce;

“Waters of the United States”

33 C.F.R. § 328(a) CONT.

The term **“waters of the United States”** means

4. All impoundments of waters otherwise defined as waters of the United States under the definition;
5. Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
6. The territorial seas;
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (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.
8. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA.

First Supreme Court Interpretation

- *Riverside Bayview Homes* (unanimous, 1985)
- “The significance of Congress’ treatment of the Corps’ § 404 jurisdiction in its consideration of the Clean Water Act of 1977 is twofold. First, the scope of the Corps’ asserted jurisdiction over wetlands was specifically brought to Congress’ attention, and Congress rejected measures designed to curb the Corps’ jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of ‘navigable waters.’”

“Migratory Bird Rule”

- Preambles to 1986 Corps and 1988 EPA regulations defining “waters of the United States,” 51 Fed. Reg. 41317 (1986) and 53 Fed. Reg. 20765 (1988)
- Declared as jurisdictional waters that are or may be used by migratory bird habitat



SWANCC

- Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (2001)
- “We hold that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner’s balefill site pursuant to the ‘Migratory Bird Rule,’ 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under §404(a) of the CWA.”

ANPRM

- 2003 Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States”

<http://www.epa.gov/owow/wetlands/swanccnav.html>

- Over 133,000 comments
- Withdrawn December 2003

2004 GAO Report

<http://www.gao.gov/new.items/d04297.pdf>

GAO

United States General Accounting Office

Report to the Chairman, Subcommittee
on Energy Policy, Natural Resources and
Regulatory Affairs, Committee on
Government Reform, House of
Representatives

February 2004

WATERS AND WETLANDS

Corps of Engineers
Needs to Evaluate Its
District Office
Practices in
Determining
Jurisdiction



GAO-04-297

Rapanos/Carabell



No clear result...

- Justices Scalia, Roberts, Thomas, and Alito remanded, concluding the phrase “waters of the United States” (and use of the traditional phrase “navigable waters”) includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams,” “oceans, rivers, [and] lakes,” ... and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. A wetland may not be considered “adjacent to” remote “waters of the United States” based on a mere hydrologic connection. Called for regulation.
- Justice Kennedy also remanded, but concluded that a water or wetland is jurisdictional under the Act if it possesses a “significant nexus” to waters that are navigable in fact and that nexus must be assessed in terms of the Act’s goals and purposes. The requisite nexus thus exists if the wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense. Noted that absent more specific regulations, the agencies must establish a significant nexus on a case-by-case basis.
- Justices Stevens Souter, Ginsburg, and Breyer dissented.



Clean Water Act Jurisdiction
Following the U.S. Supreme Court's Decision
in
Rapanos v. United States & Carabell v. United States



This memorandum¹ provides guidance to EPA regions and U.S. Army Corps of Engineers ["Corps"] districts implementing the Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States² (herein referred to simply as "Rapanos") which address the jurisdiction over waters of the United States under the Clean Water Act.³ The chart below summarizes the key points contained in this memorandum. This reference tool is not a substitute for the more complete discussion of issues and guidance furnished throughout the memorandum.

Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters

WHERE WE ARE — U.S. ARMY CORPS OF ENGINEERS





FEDERAL REGISTER

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Part II

Department of Defense

Department of the Army, Corps of Engineers

33 CFR Part 328

Environmental Protection Agency

40 CFR Parts 110, 112, 116, et al.

Definition of "Waters of the United States" Under the Clean Water Act;
Proposed Rule



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460**

**OFFICE OF THE ADMINISTRATOR
SCIENCE ADVISORY BOARD**

September 30, 2014

EPA-SAB-14-007

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Subject: Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act"

Dear Administrator McCarthy:

As part of its statutory duties, the Science Advisory Board (SAB) may provide advice and comment to you on the adequacy of the scientific and technical basis of certain planned EPA actions. The Environmental Research, Development, and Demonstration Authorization Act of 1978 (ERDDAA) requires the agency to make available to the SAB proposed criteria documents, standards, limitations, or regulations provided to any other Federal agency for formal review and comment, together with relevant scientific and technical information on which the proposed action is based. The SAB may then provide advice and comments on the adequacy of the scientific and technical basis of the proposed action.

