Redefining federal jurisdiction under the Clean Water Act as “waters of the U.S.” would greatly and unnecessarily expand federal jurisdiction over waters in Oregon.

In its present form, the bill will have a powerful, negative effect on irrigation and water control districts in Oregon. It will expand federal regulatory authority over construction and maintenance activities in all the canals and ditches that compose the large-scale district water delivery infrastructure in Oregon. The Army Corps of Engineers has already asserted jurisdiction over some portions of district water delivery systems connected to natural waterways. It is not a stretch to assume the Corps will now have no restraint on its power if its jurisdiction is now to be based upon the broad rubric of “waters of the U.S.”

The dramatic and unintended impact on district operations can best be explained through using a hypothetical district adapted from real situations in Oregon districts. Assume “Oregon Irrigation District” (ORID) operates approximately 300 miles of canals and laterals that deliver water from the river to approximately 2400 delivery points covering 27,000 acres. Under the current statutes and rules the Corps would likely determine that about 48 miles of the district’s canals were jurisdictional. Under H.R. 2421 all of the canal and laterals would be jurisdictional, a 560% increase in “jurisdictional” canals.

What would be the impact of this jurisdictional enlargement? Irrigation districts in Oregon run water during the months of April through October. Maintenance work that is necessary to ensure proper operation can be done only in the winter months, November through March, when the water is not running. These maintenance and repair activities in the canals and ditches include replacement and installation of headgates, installation and repair of measuring weirs, cleaning and repairing damage to the walls and floors of the canals, and vegetation control in the canals.

Indeed, a district the size of ORID would complete an average of 240 repair and maintenance projects per year, which translates to 240 new permits required under this bill for this one irrigation district, in this one state. Special projects such as cleaning debris away from diversion structures following high water events would require additional permits.

This legislation would require permit applications to be filed for each maintenance activity in order to be granted the maintenance exemption under 404(d). Irrigation districts would be required to obtain NPDES permits for Noxious Weed control and obtaining 404 Fill and Removal permits to clean a simple ditch for standard maintenance. While the agricultural exemption may cover some of these activities, the district still must apply for the permits, and the Corps must conduct a review of the applications, often including site visits, before the Corps can issue the exemptions. We anticipate an unprecedented administrative bottleneck that could bring district operations to a halt.

The above scenario, troublesome though it is, still does not include work that involves district facilities but is not the responsibility of the district, such as replacement of culverts under roads by the county or the State of Oregon. Nor does it include private ditches and farm ponds on land served by the districts but which are not part of the district’s system. Under the proposed legislation, all of these systems would entail additional administrative oversight – either in reviewing and issuing permits, or in administering exemptions if any become part of this bill.
The hypothetical district described above is about the size of one average district in Oregon. The impact of the legislation should logically be multiplied hundreds of times at numbers that reflect the varying size of the districts in the region. The result statewide is that thousands of applications for permits will be submitted annually to the Corps. Under the current law, districts face delays in projects because the Corps is unable to handle permit applications in a timely manner. This leads to delayed projects, and ultimately delayed irrigation, agricultural production and higher costs. These problems will become intolerably severe under the proposed legislation.

Many districts in Oregon have piped and continue to pipe canals and ditches in an effort to conserve water. This legislation will impact the districts’ conservation activities by bringing those projects under Corps’ jurisdiction. The lead time for a piping project is at least nine months without pursuing a permit from the Corps. Since piping must occur during the months when irrigation water is not running, a short delay in the permitting process could easily result in a one year delay in the project. Based on recent experience with piping projects, a one year delay of a $21M project would cost over $1M just in financing; not including lost revenues from hydropower production or interest earned on that revenue.

For irrigation systems, a delay in the permitting system often means the project has to be moved back to the next year after the irrigation season when the water has been shut off. The delay results in increased costs for the project of 5% to 25% based on recent experience and may well result in liability losses for system failure and flooding. In most instances, if the maintenance work is not completed, water delivery will be compromised and a farm will not receive irrigation water to grow its crops. In addition, the cost of filing and applying for permits would not be a onetime expense, but require continual annual payments to perform the necessary operations and annual maintenance of providing irrigation water to a district’s patrons.

There will be many dramatic and unintended impacts of this legislation. The questionable constitutionality of H.R. 2421, were it to become law, has been well-discussed elsewhere.\[1\] On-the-ground impacts in Oregon extend beyond the districts represented by the Oregon Water Resources Congress to interests ranging from individual water users to counties and the culverts for their road maintenance and construction, to home builders, to forest practices. OWRC represents only one component of the overall picture in Oregon: Oregon’s irrigation districts and other entities supply irrigation water in the state.

