

108TH CONGRESS
2D SESSION

H. R. 4843

To amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 15, 2004

Mr. BAKER (for himself, Mr. DUNCAN, Mr. BERRY, Mr. YOUNG of Alaska, Mr. CANNON, Mr. TAUZIN, Mr. BISHOP of Utah, Mr. OTTER, Mr. DOOLITTLE, Mr. FORBES, and Mr. OSE) introduced the following bill; which was referred to the Committee on Transportation and Infrastructure

A BILL

To amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Federal Wetlands Ju-
5 risdiction Act of 2004”.

6 **SEC. 2. STATEMENT OF PURPOSES.**

7 The purposes of this Act are to—

8 (1) clarify the jurisdiction of the Federal Gov-
9 ernment over waters of the United States in light of

1 the decision of the Supreme Court in *Solid Waste*
2 *Agency of Northern Cook County v. U.S. Army*
3 *Corps of Engineers*, 531 U.S. 159 (2001);

4 (2) provide consistency throughout the Nation
5 in determining the jurisdiction of the Federal Gov-
6 ernment over waters of the United States; and

7 (3) consolidate in one Federal agency the au-
8 thority of the Federal Government to implement the
9 permitting program established under section 404 of
10 the Federal Water Pollution Act (33 U.S.C. 1344).

11 **SEC. 3. FEDERAL JURISDICTION.**

12 Section 404(a) of the Federal Water Pollution Con-
13 trol Act (33 U.S.C. 1344(a)) is amended—

14 (1) by striking “(a) The Secretary” and insert-
15 ing the following:

16 “(a) ISSUANCE OF PERMITS.—

17 “(1) IN GENERAL.—The Secretary”; and

18 (2) by adding at the end the following:

19 “(2) JURISDICTION.—Waters of the United
20 States, including the territorial seas, shall be subject
21 to the jurisdiction of the permitting program estab-
22 lished by this section if the waters are—

23 “(A) navigable;

1 “(B) hydrologically connected to navigable
2 waters through a continuous, naturally occur-
3 ring surface connection; or

4 “(C) wetlands adjacent to waters described
5 in subparagraph (A) or (B).

6 “(3) SURFACE CONNECTION.—

7 “(A) INCLUDED WATERS.—For purposes
8 of paragraph (2)(B), waters shall be considered
9 to be hydrologically connected to navigable wa-
10 ters by a continuous, naturally occurring sur-
11 face connection if the waters are connected by
12 perennial or intermittent streams that con-
13 tribute flow to navigable waters, including pe-
14 rennial or intermittent streams that have been
15 restored, relocated, or channelized on the sur-
16 face or that flow through culverts.

17 “(B) EXCLUDED WATERS.—For purposes
18 of paragraph (2)(B), waters shall not be consid-
19 ered to be hydrologically connected to navigable
20 waters by a continuous, naturally occurring sur-
21 face connection if the waters are connected
22 by—

23 “(i) sheet flow (normal runoff of pre-
24 cipitation);

1 “(ii) ephemeral waters, ground water,
2 manmade ditches, or pipelines; or

3 “(iii) a municipal separate storm
4 sewer system or any other point source
5 regulated under section 402, including a
6 State program approved under section
7 402(b).

8 Such connecting waters also shall not be subject
9 to the jurisdiction of the permitting program
10 established by this section.

11 “(4) FASTLANDS.—Fastlands shall not be sub-
12 ject to the jurisdiction of the permitting program es-
13 tablished by this section.

14 “(5) DETERMINATION OF JURISDICTION.—

15 “(A) REQUEST FOR DETERMINATION.—A
16 person who holds an ownership interest in prop-
17 erty, or who has written authorization from
18 such person, may submit a request to the Sec-
19 retary identifying the property and requesting
20 the Secretary to determine the presence or ab-
21 sence of waters of the United States subject to
22 the jurisdiction of the permitting program es-
23 tablished by this section. The person making
24 the request may limit the request to a deter-
25 mination of the presence or absence of any of

1 the waters described in paragraph (2)(A),
2 (2)(B), or (2)(C).

3 “(B) REQUESTS FOR ADDITIONAL INFOR-
4 MATION.—Not later than 30 days after the date
5 of receipt of a request under subparagraph (A),
6 the Secretary may make one request for such
7 additional information as may be necessary to
8 make the jurisdictional determination.

9 “(C) DETERMINATION AND NOTIFICATION
10 BY THE SECRETARY.—Not later than 90 days
11 after the date of receipt of a request under sub-
12 paragraph (A), or not later than 60 days after
13 the date of receipt of additional information
14 provided under subparagraph (B), whichever is
15 later, the Secretary shall—

16 “(i) make a jurisdictional determina-
17 tion for the waters described in the re-
18 quest; and

19 “(ii) provide written notification of
20 the jurisdictional determination to the per-
21 son submitting the request, together with
22 written documentation of the determina-
23 tion and a written basis for the determina-
24 tion.

