

**WRITTEN STATEMENT OF  
THE EDISON ELECTRIC INSTITUTE  
ON CLEAN WATER ACT JURISDICTIONAL ISSUES**

**IN THE 110<sup>TH</sup> CONGRESS  
BEFORE THE HOUSE COMMITTEE ON  
TRANSPORTATION AND INFRASTRUCTURE**

**July 19, 2007**

The Edison Electric Institute (“EEI”) is submitting this statement in connection with the hearings being held by the House Transportation and Infrastructure Committee relating to the status of the nation’s waters under the jurisdiction of the Clean Water Act (“the CWA” or “the Act.”). We are pleased to have this opportunity to present our views, in particular regarding the potential impacts on the regulated community of H.R. 2421, the “Clean Water Restoration Act of 2007” (“CWARA”).

EEI is the association of the nation’s shareholder-owned electric utility companies and industry affiliates and associates worldwide, including companies that generate, transmit, and distribute electricity and provide an array of energy and other services to their customers. Our Alliance of Energy Suppliers division represents integrated, affiliate, and independent power producers, generators, and power marketers in the United States wholesale electricity markets. EEI’s members generate almost 60 percent of all electricity generated by electric companies in the country, and serve approximately 70 percent of all ultimate customers nationwide.

Energy is the lifeblood of our nation’s economy, which is highly dependent on affordable and reliable supplies of energy, including electricity. In fact, economic and energy growth often parallel each other. Furthermore, families, communities, and businesses across the country depend on a ready supply of electricity for heating and cooling homes, cooking and storing food, indoor and outdoor lights, computers, medical facilities, traffic signals, and the host of other essential facilities we often take for granted. In order to provide this electricity, EEI members build, operate and maintain electric generation, transmission, and distribution facilities nationwide.

Water is critical to the functioning of most electric generation facilities. For example, steam electric generating facilities often rely on water to operate and to cool turbines, to isolate and manage generation process emissions and wastes, and for other important uses. Similarly, hydropower generation facilities rely on water as the primary source of energy. In addition, generation, transmission, and distribution facilities may be built near or across wetlands or other water bodies, with the potential to affect those water bodies.

As a result, electric utilities are directly affected by the CWA. Generating facilities that discharge into navigable waters are required to obtain permits under section 402 of the Act, and the permits reflect effluent limitations and standards set under sections 301,

303, 306, and 316 of the Act. Federally permitted facilities, such as hydropower projects licensed by the Federal Energy Regulatory Commission (“FERC”), trigger section 401 of the CWA. Under that section, states ensure that the facilities meet applicable water quality standards and effluent limitations. Further, facilities that affect wetlands or involve dredge and fill activities can require permits under section 404 of the CWA, section 10 of the Rivers and Harbors Act (“RHA”), or both.

EEl’s members pride themselves on careful and proactive management of their environmental responsibilities, including their responsibilities under the CWA. They use state-of-the-art environmental programs, management systems, and other practices that not only are directed at compliance with environmental requirements, but also foster innovative and practical pollution abatement and prevention measures, with positive results for the environment and electricity consumers. At the same time, EEl members provide an essential service. They have an obligation to ensure that electricity is provided reliably, efficiently, and economically, with as little impact to the environment as possible.

H.R. 2421 proposes to expand the array of waters and human activities covered by the CWA, without a clear indication of the need to do so or a demonstration that the environmental benefits would exceed the substantial additional cost. The bill would significantly increase the permitting burden on the regulated community and on the U.S. Environmental Protection Agency (“EPA”), the U.S. Army Corps of Engineers (“the Corps”), and states, including local municipalities that provide essential services, which are responsible for implementing the CWA permitting programs. The bill would require significant additional studies, recordkeeping, reporting, and permits far out of proportion to the impact of the activities on the environment – at a cost that would exceed any benefits to the environment.

EEl supports the goals of the CWA to protect and improve the quality of the Nation’s waters. But the CWA’s current approach to the regulation of water pollution is basically sound. The CWA represents a careful balance among federal, state, and local regulation of water quality and use. Furthermore, the Act already covers the vast majority of waters of the United States, including not only navigable streams, lakes, and marine waters, but also tributaries to such waters and waters connected to them in any direct way. In addition, the Act already covers the primary sources of human impacts on those waters. Recent Supreme Court decisions have not changed that.

Therefore, the CWA does not need to be modified as proposed in H.R. 2421. EEl urges the Committee to refrain from broadly expanding the scope of the CWA as proposed in CWARA.

**I. EEl URGES THE COMMITTEE NOT TO EXPAND THE JURISDICTIONAL REACH OF THE CWA AS PROPOSED IN CWARA**

Some have characterized CWARA as seeking to reestablish the jurisdictional reach of the CWA prior to the Supreme Court’s recent decisions in *SWANCC*, *Rapanos*, and

*Carabell*.<sup>1</sup> However, CWARA would broadly expand the reach of the CWA into large new areas that the CWA has not reached in the past.