While the purpose of the bill is laudable -- to enable protection of small or isolated wetlands or other wetlands that have been the subject of recent litigation -- the language of the bill is unnecessarily broad. It would be far more sensible to leave the current jurisdictional language in place, and enact less sweeping language specifically protecting certain classes of wetlands rather than burden an already precarious agricultural economy to the breaking point.

We encourage you to consider this legislation with a full vision of its impact and understanding of the unintended consequences on agriculture and water supply in Oregon.

\[1\] See, e.g., the letter from Roderick E. Walston, Attachment A.
Letter from Roderick E. Walston

To Whom It May Concern:


Introduction

The undersigned wish to express their objections to the above Senate and House bills, which would amend the definition of “waters of the United States” in the Clean Water Act. The bills would substantially alter the historic relationship between the federal government and the states in regulating the nation’s waters, by substantially expanding federal control and diminishing state control. The Supreme Court has in several past decisions spelled out the relationship between federal and state authority to regulate water, both in the Clean Water Act context and in other contexts, and the proposed bills would substantially change that relationship. Indeed, the bills may expand federal regulatory authority beyond the constitutional bounds recognized by the Supreme Court. Since the bills would substantially change the historic federal-state balance and diminish the states’ authority to regulate water, the bills should not be approved by Congress.

1. The Bills’ Proposed Amendment of the Clean Water Act

Under the Clean Water Act, the federal government administers two major permit programs as part of the effort to eliminate water pollution. Under section 404, the Army Corps of Engineers exercises permit authority over discharges of dredged or fill materials into “navigable waters.” 33 U.S.C. § 1344. Under section 402, which establishes the National Pollutant Discharge Elimination System, the Environmental Protection Agency (EPA) exercises permit authority over the “discharge of a pollutant,” which is defined as the addition of a pollutant to “navigable waters” from a point source. Id. at §§ 1342(b), 1362(12). (The EPA is authorized to transfer its permit authority to the states, and has done so in most cases.) Thus, both the section 402 and 404 permit programs apply to activities affecting “navigable waters.” The term “navigable waters” is in turn defined as “waters of the United States.” Id. at § 1362(7).

S. 473 would strike the term “navigable waters” where it appears in the Clean Water Act, and replace the term with “waters of the United States.” The proposed amendment would then define “waters of the United States” as follows:

“The term ‘waters of the United States’ means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”

HR 2421’s proposed revisions are identical to those of S. 473.

2. The Supreme Court’s Decisions Defining “Waters of the United States”

The bills would effectively overturn two recent decisions of the United Supreme Court that define the term “waters of the United States” as used in the Clean Water Act.
First, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* ("SWANCC"), 531 U.S. 159 (2001), the Supreme Court held that “waters of the United States” as used in the Clean Water Act includes both navigable waters traditionally regulated by the federal government, and also non-navigable waters that have a “significant nexus” to navigable waters. 531 U.S. at 167. According to the Court, Congress intended to assert its “traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” Id. at 172, citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940). The Court concluded that Congress did not intend to authorize federal regulation of “isolated” wetlands, that is, wetlands having no hydrologic connection to navigable waters. According to the Court, federal regulation of such isolated wetlands would result in a “significant impingement of the States’ traditional and primary authority over land and water use,” and Congress presumptively would not have “significantly changed the federal-state balance” unless it “clearly” so provided. 531 U.S. at 173, 174. The Court rejected the United States’ argument that “waters of the United States” includes all waters found anywhere in the United States regardless of their navigability. As the Court stated, “it is one thing to give a word [navigable waters] limited effect and quite another to give it no effect whatever.” Id. at 172.

The *SWANCC* Court distinguished its earlier decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), which had held that “waters of the United States” as used in the Clean Water Act includes wetlands “adjacent” to navigable waters. According to the *SWANCC* Court, the *Riverside Bayview* decision upheld federal jurisdiction over wetlands that were “adjacent” to and “immediately abut[ted]” navigable waters—and thereby significantly affected such waters—but the decision did not suggest that federal jurisdiction applies where such immediate adjacency does not exist. 531 U.S. at 167.

