



Swimming in Uncertain Waters: Legislation to Address Current Jurisdictional Uncertainty Under the Clean Water Act?

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In response to a Congressional request for the Obama Administration's views, on May 20, 2009, the Administration provided to Congress a statement with four broad guiding principles. These principles are directed to guide legislation for the clarification of the jurisdictional reach of the Clean Water Act, 33 U.S.C. §§ 1251-1387. Noting the Supreme Court decisions, *Rapanos, et. al. v. United States*, 547 U.S. 715 (2006) and *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the statement indicates that federal agencies have had difficulty interpreting these decisions, and that such implementing complications have had an effect on jurisdictional determinations. In *SWANCC*, the court limited the basis for asserting jurisdiction over solely intrastate waters. In the well-known *Rapanos* case, the court provided two competing tests for determining jurisdiction.

In what appears to be a response to the Supreme Court's decisions, the Administration's statement emphasizes, through its suggested principles, the need for broad protection of the nation's waters, and asks that the definition of "covered waters [be made] predictable and manageable." Giving the example of prior converted croplands," it also asks for Congress to include certain Clean Water Act ("CWA") exemptions that are now in effect via regulation or guidance. Finally, the statement sought consistency between the CWA and agricultural wetlands programs as another guiding principle.

The issue of jurisdiction for all CWA programs, NPDES, water quality standards program, oil spill prevention, and clean-up program, as well as dredged and fill permitting are all affected by the CWA's scope of jurisdiction. Caution regarding the scope of jurisdiction is well illustrated by a May 7, 2009

consent decree filed simultaneously with the complaint, in *United States of America v. Anadarko Petroleum Corp. et. al.* in which civil fines and costly injunctive relief were imposed on the companies. The complaint alleged violations of the Spill Prevent, Control and Countermeasure (SPCC) rule in addition to discharges into *waters* of the United States. The consent decree makes a point that the facilities in violation of CWA Sections 301(a) and 311(b)(3) were “physically located such that they could reasonably be expected to discharge oil or hazardous substances into the waters of the United States or their adjoining shoreline.” This decree’s emphasis on jurisdiction is seemingly in response to the recognized vulnerability of federal agency’s jurisdictional determinations under current Supreme Court precedent. Accordingly, it is very likely that until Congress takes action to address CWA jurisdiction, the breadth of CWA jurisdiction will remain curtailed and unclear. Federal agencies may continue to delay making jurisdictional determinations and reserve bring CWA actions that cannot prove jurisdiction.

Legislation based on the Administration’s general principles would aim in addressing the current uncertainty regarding jurisdiction under the CWA. Indeed, Senator Russ Feingold (D-Wis.) has already sponsored legislation (S 787) to amend the CWA to clarify the jurisdiction of the United States over waters of the United States by amending key definition in the CWA. Committee action on this legislation by the Senate Environment and Public Works Committee is anticipated in the near future. Other legislation is also predicted to be introduced this year to address the scope of protecting the nation’s waters under the CWA.

The Administration’s statement can be accessed [here](#).



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