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The Clean Water Act: A Problem with a Solution

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By pursuing environmental protection to the exclusion of other policy concerns such as housing, jobs, and the economy, the Clean Water Act (CWA) fails to balance Americans' concern for the environment with individual rights. The CWA can be enforced against any person accused of discharging a pollutant into "navigable waters" without a federal permit. Under the act, the Army Corps of Engineers and the Environmental Protection Agency assert jurisdiction over virtually all waters in the United States. As a result of its broad reach, as well as the severity of its penalties, the CWA presents an unparalleled risk to individual freedom and economic growth.

For many Americans, protecting the environment is an important issue—and one that must be balanced with concerns about housing, jobs, the economy, and individual rights. Some federal environmental laws, such as the Clean Water Act (CWA), fail to balance these competing societal values and instead pursue environmental protection to the exclusion of other human concerns.

Because of its unlimited capacity to restrict or prohibit ordinary human activity, the Clean Water Act poses a unique risk to individual and economic freedom while undermining American Conservation Ethic Principle VIII, which states that the most successful environmental policies emanate from liberty. Specifically, the act authorizes severe, sometimes ruinous civil penalties[1] and criminal liability for discharging a pollutant into "navigable waters" without a federal permit. Furthermore, the act can be enforced against "any person," whether a large corporation or private individual.

One of the primary problems with the CWA is the federal government's broad and inconsistent interpretation of the term "navigable waters"—the waters that the federal government can regulate under the CWA. By promulgating an amorphous definition of navigable waters, the Army Corps of Engineers and the Environmental Protection Agency (EPA) have effectively federalized virtually all waters and much of the land in the United States, including artificial ponds and swimming pools. Such vague regulations allow federal officials to maximize the reach of the act while evading judicial review, thereby discouraging productive activity and economic investment.

Problems with the Clean Water Act generally involve either regulatory overreach or abusive enforcement. This paper offers several recommendations for reducing such overreach and abuse, including:

1. Adopting a bright-line definition of covered waters under the act;
2. Ensuring that changes in agency policies and practices are subject to public notice and comment, as well as judicial review;

1 The cost of a permit is prohibitive, averaging 788 days and $271,596 for an individual permit and 313 days and $28,915 for a nationwide permit—not counting costs of mitigation or design changes. "[O]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits." David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," *Natural Resources Journal*, Vol. 42, No. 59 (2002), pp. 74–76, 81.

3. Prohibiting unilateral revocation of valid permits;
4. Providing fair notice of property subject to federal regulation;
5. Committing the agency to binding jurisdictional determinations, with right of judicial review;
6. Requiring proof of jurisdiction and any violation upon issuing an administrative order, with right of judicial review;
7. Assigning regulatory enforcement to a single agency; and
8. Deterring "nuisance" suits.

Enacting these reforms will help to balance America's environmental regulations with other concerns, such as jobs and the economy—an approach that reflects the values of Conservation Ethic Principle VIII.

Regulatory Overreach

The Army Corps of Engineers and the EPA have a history of exceeding their authority under the Clean Water Act. Some of this history can be attributed to ambiguity in the law; most is the result of willful overreach. According to the U.S. General Accounting Office (GAO),[2] local districts of the Corps "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Clean Water Act's] jurisdiction."[3] The GAO reports that even Corps officials working in the same office disagree on the scope of the CWA and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the act.[4]

This ambiguity is no accident. Federal enforcement practices differ from district to district because "'the definitions used to make jurisdictional determinations are deliberately left 'vague.'"[5] Consequently, federal officials are able to assert the broadest possible interpretation of Clean Water Act jurisdiction on a case-by-case basis so as to avoid any facial challenge to their regulatory authority.

Examples of "vague" regulatory definitions abound. While the Clean Water Act prohibits unauthorized discharges of pollutants into "navigable waters," the Corps and the EPA have extended their enforcement of the act to non-navigable waters, such as "streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds" and any wetlands adjacent thereto.[6]

This definition of "wetland"[7] is so broad that it encompasses areas that are wet only "for one to two weeks per year."[8] In other words, a "wetland" may be mostly dry land.[9] Under this definition, approximately 100,000,000 acres of wetlands are located in the lower 48 states—an area the size of California.[10] Furthermore, approximately 75 percent of these wetlands are located on private land.[11] With half of its territory covered by wetlands, Alaska has the largest wetland acreage,[12] followed by Florida (11 million acres); Louisiana (8.8 million); Minnesota (8.7 million); and Texas (7.6 million).[13]

Likewise, the Corps and the EPA have interpreted the term "discharge" to include the mere movement of soil in the same area without any addition of material.[14] Contrary to ordinary use and com-

2 Now known as the U.S. Government Accountability Office.

3 U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297, February 2004, p. 3, www.gao.gov/new.items/d04297.pdf (accessed May 14, 2012).
4 Ibid., p. 22.
5 *Rapanos v. United States,* 547 U.S. 715, 727, 781 (2006).
6 33 Code of Federal Regulations § 328.3(a)(3).

