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**Environmental Update - November, 2009**

**Clean Water Restoration Act, S.787**

This bill (S. 787) seeks to substantially expand the jurisdictional reach of the Clean Water Act, and that of the regulatory agencies administering the Act, by amending two key definitions. S. 787 will remove the definition of 'navigable waters' that has been included in the Act since its enactment and will replace it with a new, broadly defined statutory term, 'waters of the United States.' That term has been defined in EPA and Corps regulations for many years. However, the bill will provide a statutory definition of the 'waters of the United States' that expands the prior regulatory definition to include, among other things, "all interstate and intrastate waters and their tributaries" and "wetlands" "to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." Note that the definition not only includes the actual waters, but 'activities affecting these waters.'

The term 'navigable waters,' and hence the jurisdictional reach of the Act, has been restricted over the last several years by several U.S. Supreme Court and federal appellate decisions. *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Corps of Engineers* and *Rapanos v. United States* are two of the most important. The bill will legislatively overrule these decisions. Additionally, the scope of the Clean Water Act will substantially expand to include not only traditional navigable waters, but even intrastate waters, their tributaries, and any activities affecting those waters.

S. 787 was introduced in April, 2009 by Sen. Russ Feingold and referred to the Senate Committee on the Environment and Public Works. It was reported out of committee in June, 2009 and awaits Senate action.

**SPCC Rule Finalized, Again**

The EPA has finalized, again, the Spill Prevention, Control, and Countermeasure (SPCC) rules first proposed in October, 2007, finalized in December, 2008, and for which additional comments were solicited and received in February, 2009. 74 Fed. Reg. 58784 (November 13, 2009). EPA left many of the December, 2008 rules in effect without change, made some technical corrections to a few of those rules, and removed three provisions from the rules.

The provisions removed by EPA are: the exclusion of farms and oil production facilities from the loading/unloading rack requirements (thus making these facilities subject to the rules); the alternative qualified eligibility criteria for oil production facilities; and the exemption for produced water containers.

EPA also clarified its jurisdiction. Generally, EPA has jurisdiction over non-transportation-related onshore and offshore facilities and DOT has jurisdiction over transportation-related onshore and offshore facilities. EPA stated that while the DOT has jurisdiction over equipment, operations, and facilities when they are engaged in activities subject to DOT jurisdiction, EPA stated that it had jurisdiction over those same facilities when those facilities are engaged in activities subject to EPA jurisdiction. EPA pledges to work with DOT to answer questions about duplicative jurisdiction and minimize dual regulation, where appropriate.



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