This letter documents the SAB's activities related to the proposed rule "Definition of 'Waters of the United States' Under the Clean Water Act" released on March 25, 2014, and provides advice and comments related to that proposal. Briefly, the SAB finds that the available science provides an adequate scientific basis for the key components of the proposed rule. Although water bodies differ in degree of connectivity that affects the extent of influence they exert on downstream waters (i.e., they exist on a "connectivity gradient"), the available science supports the conclusion that the types of water bodies identified as waters of the United States in the proposed rule exert strong influence on the physical, chemical, and biological integrity of downstream waters. Additional comments regarding the Board's major findings and recommendations to strengthen the science supporting the rule are provided below.



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Part II

Department of Defense

Department of the Army, Corps of Engineers

33 CFR Part 328

Environmental Protection Agency

40 CFR Parts 110, 112, 116, *et al.*

Clean Water Rule: Definition of "Waters of the United States"; Final Rule



ASWM Upcoming webinars

- **Legal Challenges to the Clean Water Rule** - 11/19/15
- **Novel Ecosystems and Restoration** - 11/19/15
- **NWI Standards & Dataset** - 12/9/15
- **Climate-Smart Conservation for Wetlands** - 12/9/15
- **Improving Wetland Restoration "Success": What We've Learned So Far** - 12/15/15

For a complete list of ASWM webinars, [click here](#).

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Clean Water Act

The federal Clean Water Act (CWA) is the main piece of federal legislation that protects the Nation's waters. Within the CWA, there are a number of sections that specifically address protection or regulation of wetlands. For example, Section 303 addresses [water quality standards](#); Section 401 includes [401 Certification](#)—to condition permits; Section 402 addresses the National Pollutant Discharge Elimination System (NPDES); and Section 404 includes the dredge and fill permitting program as well as [State Assumption](#).

On Wednesday, May 27, 2015, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers released the [Clean Water Rule](#) to clarify jurisdiction over streams and wetlands. The Association of State Wetland Managers (ASWM) has been following the rulemaking process for more than two years, and has been actively involved with other organizations in interpreting the proposed clarifications and their implications for managing wetlands, streams, floodplains and water quality.

The Clean Water Act was weakened by the US Supreme Court after the split decision known as the Rapanos and Carabel Decision in 2006, which followed another complex debate known as the SWANCC Decision in 2001. The intent of the proposed rule is to clarify jurisdiction for the protection of the nation's water resources in response to multiple requests from multiple sectors, including the agricultural community, consultants, regulators, developers, natural resource managers and conservation groups.

The Association of State Wetland Managers will be closely following the roll-out of the Rule and will be posting news stories and other useful information about it as we receive them to our website here. To view information about the rule on the EPA website, [click here](#).

[Clean Water Rule and Related documents \(EPA\)](#)

[Clean Water Rule \(EPA\)](#)

[Statement from ECOS, ACWA and ASWM Regarding Clean Water Rule.](#)

[Clean Water Rule Webinar: Understanding Legal Challenges and Next Steps for the Clean Water Rule](#)



Jeanne Christie Photo

The Clean Water Rule



Congress passed the Clean Water Act in 1972 to stop the pollution of America's waterways and protect drinking water.



Two Supreme Court decisions exposed a loophole in the Clean Water Act, allowing the pollution of certain waters, including currently unprotected wetlands.

What Can Be Done?



The Clean Water Rule will restore protections to small streams and wetlands, protecting the drinking water of **one in three** Americans.



That means: **117 million** people have protections for their drinking water.

80% of Americans favor the Clean Water Rule which will protect our streams and wetlands, safeguarding the waterways our children and grandchildren use to drink, swim and play in for generations to come.

#DitchTheRule

MAKE YOUR VOICE HEARD DITCHTHERULE.FB.ORG



The EPA wants to regulate all water, everywhere.