7 Federal regulations define "wetlands" as those areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 Code of Federal Regulations § 328.3(b).
8 Gordon M. Brown, "Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost," *Ohio Northern University Law Review*, Vol. 21 (1994), pp. 527, 529.
9 *United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).
10 United States Environmental Protection Agency, "Wetlands—Status and Trends," http://water.epa.gov/type/wetlands/vital_status.cfm (accessed May 15, 2012).
11 Jonathan H. Adler, "Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation," *Environmental Law Review*, Vol. 29, No. 26 (1999), p. 52.
12 EPA, "Wetlands—Status and Trends."
13 Ibid.
14 *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001).

mon sense, "adjacent" becomes "neighboring"[15]—sometimes miles away—and "tributary" includes "swales" and "storm drains."[16]

These excessively broad definitions jeopardize economic vitality. By allowing regulators almost unfettered discretion to interpret the law, the CWA forces businesses as well as individual property owners to operate under a cloud of uncertainty. For instance, the prospect of regulatory takings under the CWA is difficult to predict, a development that discourages investment. Such ambiguity also undermines American Conservation Ethic Principle III, which states that private property protections and free markets provide the most promising new opportunities for environmental improvements. In fact, these broad definitions have sparked such egregious agency overreach that the U.S. Supreme Court has, on two separate occasions, intervened on behalf of private property owners.

- In 2001, the High Court held that the Corps and the EPA could not regulate isolated, non-navigable water bodies and emphasized that there are statutory and constitutional limits to the scope of the Clean Water Act.[17] The Court also affirmed that regulation of local land and water use was the primary responsibility and right of state and local governments. This ruling is consistent with American Conservation Ethic Principle VI, which states that the management of natural resources should be conducted on a site- and situation-specific basis.

- Likewise, in 2006, the Court reiterated that the Corps and the EPA could not rely on a boundless interpretation of the act and regulate all water bodies with any sort of hydrological connection to "navigable waters."[18]

More recently, the Corps has tried to scale back the long-standing farm exemption for prior converted croplands—an exemption that covers 53 million acres[19]—without utilizing the formal rule-making process. The Corps also asserts that it can now regulate upland drainage ditches as "navigable waters" under its Nationwide Permit Program—an expansion of regulatory power that could affect almost every development project in the country.[20]

But these efforts to enlarge the CWA's regulatory scope pale in comparison to the expansion of the act contained in a new EPA and Army Corps of Engineers agency guidance document entitled "Guidance Regarding Identification of Waters Protected by the Clean Water Act."[21] This guidance asserts federal control over virtually all waters in the United States. Indeed, this putative reach is so broad that the agencies refuse to categorically exclude even artificial ponds and swimming pools from federal regulation.[22] It is undoubtedly the largest expansion of power ever proposed by a federal agency—and one that has already been sent to the Office of Management and Budget (OMB) for approval.[23]

Abusive Enforcement

The Corps of Engineers and the EPA have a history of heavy-handed and arbitrary enforcement of the Clean Water Act. Contrary to the plain language of the act and past agency practice, the EPA claims it has authority under §404(c) to, at any time, revoke existing "dredge and fill" permits issued by the Corps under §404(a).

15 33 Code of Federal Regulations § 328.3(c).
16 *Rapanos*, 547 U.S. 722.
17 *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

18 *Rapanos*, 547 U.S. 715.
19 Complaint, *American Farm Bureau Federation v. United States Army Corps of Engineers*, Case No. 1:10-cv-00489-RWR (Dist. Court, Dist. of Columbia 2010).
20 *National Association of Home Builders v. United State Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005).

21 U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, "Draft Guidance on Identifying Waters Protected by the Clean Water Act," http://www.epa.gov/indian/pdf/wous_guidance_4-2011.pdf (accessed May 23, 2012).
22 So broad is the agencies' reach that they are unwilling to categorically exclude "[a]rtificial reflecting pools or swimming pools in uplands;" groundwater; or even "[e]rosional features (gullies and rills), and swales and ditches that are not tributaries or wetlands." Ibid., p. 21.
23 For a comprehensive analysis of this guidance, see Pacific Legal Foundation, "Re: EPA and Army Corps of Engineers Draft Guidance on Identifying Waters Protected by the Clean Water Act," June 23, 1971, http://plf.typepad.com/Ltr%20to%20EPA%20Re_%20PLF%20Cmmnts%20on%20Idntfyng%20Wtrs%20Prctcd%20by%20CWA.pdf (May 23, 2012).

