

EPA and Congress: Restoring the Clean Water Act
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The Obama Administration and Congress are attempting to halt, or at least alter, the enormous impacts of a Supreme Court decision on the Clean Water Act (Act) regarding a small wetlands in Michigan on pollution dumping and streambed obstruction. This decision has paralyzed the US Environmental Protection Agency and Army Corps of Engineers (Corps) enforcement of Act since 2006.

In June of 2006, the U.S. Supreme Court ruled on the “Rapanos” case of whether a Michigan wetlands on private land, with a poorly defined connection to a waterway, could be regulated under the Act. The court had begun weakening the Act in 2001 by removing protection of bird migration in wetlands in the “SWANCC” case. The two decisions came after 26 years of court cases consistently strengthened Clean Water Act authority over pollution of waterways, an EPA issue, as well as obstruction of them, a Corps-EPA regulatory process.

In the Rapanos decision, four of the justices voted in favor of upholding the Nixon-era legal interpretation that all streambeds are protected, four stated that water must be flowing for the Act to apply-and Justice Anthony Kennedy stated that there must be a “significant nexus” to navigable water.

Kennedy’s puzzling definition left a huge number of streambeds in the arid west potentially unprotected, 96% in Arizona according to EPA, and fairly close to that percentage in Nevada, New Mexico and Colorado. “A lot of unprotected real estate”, as David Smith, EPA Region 9’s wetland coordinator put it in May, 2008.

If a body of water was not proven “navigable”- perhaps because it frequently dried out-and if state law regulating water pollution was based on the Federal Clean Water Act, the EPA could conceivably not protect a streambed from pollution dumping.

After 2006, there were dozens of court definitions relating to Corps or EPA enforcement of the Act that interpreted post-Rapanos “navigability”.

Threatened and actual lawsuits over potential or actual EPA enforcement led to a huge slowdown in enforcement action by EPA of pollution discharges. Developers and sewage plants faced a large backlog of Corps permits under the Act to allow construction in disputed streambed areas.

In Arizona, the Santa Cruz River, facing urban and mining development, was first declared “navigable” by the Corps in 2008. That decision was withdrawn following a corporate lobbyist meeting with the Corps Assistant Secretary. It was then restored in December, 2008, by EPA under Congressional pressure from powerful Congressmen Henry Waxman (D-Ca) and James Oberstar (D-Minn). Within Waxman’s California district, the Los Angeles River’s navigability had been in question, but EPA determined at the same time that it, too, was navigable.

Waxman subpoenaed internal memos from the EPA and Corps that he quickly released in December that verified earlier documentation that the Bush EPA had lied to Congress and had been using the Rapanos decision as an excuse to freeze action on over half, if not far more, of its enforcement cases. The Corps memos revealed the corporate influence over their Rapanos decision making.

EPA continued to deny that Rapanos affected enforcement until Waxman released the documents, at which time it ceased commenting on the issue.

At the same time, in December, the Corps and EPA issued “guidance documents” for enforcing the post-Rapanos Act that were heavily criticized by state agencies and environmentalists.

Oberstar and Wisconsin Senator Russ Feingold introduced legislation in 2007 to restore the strength of the Clean Water Act to pre-2001 strength. Oberstar will be reintroducing the bill in the Transportation and Industry Committee that he chairs, and attempting to move it quickly to the floor by the end of June, according to spokeswoman Mary Kerr.

Kerr added, “Chairman Oberstar remains committed to restoring the scope of Clean Water Act protections that existed prior to the two Supreme Court decisions and is engaged in a continuing dialogue with the new administration on this issue. Considering past statements of then-candidate Obama, we are hopeful that the administration will come out in strong support of a legislative fix to the confusion and delay that currently exists in the Clean Water program”.

An August 2008 statement from the Obama campaign to Wick Communications, owner of this newspaper, said that, “A variety of court rulings have left about half of the nation’s streams, rivers and over 20 million acres of wetlands less protected than the federal Clean Water Act intended. (If elected) Senator Obama will support and sign into law legislation that effectively restores the historical scope of the Clean Water Act and thereby advances environmental protection, community values and public health objectives.”

EPA headquarters spokeswoman Enesta Jones issued a statement in late February stating, “The Administration is now coordinating internally to better understand the programmatic and environmental implications resulting from the Supreme Court’s decisions in SWANCC and Rapanos. The court’s interpretation has resulted in reduced protections for the Nation’s lakes, streams, and wetlands and has complicated implementation of the Agency’s Clean Water Act programs....including EPA enforcement efforts. We are evaluating the nature and extent of these impacts and assessing potential options for responding to the problems we identify.”

And what about the Corps of Engineers, who responded last July to corporate lobbyists? “We have a new President and we’re waiting to hear what the Boss says. The Senate has to approve a new Secretary of the Army along with the other branches of the military and it’s reasonable to expect we won’t have Senate confirmation of an Assistant Secretary of the Corps of Engineers for six months,” said Corps spokesman Chip Smith. “Unless we get a directive from the white house or perhaps the Council of Environmental Quality in the case of the Act, we can’t really make any decisions.”

As an aside, on December 29, 2008, John Rapanos agreed to pay regulators a \$150,000 fine and to restore an amount of wetlands in Michigan equivalent to the acreage he destroyed in the 1990s. Had this been done years earlier without the court battles, Clean Water Act protection would not be in question.