

## Clean Water Act's Navigable Waters: Is it Sailing into the Sunset?

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On June 18, 2009, the Senate Committee on Environment and Public Works approved S. 787, the controversial Clean Water Restoration Act, as amended by a vote of 12-7. The bill is now headed to the floor of the Senate for a full vote. However, Idaho Senator Mike Crapo (Idaho) placed a hold on the bill to delay its consideration on the floor of the Senate.

The approved version of the bill follows on the heels of a May 20, 2009, letter from the Obama administration signed by Nancy Sutley, the Chair of the White House Council on Environmental Quality; Lisa Jackson, the Administrator of the Environmental Protection Agency; Secretary of Agriculture Tom Vilsack; Interior Secretary Ken Salazar; and Acting Assistant Secretary of the Army for Civil Works Terrence Salt, which outlined principles for legislation to clarify the meaning of the term "waters of the United States."

The amendments to S. 787 are a result of compromise language advanced by Senators Max Baucus (Montana), Amy Klobuchar (Minnesota), and Barbara Boxer (California) aimed at "restoring the environmental safeguards in place for more than three decades, while maintaining longstanding protections for farmers, ranchers, and wastewater systems under the Clean Water Act."<sup>1</sup> However, according to the overwhelming dissent offered by the minority, the bill "would give the Environmental Protection Agency vastly greater powers than they currently have in overseeing any body of water, no matter how tiny...."<sup>2</sup>

S. 787 among other things, strikes "navigable waters of the United States" and replaces it with "waters of the United States." While the majority and minority of the Committee do not seem to see eye-to-eye on the reach of the new definition, it is clear that EPA and the Corps of Engineers jurisdiction would at least be as broad as it was prior to the United States Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC") and the Court's 2006 decision in *Rapanos v. United States*.

Senator Boxer, the Committee Chairman, noted that "there remains confusion for some about the goals of this effort today. Some have suggested the goal is to expand the Clean Water Act to regulate bird baths, swimming pools, and water bodies that were never regulated before, but I am here to tell you that it is not true. In fact, right in the language of this compromise it tells EPA and the Corps to interpret this Act the same way they did the day before the SWANCC case."<sup>3</sup>

Concerned about the significant expansion of the power of EPA and the Corps to regulate "waters of the United States," Senator James Inhofe, the ranking Republican on the Senate Committee, noted that "[t]he 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."<sup>4</sup>

In response to the overwhelming concern advanced by Senators Inhofe, John Barrasso (Wyoming), and David Vitter (Louisiana), Senator Crapo placed a hold on the bill to delay its consideration on the floor of the Senate, signaling his readiness to filibuster the bill if necessary. In placing a hold on the bill, Senator Crapo noted that the bill "goes beyond restoring the regulatory environment that existed before the *Rapanos* and *SWANCC* decisions. In fact, it expands the scope of the Act by changing the standard for triggering federal jurisdiction." *Id.*

### Direct Links \_\_\_\_\_

<sup>1</sup> June 19, 2009, Senate Environment and Public Works Committee Majority Press Release available at: <http://epw.senate.gov>.

<sup>2</sup> June 18, 2009, Oklahoma Senator Inhofe Minority Press Blog available at: <http://epw.senate.gov>.

<sup>3</sup> See <http://epw.senate.gov>.

<sup>4</sup> See <http://epw.senate.gov>.