Under the EPA's interpretation of its "veto" power, permit holders would never receive a final permit; rather, they would remain in regulatory limbo, frustrated by an uncertainty that discourages productive investment and threatens property rights.

The EPA also engages in the nefarious practice of overriding the Corps' enforcement decisions and prosecuting landowners for Clean Water Act violations—even when the Corps has determined that no violation exists. This activity sometimes occurs as well at the state level, where, for example, a state issues a Clean Water Act permit through an EPA-approved delegated program, only to have that permit unilaterally revoked or modified by the EPA via a process called "overfiling." Such unilateral revocation is unacceptable: Innocent citizens should not be made to suffer because of inter-agency disputes.

But perhaps the most insidious use of federal power under the Clean Water Act involves the Corps' and the EPA's increasing use of "warning letters," "cease and desist" directives, and compliance orders to browbeat small landowners into submission. Using the threat of ruinous civil fines and criminal prosecution, these agencies rely on intimidation to compel landowner action without a hearing or proof of violation. This practice discourages investment while unfairly constraining the reasonable use of land.

Finally, the Clean Water Act's citizen lawsuit provision is flawed. A literal cottage industry exists where opportunistic litigants bring imaginary or exaggerated claims in court against an individual or small business in hopes that the risk of enormous fines will precipitate a lucrative settlement. Alternatively, a citizen suit is brought only for the purpose of delaying or running up the cost of a disfavored project with little or no risk of cost to the plaintiffs. These types of "nuisance" suits provide no environmental benefit while stymieing economic growth.

Safeguarding Human Rights

When government agencies exercise their regulatory power in excess of statutory or constitutional authority, or without regard to such power's impact on the citizenry, such agencies undermine this nation's constitutional foundation and become a law unto themselves. Consequently, citizens are left to conclude that the "rule of law" has no meaning and that rules and regulations are based on bureaucratic whim.

The protection of the environment is only one of many competing and important social values. In a society based on liberty, no single value can be pursued without regard to its cost. Environmental laws can and must be administered so as to safeguard—not thwart—fundamental human needs and rights. Therefore, the Clean Water Act must be administered to protect those needs and rights.

Recommendations

Because of the Corps' and the EPA's unwillingness to follow Supreme Court precedent and adopt new jurisdictional rules limiting the scope of the Clean Water Act, Congress is the only meaningful avenue for reform. Therefore, Congress should:

Clearly define federal jurisdiction under the Clean Water Act. A delineation of which waters are covered will remove regulatory uncertainty and reduce enforcement costs. For such reform to be successful, federal officials must acknowledge that there are limits to federal power and that relying on state and local governments to protect local waters (including wetlands) is not only sufficient, but legally required to protect America's natural resources.

Prohibit the Corps and the EPA from changing agency policies or practices by means of judicially unreviewable "internal guidance." Such a reform will encourage regulatory consistency by requiring that changes in jurisdictional interpretations are subject to formal notice and a public comment/rulemaking period that can be challenged in court if these interpretations exceed federal authority.

Prohibit the EPA from modifying or revoking a validly issued §404 permit. This change will reduce uncertainty, encourage reliance on validly issued permits, and unshackle economic investment.

Require that landowners be given fair notice that their property is subject to regulation under the Clean Water Act. Such a reform is essential to eliminating unintentional violations of the act.

Require that, upon request, the Corps or the EPA promptly provide landowners a legally binding determination as to whether their property is subject to regulation under the Clean Water Act—a determination that is subject to judicial review. Disputes about jurisdiction must be subject to immediate judicial review at the instigation of either party. This requirement will eliminate unintentional violations and deter unlawful enforcement of the act.

Require the Corps and the EPA to issue "warning letters," "cease and desist" notices, and compliance orders only in writing and only on the basis of documented, site-specific evidence sufficient to prove both federal jurisdiction and a violation of the act. Disputes about jurisdiction, violations, or the terms of such orders must be subject to immediate judicial review at the instigation of either party. The current practice of issuing letters and orders based on "any evidence" without a judicial hearing or proof of violation is unfair. This solution will discourage agency bullying and commit the agency to a sound legal position that must be defensible in court.

Limit permitting authority to a single agency without interference from another agency. This limitation will bring greater certainty to the permitting process and encourage economic investment.

Create a disincentive for harassment lawsuits. Plaintiffs who bring suits against a private party should be required to post a special bond or pay attorneys' fees and costs if they lose. This reform will discourage abuse of the citizen suit provision.[24]

24 Michael S. Greve, "The Private Enforcement of Environmental Law," *Tulane Law Review,* Vol. 65, No. 339 (1990).