



May 28, 2008

Honorable James L. Oberstar, Chairman  
Transportation and Infrastructure Committee  
U.S. House of Representatives  
Washington, D.C. 20515

Re: Definition of the Waters of the United States

Dear Congressman Oberstar:

THE  
ENVIRONMENTAL  
COUNCIL OF  
THE STATES

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David K. Paylor  
Director, Virginia Department  
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PRESIDENT

Stephen A. Owens  
Director, Arizona Department  
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VICE PRESIDENT

Michael J. Linder  
Director, Nebraska Department of  
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SECRETARY-TREASURER

Robert W. King, Jr.  
Deputy Commissioner  
South Carolina Department of  
Health and Environmental  
Control  
PAST PRESIDENT

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R. Steven Brown  
Executive Director

I am writing on behalf of the Environmental Council of the States regarding our proposal for the above matter.

In our April 2008 meeting of the state environmental agencies, we passed a resolution that asked Congress to restore the definition of waters covered by the Clean Water Act to that in use before the court cases of recent years. To accomplish that, we suggest using the definition exactly as it appeared in 40 CFR 122.2 at that time. We have attached both our resolution on this matter and the definition as we suggest it appear in statute to replace the existing one.

We believe that using this definition will ensure that the waters covered by the Clean Water Act will be no more stringent or less stringent than before. States do not believe that such use of the previous regulatory definition either broadens or lessens federal authority, nor causes a loss of States' rights.

Coupled with this approach, the States believe the 404 section of the Act needs to be amended in order to facilitate the delegation of the program from the Army Corps of Engineers and the U.S. Environmental Protection Agency to the States, as has already been done for most of the rest of the Act. The two primary obstacles to delegation are that EPA cannot provide funding for implementation of the program, and that the program cannot be partially or incrementally delegated. We have addressed these issues in a separate legislative proposal. I have also attached a copy of a second resolution that the States adopted regarding this matter.

The States' hope is that these two approaches, when combined, will return wetlands protection standards to their previous status, while providing an option for the States to integrate wetlands permits with our other responsibilities under the Act in a delegated program with federal oversight.

You will note that we do not use the term "navigable" in the definition. This is because the CFR definition does not use that term. Therefore, we suggest references in the Act where the term "navigable waters" is meant to mean "waters of the U.S." should be changed. However, use of the term "navigable" to refer to the use of the water by commercial and other shipping can remain. We note that the CFR definition retains restrictions on the scope of waters covered by referring to "interstate commerce" directly.

ECOS also believes that amendments to the Act should not broaden its scope at this time. For example, "groundwater" is not specifically mentioned in the CFR definition. Groundwater is already regulated by all 50 States under State law and we believe the States retain their rights to do so under this approach.

Please contact me or our Executive Director, R. Steven Brown, at our Washington, D.C., offices if we may be of further assistance.

Sincerely yours,

A handwritten signature in cursive script that reads "David K. Paylor". The signature is written in black ink and is positioned above the typed name.

David K. Paylor, President  
Environmental Council of the States

Attachments

“Waters of the United States or waters of the U.S. means:

- (a) All waters which are currently used, 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;
- (b) All interstate waters, including interstate “wetlands;”
- (c) 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 would affect or could affect interstate or foreign commerce including any such waters:
  - (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
  - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
- (f) The territorial sea; and
- (g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition;

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of waters which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

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, the final authority regarding Clean Water Act jurisdiction remains with EPA.”

