

Hicks-Ray Associates



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TO: WESTCAS Membership

FROM: Fred B. Hicks and Tom Ray

SUBJECT: You Make the Call

We have sent out several recent reports concerning the controversy, particularly in the House of Representatives, over the issue of the Obama Administration issuing Clean Water Act Guidance. This issue has divided Republicans and Democrats and resulted in several contentious debates concerning proposed amendments to the FY13 Energy and Water Appropriations bill prohibiting the Corps of Engineers from issuing Clean Water Guidance.

Congressional approval ratings have been hovering around 10% for a long time. That is not too far above war criminals and terrorists. Everybody complains that the Congress can't get anything done because it is too bitterly divided about everything. The Clean Water Act Guidance issue is a case in point.

Just to recap, the Supreme Court decisions including Rapanos and Cook County appear to call into question key components of the Clean Water Act including "Waters of the US" and "navigable waters. Congressional Democrats in the House and Senate with the support of the Obama Administration introduced major legislation in 2009 intended to clarify these issues. But when the 112th Congress came to an end in 2010, and with it the Democratic majority in the House and their supermajority in the Senate, this legislation had not yet gotten out of Committee.

In response, the Administration, through the Army Corps of Engineers, proposed Clean Water Act Guidance in December of 2010 to try and get around the issue of Congressional inaction. And this in turn set off a battle which continues to the present day with the Executive Branch trying to use "Guidance" to address what it could not accomplish through the legislative process and Congress trying to thwart this effort. The issues involved are very real since the Guidance process is much less transparent when compared with the traditional Rule-Making process.

Over the past year and a half, positions have hardened on both sides with Republican Members of Congress generally arguing that Guidance, achieved through a less than transparent process and in the absence of a formal Rule-Making process carries with it

Fred Hicks - 703.866.4290
P.O. Box 2115
Springfield, VA 22152-0115
fred@hicks-ray.com

Tom Ray - 254.855.0880
P.O. Box 955
Waco, TX 76703-0955
tom@hicks-ray.com

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dire consequences for the regulated community which, considering the breadth of the Clean Water Act, is practically everybody. Democrats counter with the argument that CWA and a new definition of “navigable waters” and “Waters of the US” is a critical component of environment protection that cannot be postponed because of legislative gridlock.

Many Republicans have stated publically that they would support USEPA moving forward with a formal Rule-Making process although most would prefer that this be preceded with common-sense legislation that defines at least the basics of what “navigable” and “Waters of the US” actually means.

Many Democrats have expressed their discomfort with the delays that can be a part of a complex and extended Rule-Making process. And they point out that while this uncertainty continues, the water resources of the United States are at serious risk all of which can be addressed with Guidance.

What do you think as a WESTCAS member? Would you be comfortable with the EPA, in consultation with the Corps of Engineers, entering into a Rule-Making process? Would you be willing to take the chance of doing so without having Congress first passing legislation which provides at least the framework for a Rule-Making? And would you be willing to express such a position to your Congressional delegation?

This is an important question because virtually all WESTCAS members have considerable experience in their professional lives with the CWA.

Please let us know, either by email or when we see you next week in San Diego.