Second, in *Rapanos v. United States*, 126 S.Ct. 2208 (2006), the Supreme Court recently addressed the Army Corps of Engineers’ authority to regulate wetlands that are neither isolated from navigable waters, as in *SWANCC*, nor immediately adjacent to such waters, as in *Riverside Bayview*. Although the Court failed to issue a majority opinion, a majority of the justices held that the Corps’ authority to regulate wetlands as “waters of the United States” is not unlimited, and does not apply at least unless the wetlands have a “significant nexus” to navigable waters. More specifically, four of the justices signed Justice Antonin Scalia’s plurality opinion, which concluded that the Corps’ jurisdiction extends only to “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.’” Justice Anthony Kennedy issued a concurring opinion stating that the Corps’ jurisdiction extends only to wetlands having a “significant nexus” to navigable waters, and that such a nexus exists only if the wetlands “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” Thus, five justices—those who signed Justice Scalia’s opinion and Justice Kennedy—agreed that the Corps’ jurisdiction under the Clean Water Act applies to waters that are traditionally navigable or at least have a “significant nexus” to such waters, but that the Corps’ jurisdiction does not extend to other waters lacking such a nexus.

To summarize, the Supreme Court majority in both *Rapanos* and *SWANCC* concluded that the term “waters of the United States” does not apply to all waters in the nation, but instead applies to navigable waters and other waters that have a “significant nexus” to them. The Senate and House bill’s proposed amendment of the Clean Water Act would fundamentally change the definition of “waters of the United States” by expanding the term to include virtually all waters in the nation, regardless of whether they have a “nexus”—much less a “significant” one—to navigable waters. Indeed, the proposed amendment may even overturn the *SWANCC* decision itself, by authorizing federal regulation of “isolated” waters that lack a hydrologic connection of any kind.
to navigable waters. Thus, the proposed amendment is not a minor, inconsequential one. Rather, it would fundamentally change the meaning of the Clean Water Act and substantially expand the federal regulatory role at the expense of the state role.

3. The Federal Government’s Constitutional Authority to Regulate “Navigable Waters”

Congress, in defining federal jurisdiction under the Clean Water Act, was not writing on a clean slate. The Supreme Court has in several landmark decisions held that the federal government has constitutional authority to regulate navigable waters in order to protect navigation. See, e.g., United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 63 (1913); Gibbons v. Ogden, 22 U.S. 1, 189-190 (1824). Concomitantly, the states have “virtually plenary” authority to regulate intrastate, non-navigable waters. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-164 (1935). The federal government’s traditional authority to regulate navigable waters derives from the Constitution’s Commerce Clause, which authorizes Congress to regulate commerce among the states; since navigable waters are the “highways” of interstate commerce and the “public property of the nation,” Congress’ commerce powers include regulation of navigable waters. United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703 (1899); Gilman v. Philadelphia, 70 U.S. 713, 724-725 (1866). This explains why Congress, in passing the Clean Water Act, limited federal permit authority under sections 402 and 404 to “navigable waters.”

The Supreme Court has also held, however, that Congress’ constitutional power to regulate navigable waters extends to non-navigable waters in cases where such waters may significantly affect federal interests, such as navigation or interstate commerce, in navigable waters. United States v. Grand River Dam Auth., 363 U.S. 229, 232-233 (1960); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 406 (1940); The Daniel Ball, 77 U.S. 557, 563 (1870). For example, a bridge constructed over a non-navigable tributary of a navigable waterway may impede interstate commerce in the navigable waterway. Rio Grande Dam, 174 U.S. at 703. Similarly, the discharge of pollutants into a navigable waterway, or a non-navigable tributary, may affect water quality conditions and obstruct interstate commerce in the main stem. United States v. Republic Steel Corp., 362 U.S. 482 (1960). Thus, federal interests in navigable waters, such as navigation and interstate commerce, may be affected by activities in non-navigable waters, assuming the existence of a significant nexus between the two waterways. This presumably explains why Congress, in passing the Clean Water Act, did not limit federal jurisdiction to navigable waters per se, but instead defined the term “navigable waters” more broadly as “waters of the United States.” By providing the broader definition, Congress ensured that the federal government would be able to protect cognizable national interests in the nation’s waterways, regardless of whether the waters are strictly navigable or not.

