

EXTENSIONS OF REMARKS

FEDERAL WETLANDS JURISDICTION ACT OF 2004

HON. RICHARD H. BAKER

OF LOUISIANA

IN THE HOUSE OF REPRESENTATIVES

Thursday, July 15, 2004

Mr. BAKER. Mr. Speaker, today I am introducing the Federal Wetlands Jurisdiction Act of 2004. Joining me in cosponsoring this important legislation are the Chairman of the House Transportation and Infrastructure Committee DON YOUNG, Chairman of the House Transportation and Infrastructure Subcommittee on Water Resources and the Environment JOHN DUNCAN, former Energy and Commerce Committee Chairman BILLY TAUZIN, Western States Caucus Chairman CHRIS CANNON, and fellow conservationist Congressmen MARION BERRY, ROB BISHOP, BUTCH OTTER, JOHN DOOLITTLE, RANDY FORBES, and DOUG OSE.

The legislation my colleagues and I are introducing today does two things. First, the legislation clearly defines the areas over which the Federal government has jurisdiction as "wetlands" or "waters of the United States" under Section 404 of the Clean Water Act of 1977. Second, the legislation concentrates the implementation of the Section 404 "wetlands" permitting program in one Federal agency: the U.S. Army Corps of Engineers. The legislation does not affect any part of the Clean Water Act other than Section 404.

On January 9, 2001, the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* held that the Clean Water Act does not provide the Federal government jurisdiction over areas known as "isolated wetlands." The Supreme Court case dealt with an area that was found to be jurisdictional to the Section 404 program under an Environmental Protection Agency and U.S. Army Corps of Engineers interpretation of the Act known as the "migratory bird rule." The "migratory bird rule" made jurisdictional to the Section 404 program any wetland that migratory birds could inhabit. The Supreme Court found that this interpretation was beyond the bounds of the Act. However, the Supreme Court was not specific concerning the exact areas that are "isolated wetlands."

The uncertainty about the jurisdiction of the Section 404 program that resulted from the SWANCC decision has not been resolved by interpretive rulings by the Environmental Protection Agency and the U.S. Army Corps of Engineers. Applications of SWANCC by the Corps and the EPA in determinations of Section 404 jurisdiction have resulted in a range of judicial decisions that are not consistent across the Nation. The resulting uncertainty is causing difficulty for my constituents and I am sure for the constituents of many Members of this House.

In fact, it is not impractical to say that there are literally hundreds of agency interpretations of SWANCC's impact because the Corps and EPA have essentially allowed individual per-

sonnel to make their own judgments on a case-by-case basis. Could you imagine the speed limit being set by individual police officers on a case-by-case basis?

I believe that Congress must end this uncertainty by stating as clearly as possible the areas that we intend to be jurisdictional to the Section 404 program of the Clean Water Act. While the SWANCC decision involved a Section 404 matter, the judicial decision can be interpreted to apply to the entire Clean Water Act. The legislation my colleagues and I are introducing today, however, only applies to Section 404 of the Clean Water Act. Indeed, there may be sound policy reasons to have different jurisdictional limits for other sections of the Act.

The legislation that I am introducing today provides Federal Section 404 jurisdiction over the territorial seas, traditionally navigable waters, tributaries that flow into traditionally navigable waters and the wetlands adjacent to these waters. Excluded from jurisdiction are man made connectors, such as ditches and underground culverts, and the wetlands connected thereto. The legislation also makes clear that the Section 404 program does not apply to so-called "ephemeral streams" or underground water. Finally, the legislation provides a mechanism by which landowners expeditiously can obtain a determination of whether wetlands areas on their property are within the jurisdiction of the Section 404 program.

Mr. Speaker, this legislation will exclude from areas of Federal jurisdiction areas that Congress clearly never intended to be jurisdictional to the federal government. For example, on March 30, 2004, one of my constituents testified about this problem at an oversight hearing of the Water Resources and Environment Subcommittee of the Transportation and Infrastructure Committee. On his land were some puddles of water, which is very typical of our part of the country. A tractor had driven through one of the puddles on a rainy day and down to and through a small drainage ditch on the property. Because the tractor left a rut that filled up with water from the puddle down to the stream, Corps field officials asserted jurisdiction over the puddles. The only connection between these puddles, which I believe are true "isolated wetlands," and the small drainage ditch was this man-made rut accidentally left behind by the tractor. Surely, Mr. Speaker, my colleagues will agree with me that Congress never intended to assert Federal jurisdiction over such areas of land. This legislation will exclude these areas from Federal jurisdiction.

I believe that the definition of jurisdiction contained in this legislation is consistent with the SWANCC decision, the intent of Congress in enacting Section 404 of the Clean Water Act and the traditional division of jurisdiction between the Federal government and the States and local governments.

This legislation also addresses a problem that has confounded my constituents since the original enactment of the Section 404 program

in the Federal Water Pollution Control Act of 1972. When the Section 404 program was enacted, there was a disagreement between the House and Senate regarding whether the newly created Environmental Protection Agency or the U.S. Army Corps of Engineers should have jurisdiction over the program. The conferees settled this disagreement by giving both agencies jurisdiction over the program. The result for my constituents often has been chaos. The U.S. Army Corps of Engineers implements the Section 404 program, but must also apply rules adopted by the Environmental Protection Agency; the Corps of Engineers makes jurisdictional determinations in the field, but the EPA, under a 1979 Attorney General's Opinion, has final say in this area; and, finally, the EPA can veto a decision by the Corps of Engineers to issue a Section 404 permit. No other Federal regulatory program that I know of is implemented by two Federal agencies. My legislation resolves this inherent conflict by placing responsibility for the implementation of the Section 404 program solely in the hands of the U.S. Army Corps of Engineers, which I believe has incomparable expertise in wetlands management.

Mr. Speaker, the Federal Section 404 wetlands permitting program is a very controversial program. In general, Americans want to see wetlands preserved. However, this general objective hits close to home when the wetlands in question are on privately owned property—as are 75 percent of the Federal jurisdictional wetlands. The Section 404 program can prevent or severely restrict the private use of privately owned property. Unfortunately, many of my constituents face these consequences under the Section 404 program.

Mr. Speaker, the very least we can do for the citizens of this Nation is to define clearly those areas that are subject to the jurisdiction of this regulatory program and to designate one Federal agency to implement the program. The legislation that I am introducing today does just that and no more than that. I believe, also, that our bill is pro-environment because it will diminish the number of individual landowners who unknowingly disturb or destroy wetlands. If a constituent knows ahead of time that a parcel of land is a wetland, they will refrain from buying it or developing it. Isn't precaution an effective medicine? I believe it is, and I believe this bill is the right prescription. I encourage my colleagues to support this legislation and ensure its timely enactment.

ABA CONFERS HIGHEST HONOR ON
THE REVEREND ROBERT F.
DRINAN

HON. BARNEY FRANK

OF MASSACHUSETTS

IN THE HOUSE OF REPRESENTATIVES

Monday, July 19, 2004

Mr. FRANK of Massachusetts. Mr. Speaker, I am very proud to serve in this House as the

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