Resolution Number 08-2  
Approved April 14, 2008  
New Orleans, LA

As Certified by  
R. Steven Brown  
Executive Director

## **CLEAN WATER ACT JURISDICTION ISSUES REQUIRE CLARIFICATION FROM CONGRESS**

WHEREAS, the Environmental Council of States strongly supports the Clean Water Act of 1972 and subsequent amendments, the Act's historical protections for the "waters of the United States;" and the important federal, state, and local government partnerships created by the Act in order to "restore and maintain the chemical, physical, and biological integrity of the nation's waters," and,

WHEREAS, the U.S. Supreme Court's SWANCC and Carabell/Rapanos decisions have more narrowly interpreted the scope of the Clean Water Act's (CWA) protections and create uncertainty in jurisdiction for all Clean Water Act programs; and,

WHEREAS, the waters (whose protections are jeopardized by the Supreme Court decisions and federal policy guidance and represent over 50% of U.S stream miles in the lower 48 states and an estimated 20 million acres of wetlands, both according to US Environmental Protection Agency estimates) are critical to achieving the goals of the Clean Water Act; and,

WHEREAS, States believe that failing to continue to exercise broad jurisdiction under the Clean Water Act would result in substantial losses to the quality and quantity of the nation's waters; and,

WHEREAS, the issuance by the U.S. Corps of Engineers and U.S. Environmental Protection Agency of supplementary guidance concerning Clean Water Act jurisdiction has not alleviated confusion, has further complicated all permitting programs established by the Clean Water Act, jeopardizes protections for intermittent and ephemeral streams and wetlands, and has added substantial delay to valid permit actions; and,

WHEREAS, States that have developed and implemented their own wetland rules both prior to and in response to the SWANCC and Carabell/Rapanos decisions are undermined by the continued confusion at the Federal level; and,

WHEREAS, State programs and laws are significantly intertwined with the Clean Water Act, which established minimum protections for "waters of the U.S." and over a third of States are prohibited from protecting water not covered by the Clean Water Act.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Supports continued and consistent federal wetlands jurisdiction.

Supports a simplified and more flexible process for State assumption of the Section 404 Program, including partial assumption of program responsibilities, in order to assist with the restoration of clarity regarding the scope of regulated wetlands and other waters, and to provide protection against continued confusion at the Federal level.

Agrees that some form of congressional action is needed to eliminate confusion, provide clarity concerning Clean Water Act jurisdiction, restore jurisdiction under the Clean Water Act to broadly protect the waters of the United States, and support protection of those waters historically protected and properly identified in the longstanding USEPA and Corps regulations (40 CFR 122.2 and 33 CFR 328.3) including "all waters which are subject to the ebb and flow of the tide; all interstate waters, including interstate "wetlands;" 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; all impoundments, tributaries, and "wetlands" adjacent to these waters; and the territorial seas."

Encourages the U.S. Congress to act immediately to reestablish Clean Water Act jurisdiction to the full scope of waters protected prior to the recent Supreme Court decisions, and to work in cooperation with ECOS and other interested organizations to resolve Clean Water Act jurisdiction issues.

Resolution Number 08-3  
Approved April 14, 2008  
New Orleans, LA

As Certified by  
R. Steven Brown  
Executive Director

## **STATE DELEGATION OF CLEAN WATER ACT SECTION 404 PERMIT PROGRAM**

WHEREAS, States have the ability to assume jurisdiction over Section 404 permit programs under the Clean Water Act but in only two cases have sought and assumed the program; and,

WHEREAS States' goals are to maintain wetland protection, achieve consistency in program administration, and streamline the federal permit process; and,

WHEREAS States who assume the federal Section 404 permitting program are prohibited from receiving federal funding for implementation; and,

WHEREAS States that develop state wetland permit programs using federal EPA wetlands development grants are not eligible for EPA wetland grants to implement their state wetlands permit programs.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Supports delegation of Section 404 responsibilities to States.

Encourages USEPA to develop clear guidelines and processes for State assumption of Section 404 of the Clean Water Act that will encourage states to apply for and assume regulatory responsibility over this important natural resource program.

Supports Congressional action to authorize and appropriate adequate funding for States that assume the Section 404 permitting program and to broaden the eligibility of the existing EPA wetland grant program for both development and implementation activities.

Supports a simplified and more flexible process for State assumption of the Section 404 Permit Program, including partial assumption of program responsibilities, in order to improve effectiveness and provide more efficient and effective permitting for applicants while maintaining protection of wetlands in the United States.