

109<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 2658

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

---

## IN THE HOUSE OF REPRESENTATIVES

MAY 26, 2005

Mr. BAKER (for himself, Mr. BERRY, Mr. BROWN of South Carolina, Mrs. NORTHUP, Mr. CANNON, and Mr. DUNCAN) 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 Federal Government 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 2005”.

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

7       The purposes of this Act are —

1           (1) to clarify the jurisdiction of the Federal  
2           Government over waters of the United States in  
3           light of the decision of the Supreme Court in *Solid*  
4           *Waste Agency of Northern Cook County v. U.S. Army*  
5           *Corps of Engineers*, 531 U.S. 159 (2001), so that,  
6           consistent with the States' traditional and primary  
7           power over land and water use, waters such as iso-  
8           lated wetlands that do not have a significant nexus  
9           with traditional navigable waters are not subject to  
10          Federal jurisdiction, but remain subject to regula-  
11          tion by the States;

12          (2) to provide consistency throughout the Na-  
13          tion in determining the jurisdiction of the Federal  
14          Government over waters of the United States;

15          (3) to consolidate in one Federal agency the ad-  
16          ministrative authority of the Federal Government to  
17          determine, in accordance with this Act, the waters of  
18          the United States subject to the jurisdiction of the  
19          permitting program established by section 404 of the  
20          Federal Water Pollution Control Act (33 U.S.C.  
21          1344); and

22          (4) to protect the right of States to regulate  
23          wetlands and other waters within their jurisdiction.

1 **SEC. 3. FEDERAL JURISDICTION.**

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

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

6 “(a) ISSUANCE OF PERMITS.—

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

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

9 “(2) JURISDICTION.—

10 “(A) IN GENERAL.—Waters of the United  
11 States, including the territorial seas, shall be  
12 subject to the jurisdiction of the permitting pro-  
13 gram established by this section if the waters  
14 are—

15 “(i) navigable;

16 “(ii) connected to navigable waters  
17 through a continuous, naturally occurring  
18 surface water connection; or

19 “(iii) wetlands adjacent to waters de-  
20 scribed in clause (i) or (ii).

21 “(B) INCLUDED WATERS.—For purposes  
22 of subparagraph (A)(ii) waters shall be consid-  
23 ered to be connected to navigable waters by a  
24 continuous, naturally occurring surface water  
25 connection if the waters are connected by pe-  
26 rennial or intermittent streams that contribute

1 flow to navigable waters, including perennial or  
2 intermittent streams that have been restored,  
3 relocated, or channelized on the surface or that  
4 flow through culverts.

5 “(C) EXCLUDED WATERS.—

6 “(i) IN GENERAL.—For purposes of  
7 subparagraph (A)(ii), waters shall not be  
8 considered to be connected to navigable  
9 waters by a continuous, naturally occurring  
10 surface water connection if the waters are  
11 connected by—

12 “(I) sheet flow;

13 “(II) ephemeral waters, ground  
14 water, manmade ditches, or pipelines;  
15 or

16 “(III) a municipal separate storm  
17 sewer system or any other point  
18 source regulated under section 402,  
19 including a State program approved  
20 under section 402(b).

21 “(ii) TREATMENT OF CONNECTING  
22 WATERS.—The connecting waters de-  
23 scribed in clause (i) shall not be subject to  
24 the jurisdiction of the permitting program  
25 established by this section.

1                   “(iii) FASTLANDS.—Fastlands shall  
2                   not be subject to the jurisdiction of the  
3                   permitting program established by this sec-  
4                   tion.”.

5 **SEC. 4. STATUTORY CONSTRUCTION.**

6           Nothing in this Act, or the amendments made by this  
7 Act, shall be construed to preclude or deny the right of  
8 any State or interstate agency to control the discharge of  
9 dredged or fill material in any portion of the wetlands or  
10 other waters within the jurisdiction of such State, includ-  
11 ing any activity of any Federal agency.

12 **SEC. 5. SINGLE AGENCY IMPLEMENTATION.**

13           Section 404(a) of the Federal Water Pollution Con-  
14 trol Act (33 U.S.C. 1344(a)) is further amended by add-  
15 ing the following:

16                   “(3) AUTHORITY OF SECRETARY.—Beginning  
17                   on the date of enactment of this paragraph, the Sec-  
18                   retary shall have sole administrative authority to de-  
19                   termine, in accordance with this Act, the waters of  
20                   the United States subject to the jurisdiction of the  
21                   permitting program established by this section.”.

