FACTS & ISSUES

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League of Women Voters of the Houston Area

Clean Water Restoration Act
(HR2421 and S1870)
What Does It Do? Why Is It Needed?

The Clean Water Act was passed in 1972 during the administration of Richard M. Nixon and has served as one of our nation's core pieces of environmental legislation since then. It was re-authorized in 1987. It has been a legal bulwark for protecting water quality of streams, lakes, wetlands, and other waters. In the case of wetlands and smaller streams, it can protect their very existence. How does the currently proposed Clean Water Restoration Act differ from its predecessor?

What Will the Clean Water Restoration Act Do?

1. It will delete the word "navigable" from the Clean Water Act.

2. It will adopt a statutory definition of the "waters of the United States" based upon the longstanding definition in the EPA's (40 CFR 122.2) and the Corps of Engineers' (33 CFR 328.3) regulations.

   By the current Clean Water Act definition, the act applies only to surface waters, rivers, lakes, estuaries, coastal waters, and wetlands. Jurisdictional waters generally include all interstate waters, intrastate waters used in interstate and/or foreign commerce, tributaries of such interstate and intrastate waters, territorial seas at the cyclical high tide mark, and wetlands adjacent to all of the above waters. Not all surface waters would be considered "waters of the United States" under the current CWA definition.

   Compare the previous definition to that of "waters of the United States" contained in 33 CFR 328.3 (Corps of Engineers' regulation). It encompasses:

   a. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
   b. All interstate waters including interstate wetlands;
   c. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
      i. which are or could be used by interstate or foreign travelers for recreational or other purposes; or
      ii. from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
      iii. which are used or could be used for industrial purpose by industries in interstate commerce;
   d. All impoundments of waters otherwise defined as waters of the United States under the definition;
   e. Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
   f. The territorial seas;
   g. Wetlands adjacent to waters (other than waters that are themselves wetlands)
      Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.
   h. Waters of the United States do not include prior converted cropland.

3. It will include findings of Congressional powers that provide the basis for Congress's assertion of constitutional authority over the nation's waters, as defined in the Act, including so-called "isolated" waters, headwater streams, small rivers, ponds, lakes and wetlands.

Why Is the Clean Water Restoration Act Needed?

Recent Supreme Court decisions and attempted policy revisions by the EPA and the Corps of Engineers have thoroughly muddied the legislative and judicial waters. Clarity and consistency have suffered in interpretation and application.

For many years, it was generally understood that the Clean Water Act (CWA) applied to a vast swath of the nation's waters and wetlands. However, a Supreme Court decision in 2001 marked a major detour from traditional interpretation of the Clean Water Act. Often call called the "SWANCC" case, the ruling in the case of Solid Waste Agency of Northern Cook County v. Army Corps of Engineers held that the Clean Water Act's jurisdiction did not extend to protecting 17 acres of seasonal ponds solely on the basis of their being used by migratory birds. It brought into question whether the CWA actually applied to "non-navigable, isolated, intrastate" waters. What was originally a narrow, though unwelcome, decision assumed greater implications.

As a result of pressure originating with the SWANCC decision, in January 2003 the EPA and the Corps instructed their staffs to discontinue applying CWA protection to "isolated" waters without prior permission from headquarters. The agencies requested public comment and the overwhelming majority of the 133,000 comments were negative. The House of Representatives voted to discontinue the policy in May 2006. However, the policy has not been rescinded.

The Supreme Court complicated the situation further with two of its 2006 decisions. Two cases (Rapanos v. U.S. and Carabell v. Army Corps of Engineers) challenged whether the CWA applies to non-navigable tributaries and their adjacent wetlands. The Court issued a 4:1:4 split decision with separate opinions written by Justices Scalia, Kennedy, and Stevens, all applying different reasoning and tests to determine applicability. Justice Kennedy was the deciding vote and wrote his own opinion. His test would require that "a significant nexus" exist between a water body or wetland in question and a navigable water body.

Confusion reigns and isolated waters and wetlands, small streams, and ephemeral streams are at risk. Human energy is being spent on trying to sort through controversial definitions and resolve conflicting tests of jurisdiction. A legislative solution to clarify jurisdictional definitions would quell the discord over competing legal interpretations of recent court decisions.

The State of Texas exercises its water quality authority through the TCEQ for most water and wetland issues and the Texas Railroad Commission for discharges from the oil and gas industry. Neither agency has been known for its assiduous enforcement of protection. Also, the agencies ground their actions under the provisions of the Clean Water Act. The diminution of the federal CWA will result in the lessening of state protection as well.

The 200,000 acres of playa lakes in the Texas Panhandle could be defined as "isolated" and thus vulnerable. Just 21% of Texas' stream-miles flow permanently. Depending upon how recent Court decisions are interpreted, the remaining stream miles could lose regulatory jurisdiction. The Galveston District of the Corps has removed coastal wetlands that are connected to streams and bays via sheet flows from its jurisdictional protection – regardless of the inherent hydrological linkage of the ecosystem.

The passage of the Clean Water Restoration Act, identified in the House of Representatives as HR2421 and in the Senate as S1870, would provide a panacea to waters and wetlands of Texas and the rest of the United States. There is significant support for the legislation, although there is also some determined opposition. The two bills command bipartisan support. The House bill was introduced in May 2007 by Reps. James Oberstar (D-MN), John Dingell (D-MI) and Vernon Ehlers (R-MI) and has 170 additional co-sponsors. The Senate bill was introduced June 2007 by Sen. Russ Feingold (D-WI) and has 20 additional co-sponsors.

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