Under the proposed wording of CWARA, the CWA would be modified to apply to any waters subject to the legislative power of Congress and any activities affecting those waters. This would include waters that do not have a direct nexus to navigable waters and their tributaries, such as mudflats, potholes, and other isolated waters. Without clarification, it may also include waste treatment impoundments, which are specifically designed to retain and manage waste and cannot be subject to generally applicable water quality requirements without defeating the purpose of the impoundments. Similarly, CWARA may also be read to include groundwater, which traditionally has been regulated by states with a carefully targeted, supporting federal overlay, such as the wellhead protection, sole source aquifer, and underground injection control provisions of the Safe Drinking Water Act and underground storage tank provisions of Resource Conservation and Recovery Act.

Such a broad expansion of the reach of the CWA would mean that many more human activities would be subject to federal regulatory and permitting requirements than have traditionally been covered by those requirements. Those newly covered activities are currently overseen by state and local governments under their respective environmental laws and for which they already use local police power to protect the environment. By elevating them to a federal level, Congress would import an array of complex regulations and permitting under the CWA and a host of other federal environmental statutes such as the National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act, and Coastal Zone Management Act.

In addition, many of the CWA water quality standard and permitting programs are managed by states, with oversight by EPA and the Corps, through longstanding and largely successful state delegated programs. By increasing the array of waters and human activities covered by the Act, CWARA would impose a major new unfunded federal mandate on the states. States already are required to meet a host of EPA and Corps regulatory requirements, and those requirements are constantly being tightened. By expanding the numbers and types of waters and activities covered by the Act, CWARA would directly increase the burden on states and the regulated community, without providing additional resources to manage this burden.

Ironically, this broad expansion of the CWA and its burden on states and the regulated community would come without clear net benefits. The Supreme Court's opinions in *SWANCC*, *Rapanos*, and *Carabell* carefully retain federal regulatory authority to address primary water quality issues across the nation. Navigable water bodies, their tributaries, and waters adjacent to them with a significant nexus to those waters remain

---

<sup>1</sup> *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States & Carabell v. U.S. Army Corps of Engineers*, 126 S. Ct. 2208 (2006).

fully covered by the CWA. That covers the vast majority of the surface water in the United States.

Furthermore, human activities that involve discharges to or other impacts on those waters are covered by the CWA, unless specifically exempted by the Act or regulations. Under the Supreme Court's Tacoma decision,<sup>2</sup> the Act's reach as to regulating such activities is very broad indeed – covering both water quality and quantity issues across a very broad spectrum. These existing areas of CWA jurisdiction already ensure robust regulation of industrial, construction, farming, forestry, and other human activities as they affect the vast majority of U.S. waters.

This CWA regulation already comes at a steep cost in federal, state, local, and private resources (*i.e.*, dollars, human resources and time). To expand the reach of the Act would substantially increase this cost without corresponding benefits. CWARA would extend the CWA to remote waters and could be interpreted to extend the Act to treatment impoundments and groundwater, when those types of water either are regulated by states and localities today or such regulation is inappropriate or unwarranted. CWARA also would cover any human activities that may affect water, without regard to whether a discharge is involved, the nature of the impact, and the cost of imposing a federal regulatory array on the activities. For example, in terms of evaluating the impact of CWARA on the ability of electric utilities to manage rights-of-way for reliability we see no limit on the potential for EPA and the Corps to assert jurisdiction over every activity affecting the ground, a wet spot, a puddle, a gully, or the water table. The result would be a significant expansion in permitting requirements for electricity facilities and increased potential liability from citizen suits.

To expand the CWA to include a new array of remote or inappropriate waters under the full panoply of federal regulations is likely to have limited benefit. But as in any program that seeks to address the last small effects of human activity, it would come at substantial cost.

Furthermore, if Congress were to enact CWARA, EPA, the Corps, and state water quality agencies would have to fundamentally revisit their entire array of regulations under the CWA. The current water quality standard, effluent limitation, and permitting regulations have been developed in the context of navigable waters, tributaries, and waters directly linked to them, and with a careful focus on discharges. The agencies would have to re-examine all of these programs to ensure proper fit and application in the context of the broadly expanded array of waters and human activities. This regulatory re-examination would be enormously complex, costly, and time consuming and would necessarily redirect those agencies from conducting current tasks.

---

<sup>2</sup> *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994).

## II. EEI ENCOURAGES THE COMMITTEE TO PRESERVE THE “WASTE TREATMENT SYSTEM” EXCEPTION

EPA’s definition of “waters of the United States” in 40 C.F.R. 122.2 specifies that “waste treatment systems” designed to meet the requirements of the CWA are *not* waters of the United States. Many companies have relied on this exception for their cooling ponds and other treatment facilities.

Many utility companies have constructed cooling ponds, settling basins, ash ponds, and other impoundments for the purpose of treating pollutants, and these treatment systems have largely not been considered as “waters of the United States” but rather as industrial facilities for pollution control. Changing the definition of “waters of the United States” could change the legal status of those facilities in a single stroke, putting them into noncompliance with the Act, and leaving power companies with the task of trying to find a way to comply under the new statutory definition. This would have enormous repercussions for energy supply and have an immense cost to the economy.