SAY NO TO THE CLEAN WATER ACT EXPANSION

WOTUS Lawsuits: Overview

- Number of Lawsuits
- Plaintiffs/Petitioners
- States Challenging or Supporting the Rule
- Courts
- Question about Jurisdiction
- Legal Claims
 - Procedural
 - Clean Water Act (statutory)
 - Constitutional
 - Other
- N.D. District Court's Preliminary Injunction
- Sixth Circuit's Stay

Number of Lawsuits

- United States District Courts
 - At least 17 cases filed (1 of which was voluntarily dismissed)
- United States Circuit Courts of Appeals
 - At least 22 petitions for review filed

Plaintiffs/Petitioners

States/Industry/Associations

➤ American Farm Bureau Federation

- American Forest & Paper Association
- American Petroleum Institute
- American Road and Transportation Builders Association
- Greater Houston Builders Association
- Leading Builders of America
- Matagorda County Farm Bureau
- National Alliance of Forest Owners
- National Association of Home Builders
- National Association of Manufacturers
- National Association of Realtors
- National Cattlemen's Beef Association
- National Corn Growers Association
- National Mining Association
- National Pork Producers Council
- National Stone, Sand, and Gravel Association
- Public Lands Council
- Texas Farm Bureau
- U.S. Poultry & Egg Association

➤ Georgia

- West Virginia
- Alabama
- Florida
- Indiana
- Kansas
- Kentucky
- North Carolina Department of Environment and Natural Resources
- South Carolina
- Utah
- Wisconsin

➤ Chamber of Commerce of the United States of America

- National Federation of Independent Business
- State Chamber of Oklahoma
- Tulsa Regional Chamber
- Portland Cement Association

Plaintiffs/Petitioners (continued)

States/Industry/Associations

- North Dakota
 - Alaska
 - Arizona
 - Arkansas
 - Colorado
 - Idaho
 - Missouri
 - Montana
 - Nebraska
 - Nevada
 - South Dakota
 - Wyoming
 - New Mexico Environment Department
 - New Mexico State Engineer
- Oklahoma
- Southeastern Legal Foundation, Inc.
 - Georgia Agribusiness Council, Inc.
 - Greater Atlanta Homebuilders Association, Inc.
- Texas
 - Louisiana
 - Mississippi
- Utility Water Act Group
- Washington Cattlemen's Association
 - California Cattlemen's Association
 - Oregon Cattlemen's Association
 - New Mexico Cattle Growers Association
 - New Mexico Wool Growers, Inc.
 - New Mexico Federal Lands Council
 - Coalition of Arizona/New Mexico Counties for Stable Economic Growth
 - Duarte Nursery, Inc.
 - Pierce Investment Company
 - LPF Properties, LLC.
 - Hawkes Company, Inc.
- Murray Energy Corporation

Plaintiffs/Petitioners (continued)

States/Industry/Associations

- Ohio
 - Attorney General Bill Schuette on Behalf of the People of Michigan
 - Tennessee
- Arizona Mining Association
 - Arizona Farm Bureau
 - Association of Commerce and Industry
 - New Mexico Mining Association
 - Arizona Chamber of Commerce & Industry
 - Arizona Rock Products Association
 - New Mexico Farm & Livestock Bureau
- Association of American Railroads
 - Port Terminal Railroad Association
- Southeast Stormwater Association
 - Florida Stormwater Association
 - Florida Rural Water Association, Inc.
 - Florida League of Cities
- American Exploration and Mining Association
- Texas Alliance for Responsible Growth, Environment and Transportation
- Michigan Farm Bureau

Plaintiffs/Petitioners (continued)

Environmental Organizations

- National Wildlife Federation
- Natural Resources Defense Council, Inc.
- Puget Soundkeeper Alliance
 - Sierra Club
- Waterkeeper Alliance, Inc.
 - Center for Biological Diversity
 - Center for Food Safety
 - Humboldt Baykeeper
 - Russian Riverkeeper
 - Monterey Coastkeeper
 - Snake River Waterkeeper, Inc.
 - Upper Missouri Waterkeeper, Inc.
 - Turtle Island Restoration Network, Inc.
- One Hundred Miles
 - South Carolina Coastal Conservation League

