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House Bill Aims to Circumvent Supreme Court on Clean Water Act

Written By: James M. Taylor
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Legislation designed to extend the national government's power over isolated local bodies of water is being pushed by environmental activist groups in the weeks leading up to the 2007-2008 U.S. House of Representatives session, which begins in September.

Rep. James Oberstar (D-MN) is leading the effort to pass H.R. 2421, the Clean Water Restoration Act, which would give federal agencies unprecedented authority over what were previously state and local issues.

The bill was introduced in May and is likely to be hotly debated in Congress this fall.

Court Limited Fed Power

The act's supporters admit it is aimed at invalidating a U.S. Supreme Court decision that defined the limits of federal authority over isolated bodies of water.

Under the 1977 Clean Water Act (CWA), Congress gave the Environmental Protection Agency and U.S. Army Corps of Engineers authority to regulate pollution in "navigable waters." The scope of the CWA was defined in 2006 by the U.S. Supreme Court, which ruled "navigable waters" include not only those that are navigable but also any waters that share a common nexus "to perform important functions for an aquatic system incorporating navigable waters."

While the Court expanded the definition of "navigable waters" beyond a face-value reading of the term, it nevertheless put the brakes on attempts by federal agencies to regulate isolated bodies of water that have little if any meaningful connection to navigable waters.

The Court justified its ruling by noting that pollutants reaching a non-navigable stream or watershed can still affect a navigable waterway if the stream or watershed discharges into the navigable waterway. By contrast, the Court ruled, isolated bodies of water with little or no meaningful interaction with navigable waterways have little impact on such waterways. The key to determining whether federal authority extends to such non-navigable watersheds is whether a non-navigable watershed performs important functions for the navigable waterway, the Court ruled.



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Ire in Congress

Some members of Congress, upset the Court did not interpret the term "navigable waters" to grant the federal government full authority over even the most isolated waters and wetlands, have vowed to render the decision moot by new legislation. Led by Oberstar, they contend the CWA intended to give them such power.

"This bill is designed to restore the authority of the Clean Water Act so it has the same effect it had prior to the Supreme Court's rulings," said Oberstar in a May 22 press statement. "This legislation will not create onerous new rules or regulations."

New Powers Sought

Linda Runbeck, a former Minnesota State Senator who now serves as president of the American Property Coalition, says the proposed legislation extends federal power far beyond any rational reading of the Clean Water Act.

The proposed legislation "puts the federal government in control of all 'waters of the United States'--a very broad definition--and newly regulates 'activities affecting these waters,' said Runbeck. "It also strikes the word 'navigable' wherever it appears."

Pacific Legal Foundation attorney James Burling agreed, saying, "If our constitutional system of limited federal powers means anything, we have to win on this issue."

The bill mustered the support of approximately 160 House members in the spring, but it still must overcome some principled opposition.

Richard Baker (R-LA), the ranking Republican on the House Subcommittee on Water Resources and the Environment, has called the bill "the largest-ever expansion of federal powers over private property."

James M. Taylor (taylor@heartland.org) is a senior fellow with The Heartland Institute and managing editor of Environment & Climate News.

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**HEARTLAND
INSTITUTE**

19 South LaSalle Street
Suite 903
Chicago, IL 60603
312.377.4000
think@heartland.org

Web Site Manager
Latonya Harris
lharris@heartland.org