For example, if treatment systems are not clearly excluded from regulation as jurisdictional waters, they could be required to meet stringent water quality standards at the point of discharge into waste treatment systems rather than the point of discharge from the systems into jurisdictional waters. Such a requirement would effectively defeat their underlying treatment purpose.

To give an idea of the potential costs, utilities frequently rely on cooling water impoundments to reduce the temperature of water used to cool steam electric plants. If such impoundments were required to comply with CWA requirements developed for navigable streams, lakes, and marine waters, companies would have to adopt alternative systems such as cooling towers. But such alternative technologies often cannot be retrofitted at existing plants, and if they can be retrofitted, the economic and energy cost to do so is prohibitive. For example, EPA has estimated that to convert an existing power plant to cooling towers generally would cost from \$130 million to \$200 million, with annual operating costs of \$4 million to \$20 million. The Department of Energy has estimated that retrofitting cooling towers to an electric generating plant, fossil or nuclear, would impose a capital cost of \$65 to \$128 per kW and a loss of net generation output of 1.1 percent to 2.1 percent (2002 dollars). In today’s market, and in combination with other anticipated regulatory impacts, such costs could challenge the economic viability of some facilities. In addition, installing the necessary retrofits could take up to ten months, resulting in potentially substantial loss in energy production.

Similarly, there are approximately 450 coal-fired utility power plants and roughly 600 active ash treatment facilities in the U.S., with approximately equal proportions of landfills and surface impoundments. These facilities are designed to manage coal combustion products (“CCPs”) – coal fly ash, bottom ash, boiler slag, and flue gas desulfurization materials – produced from the combustion of coal for the generation of electricity. The facilities are constructed and operated so as to limit the migration of constituents of concern (e.g., metals present in coal ash) from the unit into the environment (e.g., surface water, groundwater).

If these CCP treatment systems were considered “waters of the United States,” they would have to meet water quality standards within the facility. But there is no proven, readily available technology to assure that such facilities could meet such internal limits. While a certain amount of chemical fixation and precipitation of dissolved metals does occur within the management units, a requirement to meet water quality standards within the units would be practically impossible. As a result, companies would have to convert to alternative technologies such as dry ash handling, if feasible. Closure of a single ash pond would cost as much as \$20 million. The conversion to dry ash handling itself could cost as much as \$50 million per power plant. Initial capital costs associated with the permitting and construction of a new ash management landfill could be \$10 million. Long-term capital and O&M costs would be another \$50 million. In addition, it would take at least 3 to 5 years to complete the process of new facility design, permitting and construction. If existing ash impoundments were forced to close, power plants that rely on such units for the management of their CCPs would likely be forced to shut-down.

### **III. EEI ENCOURAGES THE COMMITTEE TO ASSURE AN EFFECTIVE NATIONWIDE PERMIT PROGRAM UNDER CWA SECTION 404**

The siting, construction, maintenance, and repair of generation, transmission, and distribution facilities can involve locating facilities and conducting activities on or near wetlands or other water bodies. In particular, transmission and distribution lines – because they often cover long distances – may cross wetlands or water bodies at some points. As a result, depending on the nature of their activities, electric utilities may need to obtain “dredge and fill” permits under section 404 of the CWA. Therefore, EEI member companies are keenly interested in how the Corps and EPA administer the CWA section 404 and CWA other programs.

Over the years since the CWA was enacted, the Corps and EPA have sought to craft a regulatory program under section 404 that carefully protects the environment and is administratively feasible. Recognizing that a large number of human activities can affect wetlands and other water bodies, the agencies have used a permit program that divides human activities into categories and tailors the regulatory requirements to each category based on its typical effects on the environment. Low-impact activities often will be covered by a “nationwide permit” that imposes conditions without having to obtain individual EPA or Corps approval, unless atypical environmental effects are involved. This has enabled the agencies and the regulated community to focus on activities that raise more significant concerns, while ensuring that lower-impact activities are still undertaken with care to minimize environmental effects.

EEI has encouraged EPA and the Corps to balance economic development and wetlands protection under these programs, and it is important to retain this careful balance in the future. In particular, new transmission lines are increasingly needed to maintain reliability, transmit renewable energy from where it is generated to where it is consumed, and to support competitive regional electricity markets. However, obtaining regulatory approvals for new transmission projects from federal, state, and local

agencies is a complex process that can lead to costly delays. Multiple government agencies are involved in right-of-way authorizations and related environmental permitting, including the Corps and EPA under section 404.

Congress should assure an effective section 404 nationwide permit program. Also, Congress should recognize that if CWARA is enacted, EPA and the Corps will need to ensure that the program remains viable as a new array of waters and human activities are swept under the CWA umbrella.

EEl appreciates this opportunity to provide our views on issues of jurisdiction under the Clean Water Act, especially as they directly affect the electric power sector.