States Challenging or Supporting the Rule

States Challenging the Rule

Alabama	New Mexico (Environment
Alaska	Department and State
Arizona	Engineer)
Arkansas	North Carolina (Department
Colorado	of Environment and Natural
Florida	Resources)
Georgia	North Dakota
Idaho	Ohio
Indiana	Oklahoma
Kansas	South Carolina
Kentucky	South Dakota
Louisiana	Tennessee
Michigan	Texas
Mississippi	Utah
Missouri	West Virginia
Montana	Wisconsin
Nebraska	Wyoming
Nevada	

States Supporting the Rule

Connecticut
District of Columbia
Hawaii
Massachusetts
New York
Oregon
Vermont
Washington

Courts

➤ District Courts

- Northern District of Georgia
- Southern District of Georgia
- District of Minnesota
- District of North Dakota
- Southern District of Ohio
- Northern District of Oklahoma
- Southern District of Texas
- Northern District of West Virginia

- On October 13, 2015, the U.S. Judicial Panel on Multidistrict Litigation denied the motion to centralize the pretrial proceedings in the district court cases

➤ Circuit Courts of Appeals

- Second Circuit
- Fifth Circuit
- Sixth Circuit
- Eighth Circuit
- Ninth Circuit
- Tenth Circuit
- Eleventh Circuit
- District of Columbia Circuit

- Most of the circuit cases were consolidated in the Sixth Circuit

Question about Jurisdiction

- Do the District Courts or the Circuit Courts have jurisdiction?
- Why the uncertainty?
- Oral argument before the Sixth Circuit is set for December 8, 2015

M. Judicial Review

Section 509(b)(1) of the CWA provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator. The Supreme Court and lower courts have reached different conclusions on the types of actions that fall within section 509. *Compare, E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977); *NRDC v. EPA*, 673 F.2d 400 (D.C. Cir. 1982); *National Cotton Council of Amer. v. EPA*, 553 F.3d 927(6th Cir. 2009) *cert denied* 559 U.S. 936 (2010) *with, Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008); *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012) *cert denied* 559 U.S. 936 (2010).

80 Fed. Reg. 37104

Legal Claims

- Procedural violations associated with the rulemaking process
 - Substantial changes to proposed rule without additional public comment
 - Final rule is not a “logical outgrowth” of the proposed rule
 - Failed to make all information relied upon available to the public
 - Failed to respond appropriately to comments
- Clean Water Act (statutory) violations
 - Exceeds the agencies’ CWA authority
 - Inconsistent with CWA’s plain language
- Constitutional violations
 - Commerce Clause
 - Tenth Amendment
 - Due Process Clause
- Other violations
 - Regulatory Flexibility Act
 - Unfunded Mandates Reform Act
 - National Environmental Policy Act
 - Anti-Lobbying Act
 - Executive Orders

District Court's Preliminary Injunction

- On August 27, 2015, the U.S. District Court for the District of North Dakota granted the plaintiffs' motion for preliminary injunction
- Court weighed four factors:
 - “(1) the threat of irreparable harm to the movant; (2) the balance of harms; (3) the movant's likelihood of success on the merits; and (4) the public interest”
- Court's order highlights:
 - Jurisdictional issue
 - States are likely to succeed on the merits
 - Agencies violated CWA authority
 - Agencies did not comply with rulemaking requirements
- Limited scope of the injunction

Sixth Circuit's Order of Stay

- On October 9, 2015, the Sixth Circuit stayed the Rule nationwide
- Court balanced four factors:
 - “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay”
- Court's order highlights:
 - Potential problems with portions of the Rule
 - Tributaries, adjacent waters, significant nexus, distance limitations
 - Facially suspect rulemaking process
 - Not a “logical outgrowth”
 - Lack of scientific support
- Dissent

Appropriations

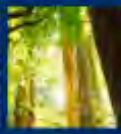
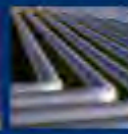


FY2016 Approps Status

- None of the twelve FY2016 regular appropriation bills that fund the federal government have been enacted yet. A Continuing Resolution (Public Law No. 114-53) was passed to extend appropriations to federal agencies until Dec. 11, 2015 (funds most projects and activities near the FY2015 levels). This approach to funding is not unusual. But things are gearing up for an omnibus bill.

