NAVIGATING THROUGH THE RHETORIC ABOUT THE CLEAN WATER RESTORATION ACT

A bipartisan group of House leaders – Representatives Oberstar, Ehlers, and Dingell – have introduced the Clean Water Restoration Act (HR 2421), along with over 160 colleagues. The bill will return clear Clean Water Act protections to America's waters, including many wetlands and small streams that are presently in legal limbo and could lose federal protections. It will require that such water bodies be considered protected "waters of the United States," using a definition based on the Corps' and EPA's longstanding regulations. It would also delete the word "navigable" because recent Supreme Court cases have fixated on that word to ignore Congress's direction since 1972 to focus on water quality, not navigability.

The bill has the support of hundreds of groups across the country. But many industry associations and organizations whose members release pollution into the Nation's waters are fighting hard against restoring Clean Water Act protections. After all, if fewer things are "waters of the United States," fewer polluting projects will require environmental reviews before they go forward – it will be as if the Clean Water Act essentially has been repealed for pollution in those waters. As a result, much inflammatory and misleading material has been distributed about the Clean Water Restoration Act (CWRA).

Myth #1: The bill will expand the law to any accumulation of water. Opponents have argued that the bill could apply to any place in the nation that is wet, even absurdly contending that "swimming pools and hot tubs" could be included. They have also suggested that the bill could make groundwater resources "waters of the United States."

Fact: The bill confirms Congress's authority to reach critical water bodies, but does not overreach. Since 1972, the Clean Water Act has applied to all of the "waters of the United States," and the agencies' regulations have broadly protected water bodies. EPA, for instance, covers waters including those that, among other things, could be put to use for "industrial purposes by industries in interstate commerce. . . ." Despite this broad scope of regulation, the agencies have not regulated all wet areas. Instead. they have recognized that some water -- including ornamental ponds and swimming pools and "[a]rtificially irrigated areas which would revert to upland if the irrigation ceased" -- are not generally considered "waters of the United States." CWRA's language, like that of the Clean Water Act, is broad, but permits the exclusion of insignificant accumulations of water. The Corps and EPA have not regulated swimming pools under the Clean Water Act, and they will not do so under CWRA either.

Opponents' claim that the bill will change how groundwater is regulated is another boogeyman. Several Clean Water Act provisions distinguish between "navigable waters" and "ground waters," and if CWRA becomes law, and the term "waters of the United States" replaces "navigable waters" throughout the law, then the statute will still distinguish between "waters of the United States" and "ground waters."

Myth #2: The bill would apply to <u>activities</u> that were not previously reached. The bill states that it protects a water body when Congress has constitutional authority to regulate either the water itself or an activity that pollutes that water. Opponents argue that this language expands the Clean Water Act to apply to activities not currently regulated.

Fact: The bill covers waters, not <u>activities</u>. Opponents' interpretation is wrong. The term "activities" appears in the bill only <u>to help identify the water bodies</u> that Congress intends to protect (just as the existing EPA and Corps rules protect waters when their use or degradation could affect interstate commerce). Furthermore, the Clean Water Act's core permitting programs apply only to activities that result in the discharge of pollutants from specified "point sources" into protected waters, and nothing in the bill changes that long-standing limitation of the Act.

Myth #3: The bill would overrule existing exemptions. Opponents have argued that the bill would "[e]liminate the existing regulatory limitations" on what is considered a "water of the United States" and that even existing exemptions contained in the Clean Water Act could be limited by the bill.

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Fact: The bill "saves" statutory exemptions and does not change existing regulations. The bill specifically preserves existing limitations in the Clean Water Act on applying some of the law's requirements to certain "return flows from irrigated agriculture," "normal farming, silviculture, and ranching," "construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches," "construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment," and other activities. And with respect to existing regulatory limitations on what's protected, the bill neither requires their elimination nor permanently codifies them – it just leaves them alone. In fact, it states that Congress finds "the definition of `waters of the United States' in the regulations of the Environmental Protection Agency and the Army Corps of Engineers have properly established the scope of waters to be protected under the Federal Water Pollution Control Act. . . ." Finally, the bill does not eliminate "quick fill" general permits that give advanced approval to various activities and account for almost 90 percent of the permits involving dredge or fill in wetlands, streams and other waters.

Myth #4: The Clean Water Restoration Act would not withstand legal challenge. Opponents have raised the specter of further litigation (by *them*, presumably) and suggest that the bill would not be able to survive a lawsuit that claims CWRA is unconstitutional.

Fact: The bill stands on very solid legal ground. The Supreme Court has never ruled Congress cannot broadly protect streams, wetlands and other waters. Excluding categories of water bodies does a grave disservice to the Clean Water Act's purpose of restoring "the chemical, physical, and biological integrity of the Nation's waters." CWRA is drafted to make clear that Congress is exercising its Constitutional power to protect waters in the public interest. As the Environmental Law Institute recently concluded, "[a] principled reading of the relevant cases . . . suggests that a comprehensive legislative scheme to protect all of the Nation's waters . . . should be upheld as constitutional."

Myth #5: The Clean Water Restoration Act will intrude on States' authority. To hear opponents' rhetoric, one might think the bill is a federal power grab, expanding Clean Water Act protections to intrastate waters that were previously regulated only by states and localities.

Fact: States support broad Clean Water Act protections. State water protection programs commonly depend on the Clean Water Act, which has provided a nationwide minimum level of pollution control for water bodies – including wholly intrastate waters – since the 1970s. Some State laws limit whether and how the State can adopt protections stricter than federal law. Not surprisingly, the vast majority of States opposed rollbacks of the regulations on which CWRA is based when they were suggested in 2003, and over 30 States urged the Supreme Court last year to uphold broad protections for small streams and their adjacent wetlands. Since its introduction, CWRA already has gained the endorsement of many state officials across the country as well as the Association of State Wetland Managers and the Association of State Floodplain Managers. CWRA does not expand historic protections or interfere with State or local government rights over such issues as water allocation or zoning.

Myth #6: Congress shouldn't decide the proper scope of the Clean Water Act. Opponents have been trying to convince Congress not to take up the question of whether or not to restore protections to the nation's water bodies. Instead, they have argued that the agencies should amend their regulations to cut back on the water bodies that are considered "waters of the United States."

Fact: Congress, not the Supreme Court or the administrative agencies, is the right branch of government to address the proper scope of the Clean Water Act. The Court's incorrect interpretations of the Act, the implementation of which has led to the loss of significant aquatic resources in the recent past, cannot be overruled by agency regulations. Moreover, the agencies have proven themselves ill-equipped to respond effectively to the Courts' confusing opinions. The so-called "guidance" recently issued by the Corps and EPA in response to the latest Supreme Court decision took nearly a year to release, and it still fails to provide clear answers to the fundamental questions of how to determine many water bodies' status under the Clean Water Act.

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