1 “(D) AUTHORITY TO SEEK IMMEDIATE JU-
2 DICIAL REVIEW.—

3 “(i) IN GENERAL.—Any person au-
4 thorized under this paragraph to request a
5 jurisdictional determination for property
6 may—

7 “(I) seek judicial review of any
8 such jurisdictional determination, or
9 injunctive relief in the case of a fail-
10 ure to make a determination, in the
11 United States District Court for the
12 district in which the property is lo-
13 cated; or

14 “(II) may proceed under the ad-
15 ministrative appeals process estab-
16 lished under this section.

17 “(ii) WATERS SUBJECT TO REVIEW.—
18 Judicial review, injunctive relief, or admin-
19 istrative appeal under clause (i) may be
20 sought for any of the waters described in
21 paragraph (2)(A), (2)(B), or (2)(C), as
22 specified in the request made under this
23 paragraph.

24 “(iii) JUDICIAL REVIEW FOLLOWING
25 ADMINISTRATIVE APPEALS.—Any person

1 who elects to proceed under the adminis-
2 trative appeals process shall retain the
3 right to seek in the United States District
4 Court for the district in which the property
5 is located judicial review of the final deci-
6 sion of the Secretary under the administra-
7 tive appeals process.”.

8 **SEC. 4. SINGLE AGENCY IMPLEMENTATION.**

9 (a) IN GENERAL.—Beginning on the date of enact-
10 ment of this Act, all authorities of the Administrator of
11 the Environmental Protection Agency under section 404
12 of the Federal Water Pollution Control Act (33 U.S.C.
13 1344) are transferred to the Secretary of the Army, acting
14 through the Chief of Engineers.

15 (b) AUTHORITIES RETAINED BY EPA.—Notwith-
16 standing subsection (a), the Administrator shall retain the
17 authority to comment on permits issued under section
18 404(a) of the Federal Water Pollution Control Act (33
19 U.S.C. 1344(a)) and general permits issued under section
20 404(e) of such Act (33 U.S.C. 1344(e)).

21 (c) TRANSFER OF FUNDS.—All funds appropriated
22 to the Administrator for carrying out the authorities
23 transferred under this section shall be transferred to the
24 Secretary.

1 (d) CONFORMING AMENDMENTS.—Section 404 of the
2 Federal Water Pollution Control Act (33 U.S.C. 1344) is
3 amended—

4 (1) in subsection (b) by striking “the Adminis-
5 trator, in conjunction with”;

6 (2) by striking subsection (c); and

7 (3) in subsection (q) by adding at the end the
8 following: “No agreement entered into under this
9 subsection shall authorize any of the signatory agen-
10 cies to request a decision concerning a permit issued
11 under this section to be elevated to any level above
12 the District Engineer.”.

13 **SEC. 5. DEFINITIONS.**

14 Section 404 of the Federal Water Pollution Control
15 Act (33 U.S.C. 1344) is amended by adding at the end
16 the following:

17 “(u) DEFINITIONS.—In this section, the following
18 definitions apply:

19 “(1) NAVIGABLE.—The term ‘navigable’ means
20 a water that is presently used, or is susceptible to
21 use, in its natural condition or by reasonable im-
22 provement as a means to transport interstate or for-
23 eign commerce shoreward to its ordinary highwater
24 mark, including all waters that are subject to the

1 ebb and flow of the tide shoreward to their mean
2 highwater mark.

3 “(2) WETLANDS.—The term ‘wetlands’ means
4 those lands that have a predominance of hydric soils
5 and that are inundated or saturated by surface
6 water or ground water at a frequency and duration
7 to support, and that under normal circumstances do
8 support, a prevalence of vegetation typically adapted
9 for life in saturated soil conditions. Wetlands gen-
10 erally include swamps, marshes, bogs, and similar
11 areas.

12 “(3) ADJACENT WETLANDS.—The term ‘adja-
13 cent wetlands’ means wetlands that are physically
14 touching (abutting or contiguous to) a water de-
15 scribed in subsection (a)(2)(A) or (a)(2)(B). Wet-
16 lands separated by a riverbank from which river
17 water overflows into the wetlands annually or bian-
18 nually are adjacent wetlands for purposes of this
19 section.

20 “(4) CULVERT.—The term ‘culvert’ means a
21 pipe or structure that conveys perennial or intermit-
22 tent streams from one side of a linear structure,
23 such as a roadway, to the other side.

24 “(5) FASTLANDS.—The term ‘fastlands’ means
25 areas located behind legally constituted manmade

1 structures, such as levees, constructed and main-
2 tained to permit the utilization of the areas for com-
3 mercial, industrial, or residential purposes consistent
4 with local land use planning requirements.”.

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