Rider Status

- The House approved the Environment Appropriations bill on June 18, 2015. Section 422 of the House appropriations bill states that none of the funds under the Act “may be used to develop, adopt, implement, administer, or enforce any change to the regulations and guidance . . . pertaining to the definition of waters under the jurisdiction of the Federal Water Pollution Control Act,”
- The Senate approved a different appropriations bill on June 23, 2015 in which Section 421 of the Senate bill mirrors Section 422 of the corresponding House bill.
- Discussions but nothing clear about where it may go on an omnibus.



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APPROPRIATIONS:

Ryan looks to detangle refugee fears from omnibus

Hannah Northey and Geof Koss, E&E reporters

E&E Daily: Wednesday, November 18, 2015

House Speaker Paul Ryan (R-Wis.) yesterday moved to head off what could be an early major hurdle to his leadership by separating omnibus negotiations to prevent a government shutdown from GOP opposition to the president's welcoming of Syrian refugees.

Asked whether he would turn to the omnibus to address the refugee issue, Ryan responded, "We don't want to wait that long. We want to -- we want to work and act on this faster than that."

Top Democrats in the Senate appeared to back the new House leader.

"I think Speaker Ryan has the right idea," Senate Minority Leader Harry Reid (D-Nev.) told reporters on Capitol Hill. "He's said he's going to leave any refugee legislation separate and apart from the omnibus."

Ryan is facing pressure from Republicans following terrorist attacks in Paris to scuttle the president's plan to resettle up to 10,000 Syrian refugees in the United States. Republicans including Alabama Sens. Jeff Sessions and Richard Shelby **called** on Senate appropriators this week to place conditions on any spending bill that includes funds for refugee resettlement.

But Ryan signaled yesterday he would keep the issues separate. Ryan told reporters that while the United States needs to accept refugees, there needs to be more oversight to ensure terrorists aren't infiltrating their ranks. He also said he had assembled a task force to begin consideration of a bill to deal with the refugee crisis.

Other Related Activities



114TH CONGRESS
1ST SESSION

S. 1140

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term “waters of the United States”, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 30, 2015

Mr. BARRASSO (for himself, Mr. DONNELLY, Mr. INHOFE, Ms. HEITKAMP, Mr. ROBERTS, Mr. MANCHIN, Mr. SULLIVAN, Mr. ROUNDS, Mr. BLUNT, Mr. MCCONNELL, Mrs. CAPITO, Mrs. FISCHER, and Mr. HOEVEN) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term “waters of the United States”, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**



NOV 16 2015

MEMORANDUM

TO: EPA DEPUTY ASSISTANT ADMINISTRATOR FOR WATER
EPA REGIONAL ADMINISTRATORS (REGIONS 1 – X)
USACE CHIEF OF ENGINEERS
USACE DIVISION AND DISTRICT ENGINEERS

SUBJECT: Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule; Improving Transparency and Strengthening Coordination

On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the Clean Water Rule nationwide pending further action of the court. The agencies are fully complying with the stay.¹ We look forward to vigorously defending the merits of the Clean Water Rule, which we continue to believe is fully consistent with the law and based on the best available peer-reviewed science. We are confident that, when implemented, the new rule will make the process of identifying waters protected under the Clean Water Act (CWA) easier to understand, more predictable, and more consistent with current science, while protecting the streams and wetlands that form the foundation of our nation's water resources.

Even as we defend the Clean Water Rule in court, we intend to move forward with measures to improve implementation of the national CWA section 404 program that were announced concurrent with the Rule. It is critical that we capitalize on the momentum already established to improve transparency, strengthen our coordination processes, increase public participation, utilize the best available science and technical data for making case-specific significant nexus determinations, and to promote public health and environmental protection for all Americans who depend on reliable and abundant sources of clean water.

Improving Transparency: A key component of making the agencies' programs more consistent, predictable, and environmentally effective is to increase the public's access to information about how our decisions are made. As reflected in our joint memorandum to

¹ See joint EPA/Army memorandum issued October 10, 2015.



Santeri Salokivi: *The Wait*, 1911

Discussion



Thank you !