22 **SEC. 6. DETERMINATION OF JURISDICTION.**

23           Section 404(a) of the Federal Water Pollution Con-  
24 trol Act (33 U.S.C. 1344(a)) is further amended by add-  
25 ing the following:

1           “(4) REQUEST FOR DETERMINATION.—A per-  
2           son who holds an ownership interest in property, or  
3           who has written authorization from such person,  
4           may submit to the Secretary a request identifying  
5           the property and requesting the Secretary to deter-  
6           mine the presence or absence of waters of the  
7           United States subject to the jurisdiction of the per-  
8           mitting program established by this section. The  
9           person making the request may limit the request to  
10          a determination of the presence or absence of any of  
11          the waters described in paragraph (2)(A)(i),  
12          (2)(A)(ii), or (2)(A)(iii).

13           “(5) REQUESTS FOR ADDITIONAL INFORMA-  
14          TION.—Not later than 30 days after the date of re-  
15          ceipt of a request under paragraph (4), the Sec-  
16          retary may make one request for such additional in-  
17          formation as may be necessary to make the jurisdic-  
18          tion determination.

19           “(6) DETERMINATION AND NOTIFICATION BY  
20          THE SECRETARY.—Not later than 90 days after the  
21          date of receipt of a request under paragraph (4), or  
22          not later than 60 days after the date of receipt of  
23          additional information provided under paragraph  
24          (5), whichever is later, the Secretary shall —

1           “(A) make a jurisdictional determination  
2 for the waters described in the request; and

3           “(B) provide written notification of the ju-  
4 risdictional determination to the person submit-  
5 ting the request, together with written docu-  
6 mentation of the determination and a written  
7 basis for the determination.

8           “(7) AUTHORITY TO SEEK IMMEDIATE JUDI-  
9 CIAL REVIEW.—

10           “(A) IN GENERAL.—Any person authorized  
11 under paragraph (4) to request a jurisdictional  
12 determination for property may—

13           “(i) seek judicial review of any such  
14 jurisdictional determination, or injunctive  
15 relief in the case of a failure to make a de-  
16 termination, in the United States District  
17 Court for the district in which the property  
18 is located; or

19           “(ii) proceed under the administrative  
20 appeals process established under this sec-  
21 tion.

22           “(B) WATERS SUBJECT TO REVIEW.—Ju-  
23 dicial review, injunctive relief, or administrative  
24 appeal under subparagraph (A) may be sought  
25 for any of the waters described in paragraph

1           (2)(A)(i), (2)(A)(ii), or (2)(A)(iii), as specified  
2           in the request made under paragraph (4).

3           “(C) JUDICIAL REVIEW FOLLOWING AD-  
4           MINISTRATIVE APPEALS.—Any person who  
5           elects to proceed under the administrative ap-  
6           peals process shall retain the right to seek in  
7           the United States District Court for the district  
8           in which the property is located judicial review  
9           of the final decision of the Secretary under the  
10          administrative appeals process.”.

11 **SEC. 7. DEFINITIONS.**

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

15          “(v) DEFINITIONS.—In this section, the following  
16 definitions apply:

17           “(1) ADJACENT WETLANDS.—The term ‘adja-  
18          cent wetlands’ means wetlands that are physically  
19          touching (abutting or contiguous to) a water de-  
20          scribed in subsection (a)(2)(A)(i) or (a)(2)(A)(ii).  
21          Wetlands separated by a riverbank from which river  
22          water overflows into the wetlands annually or bian-  
23          nually are adjacent wetlands for purposes of this  
24          section.

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

5           “(3) FASTLANDS.—The term ‘fastlands’ means  
6 areas located within legally constituted manmade  
7 structures, such as levees and dikes, constructed and  
8 maintained to permit the utilization of the areas for  
9 commercial, industrial, or residential purposes con-  
10 sistent with local land use planning requirements.

11           “(4) NAVIGABLE.—The term ‘navigable’ means  
12 a water that is presently used, or is susceptible to  
13 use, in its natural condition or by reasonable im-  
14 provement as a means to transport interstate or for-  
15 eign commerce shoreward to its ordinary highwater  
16 mark, including all waters that are subject to the  
17 ebb and flow of the tide shoreward to their mean  
18 highwater mark.

19           “(5) SHEET FLOW.—The term ‘sheet flow’  
20 means non-channelized water flowing over upland.

21           “(6) WETLANDS.—The term ‘wetlands’ means  
22 those lands that have a predominance of hydric soils  
23 and that are inundated or saturated by surface  
24 water or ground water at a frequency and duration  
25 to support, and that under normal circumstances do

1 support, a prevalence of vegetation typically adapted  
2 for life in saturated soil conditions. Wetlands gen-  
3 erally include swamps, marshes, bogs, and similar  
4 areas.”.

○