The legislative history of the Clean Water Act demonstrates that Congress meant to ensure that the federal government would have authority to protect the nation’s interests not only in navigable waters, but also in non-navigable waters that significantly affect the nation’s navigable waterways. The House Conference Committee report, describing the meaning of “waters of the United States,” stated:

The new and broader definition [of federal jurisdiction] is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case [citation omitted]—to include waterways which would be “susceptible’ of being used . . . with reasonable improvement,” . . . . United States v. Appalachian Electric Power Co., 331 U.S. 377, 407-410, 416 (1940) [other citations omitted.] [¶]

[T]here is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a
link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The “gist of the Federal test” is the waterway’s use “as a highway,” not whether it is “part of a navigable interstate or international commercial highway.” Utah v. United States, 403 U.S. 9, 11 (1971) [other citations omitted.]

HOUSE CONSIDERATION OF REPORT OF CONFERENCE COMMITTEE, compiled in 1 LEGISLATIVE HISTORY OF WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Ser. No. 93-1, 93d Cong., 1st Sess. 250-251 (1973) (statement of Rep. Dingell). Thus, Congress intended that federal jurisdiction under the CWA would apply to waters that serve as a “link in the chain of commerce among the States,” regardless of whether such waters are strictly “navigable,” as the Supreme Court held in Appalachian Power, 311 U.S. 377 (1940), and regardless of whether the waters are wholly intrastate, as the Supreme Court held in Utah v. United States, 403 U.S. 9 (1971).

Although Congress broadly defined “navigable waters” as “waters of the United States” in the Clean Water Act, Congress nonetheless retained “navigable waters” as the touchstone of federal jurisdiction under the statute. Thus, as the Supreme Court held in SWANCC, navigable waters are relevant and significant in defining the scope of federal jurisdiction under the Clean Water Act. SWANCC, 531 U.S. at 172. By retaining this jurisdictional touchstone, Congress ensured that the federal government would not encroach on the states’ traditional authority to regulate and manage their water resources, particularly where those resources have primarily local effects. Although Congress granted broad authority to federal agencies to prevent water pollution, Congress limited federal jurisdiction to waters that are either navigable or that have a significant nexus to such waters, as the Supreme Court held in SWANCC and Rapanos.

Indeed, the Clean Water Act contains other provisions reflecting Congress’ intent that the statute should not be construed as diminishing or impairing the states’ traditional authority to regulate water resources. Section 101(b) provides that the states have the “primary responsibilities and rights” to prevent water pollution and “plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(b). Section 101(g) provides that the congressional “policy” is that “the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by” the statute. 33 U.S.C. § 1251(g). These and other provisions recognize the long-standing tradition that the states are primarily responsible for regulating water rights and water quality in our federal system. As the Supreme Court has declared, “[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.” California v. United States, 438 U.S. 645, 653 (1978). Since Congress in the Clean Water Act preserved the states’ traditional authority to regulate water resources, the Supreme Court in SWANCC and Rapanos properly held that federal jurisdiction to regulate non-navigable waters applies only where such waters have a “significant nexus” to navigable waters, in terms of their effect on cognizable national interests.

Under the federal system embedded in our Constitution, state and local governments have traditionally been responsible for regulating water uses and local land uses. In regulating water uses, the states allocate water among different consumptive uses, such as urban and agricultural uses, and also allocate water to protect environmental needs, such as fish and wildlife, recreation, and scenic beauty. In balancing these needs, the states make choices concerning whether local water resources should be developed to promote economic growth or instead retained in their natural condition as part of the environmental heritage, and they generally try to strike a fair and reasonable balance between these competing needs. At the local level, local governments are
responsible for approving development projects, such as residential and commercial projects, that will provide housing and accommodate local growth, and these local governments also make choices between economic growth and environmental preservation—including preservation of wetlands and other water resources in their natural condition. The local governments may approve the development projects because the public benefits outweigh the environmental harm or they may disapprove the projects because the environmental costs are unacceptably high—or, as often happens, they may approve the projects subject to conditions to avoid or mitigate the environmental harm. These decisions are typically, and properly, made at the local rather than national level, because they typically involve resources, including local waters, that have purely local rather than national effects. The Senate and House bills’ proposed amendment of the Clean Water Act threatens to change this long-accepted regime by authorizing federal agencies to regulate local, intrastate, non-navigable waters even where no conceivable national or federal interests are at stake, thus diminishing the traditional authority of state and local governments to regulate local water uses and land uses. In the undersigned’s view, decisions affecting the use of local resources having primarily local effects are better made at the local rather than the national level.

