

## National Wetlands Regulatory Policy

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### Policy

The American Society of Civil Engineers (ASCE) believes Congress must amend the Clean Water Act to clarify jurisdiction over wetlands, establish clearly where states must assume responsibility, and provide appropriate federal oversight. We recommend legislation that would:

- Maintain federal jurisdiction over all interstate and navigable waters, their tributaries, and all adjacent wetlands under the pre-2001 U. S. Army Corps of Engineers' regulatory program under the Commerce Clause in the U.S. Constitution using an unambiguous test for significant nexus to navigable-in-fact waters.
- Clarify state jurisdiction under section 404 of the Clean Water Act over isolated, non-navigable intrastate waters and their adjacent wetlands, including vernal pools, playas, and prairie potholes, considering recent Supreme Court decisions and other jurisdiction based on environmental and wildlife considerations under regulations promulgated by the Department of the Interior or the Environmental Protection Agency.
- Amend the Clean Water Act to clarify purely environmental federal jurisdiction over intermittent and ephemeral streams and their adjacent wetlands under section 404 to the U.S. Army Corps of Engineers, in coordination with the Environmental Protection Agency.

### Issue

Both economic development and environmental protection depend on effective permits within a consistent regulatory program, which in turn depend on clear jurisdiction. When jurisdiction is unclear, as it is today, inevitably there will be lawsuits and interruptions to both environmental protection and necessary development. There is strong public consensus that the nation's wetlands must be protected. However, after more than 30 years of regulation, federal regulation of wetlands under the Clean Water Act has been called into question. Two Supreme Court decisions, *SWANCC* and *Rapanos*, have narrowed federal jurisdiction under the Clean Water Act, removing some wetlands from regulatory protection and causing confusion among the public and industry because of unclear jurisdictions.

The Clean Water Act states that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . ." (86 Stat. 816, 33 U. S. C. § 1251(b)). For whatever reason, the Act's implementation over three decades has not paid much attention to the states' responsibility under Section 404. The Supreme Court has called attention to this and appropriate implementation is now necessary.

In the *Rapanos* decision, the controlling opinion of Justice Kennedy stated that "through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." This *significant nexus* test should be codified by law or regulation based on a rulemaking to establish clear jurisdictional boundaries.

### Rationale

Clear jurisdictions for national wetlands regulations must emerge from the national legislative and policy-making bodies. A clear jurisdiction for national wetlands policy and criteria is needed to ensure that wetlands' issues are properly addressed in a timely and predictable manner during the project development process.

*First Approved in 1991*