4. History of the Army Corps of Engineers’ Regulations

The Senate and House bills’ proposed amendment of the Clean Water Act is apparently intended to define “waters of the United States” in substantially the same way this term is defined in the Army Corps of Engineers’ current regulations. The Corps’ current regulations define “waters of the United States” as including not only traditionally navigable waters, but also “[a]ll 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 . . . .” 33 C.F.R. § 328.3(a)(3). Thus, the language of the Senate and House bills, on the one hand, the Corps’ current regulations, on the other, is virtually identical. Indeed, S. 473 goes beyond the Corps’ regulations, because the Corps’ regulations authorize regulation of the identified waters only if activities in them “could affect interstate or foreign commerce” and S. 473 does not include this qualifying language.

As the Supreme Court observed in SWANCC, the original regulations adopted by the Army Corps of Engineers in 1974, shortly after passage of the Clean Water Act, defined “waters of the United States” in more limited terms than its current regulations. SWANCC, 531 U.S. at 168. Under the Corps’ original regulations, “waters of the United States” was defined as referring to “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.” 33 C.F.R. § 209.120(d)(1). In explaining the regulations, the Corps stated that “it is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.” Id. at § 209.260(e)(1). Thus, the Corps’ original regulations defined “waters of the United States” in terms of the federal government’s traditional authority to regulate navigable waters. Subsequently a federal district court held that the Corps had interpreted the term too narrowly and that the term authorized regulation of non-traditionally-navigable waters. Natural Resources Defense Council v. Calloway, 392 F.Supp. 685 (D.C. Cir. 1975). In response to the district court decision, the Corps amended its regulations to conform to the district court decision, and the regulations as amended are currently in effect. In SWANCC, the Supreme Court subsequently ruled that the Corps’ original regulations correctly interpreted Congress’ intent, 531 U.S. at 168, thus impliedly disagreeing with the district court’s interpretation in Calloway. In light of this history, Congress should not adopt the Corps’ current regulations as a proper interpretation of “waters of the United States,” since the Corps’ regulations were adopted pursuant to a federal district court interpretation that was subsequently rejected by the Supreme Court.
Conclusion

S. 473 and HR 2421, in amending the term “waters of the United States” in the Clean Water Act, would fundamentally change the traditional balance of federal and state power to regulate water. The bills would expand federal authority beyond the bounds recognized in the statute, as interpreted by the Supreme Court—and indeed beyond the bounds of Congress’ constitutional powers as also interpreted by the Court. The bills would thus alter the nature of the federalism that has long been long accepted as part of our constitutional fabric. In our view, the bills are unnecessary to protect any cognizable, identified national interests in our nation’s waterways, because they would extend federal regulatory control to purely local waters that, by definition, have purely local effects. State and local governments have traditionally been responsible for regulating these local water resources, and their responsibility for continuing to regulate them should not be changed by Congress. Accordingly, the undersigned strongly urge that Congress not change the historic federal-state balance by approving the proposed amendment of the Clean Water Act.

Thank you for your consideration.

Very truly yours,

Roderick E. Walston
Best Best & Krieger LLP
Walnut Creek, CA 94596

ATTACHMENT B

Army Corps of Engineers Permit Review Requirements

In response to a recent application by a district in Oregon to the Corps for a permit brought, the Corps sent a letter listing following requirements before the Corps can determine whether or not a permit is required:

a. Exact method of removal, including equipment to be used.
b. Profile plan-view of drawings of the channel showing the areas to be dredged.
c. Mailing labels with the names and addresses of the adjoining property owners to be used for the distribution of a public notice.
d. Drawings showing the location and dimensions of the disposal site in relation to the channel.
e. While not necessary for the public notice, we will need drawings and a description of the containment plan for the disposal before we can complete our evaluation. The design of the disposal site should ensure adequate residence time for the dredged material to minimize increases to the aquatic system. While not required for our review, photos of the proposed disposal site may be the best method of determining whether or not there are wetlands on the site. If there are wetlands on the proposed disposal site, you may want to consider other options.
f. A description of the direct and indirect adverse environmental affects of this project. For instance, if the project will further channelize these tributaries. What stream and wetland
functions will be lost, and what will be gained.

The letter goes on to describe sediment testing requirements for the Tier I review. If the Corps cannot make a favorable suitability determination based on Tier I information, further information is required for a Tier II evaluation (which has different levels of testing as well).

While the proposed activity that triggered this letter involved work in a creek channel, it is likely similar requirements would be imposed for work in an irrigation canal or drainage ditch if this legislation passes. This would be an extraordinary and unreasonable burden on districts for maintenance of their water delivery and drainage systems or for piping to conserve water.

To Federal Legislation Index
http://www.owrc.org/fedleg/fedlegis.htm