

The New York Times

Rulings Restrict Clean Water Act, Foiling E.P.A.

Published on Monday, March 1, 2010 by The New York Times

by Charles DuHigg and Janet Roberts

Thousands of the nation's largest water polluters are outside the Clean Water Act's reach because the Supreme Court [1] has left uncertain which waterways are protected by that law, according to interviews with regulators.

As a result, some businesses are declaring that the law no longer applies to them. And pollution rates are rising. Companies that have spilled oil, carcinogens and dangerous bacteria into lakes, rivers and other waters are not being prosecuted, according to Environmental Protection Agency [2] regulators working on those cases, who estimate that more than 1,500 major pollution investigations have been discontinued or shelved in the last four years.

The Clean Water Act was intended to end dangerous water pollution by regulating every major polluter. But today, regulators may be unable to prosecute as many as half of the nation's largest known polluters because officials lack jurisdiction or because proving jurisdiction would be overwhelmingly difficult or time consuming, according to midlevel officials.

"We are, in essence, shutting down our Clean Water programs in some states," said Douglas F. Mundrick, an E.P.A. lawyer in Atlanta. "This is a huge step backward. When companies figure out the cops can't operate, they start remembering how much cheaper it is to just dump stuff in a nearby creek."

"This is a huge deal," James M. Tierney, the New York State assistant commissioner for water resources, said of the new constraints. "There are whole watersheds that feed into New York's drinking water supply that are, as of now, unprotected."

The court rulings causing these problems focused on language in the Clean Water Act that limited it to "the discharge of pollutants into the navigable waters" of the United States. For decades, "navigable waters" was broadly interpreted by regulators to include many large wetlands and streams that connected to major rivers.

But the two decisions suggested that waterways that are entirely within one state, creeks that sometimes go dry, and lakes unconnected to larger water systems may not be "navigable waters" and are therefore not covered by the act — even though pollution from such waterways can make its way into sources of drinking water.

Some argue that such decisions help limit overreaching regulatory efforts.



The mouth of Avondale Creek in Alabama, into which a pipe maker dumped oil, lead and zinc. A court ruling made the waterway exempt from the Clean Water Act. (David Walter Banks for The New York Times)

“There is no doubt in my mind that when Congress passed the Clean Water Act in 1972 they intended it to have broad regulatory reach, but they did not intend it to be unlimited,” said Don Parrish, the American Farm Bureau Federation’s senior director of regulatory relations, who has lobbied on Clean Water issues.

But for E.P.A. and state regulators, the decisions have created widespread uncertainty. The court did not define which waterways are regulated, and judicial districts have interpreted the court’s decisions differently. As regulators have struggled to guess how various courts will rule, some E.P.A. lawyers have established unwritten internal guidelines to avoid cases in which proving jurisdiction is too difficult, according to interviews with more than two dozen current and former E.P.A. officials.

The decisions “reduce E.P.A.’s ability to do what the law intends — to protect water quality, the environment and public health,” wrote Peter S. Silva, the E.P.A.’s assistant administrator for the Office of Water, in response to questions.

About 117 million Americans get their drinking water from sources fed by waters that are vulnerable to exclusion from the Clean Water Act, according to E.P.A. reports.

The E.P.A. said in a statement that it did not automatically concede that any significant water body was outside the authority of the Clean Water Act. “Jurisdictional determinations must be made on a case-by-case basis,” the agency wrote. Officials added that they believed that even many streams that go dry for long periods were within the act’s jurisdiction.

But midlevel E.P.A. officials said that internal studies indicated that as many as 45 percent of major polluters might be either outside regulatory reach or in areas where proving jurisdiction is overwhelmingly difficult.

And even in situations in which regulators believe they still have jurisdiction, companies have delayed cases for years by arguing that the ambiguity precludes prosecution. In some instances, regulators have simply dropped enforcement actions.

In the last two years, some members of Congress have tried to limit the impact of the court decisions by introducing legislation known as the Clean Water Restoration Act. It has been approved by a Senate committee but not yet introduced this session in the House. The legislation tries to resolve these problems by, in part, removing the word “navigable” from the law and restoring regulators’ authority over all waters that were regulated before the Supreme Court decisions.

But a broad coalition of industries has often successfully lobbied to prevent the full Congress from voting on such proposals by telling farmers and small-business owners that the new legislation would permit the government to regulate rain puddles and small ponds and layer new regulations on how they dispose of waste.

“The game plan is to emphasize the scary possibilities,” said one member of the Waters Advocacy Coalition, which has fought the legislation and is supported by the American Farm Bureau Federation, the National Association of Home Builders and other groups representing industries affected by the Clean Water Act.

“If you can get Glenn Beck [3] to say that government storm troopers are going to invade your property, farmers in the Midwest will light up their congressmen’s switchboards,” said the coalition member, who asked not to be identified because he thought his descriptions would anger other coalition participants. Mr. Beck, a conservative commentator on Fox News, spoke at length against the Clean Water Restoration Act in December.

The American Land Rights Association, another organization opposed to legislation, wrote last June [4] that people should “Deluge your senators with calls, faxes and e-mails.” A news release [5] the same month from the American Farm Bureau Federation warned that “even rainwater would be regulated.”

“If you erase the word ‘navigable’ from the law, it erases any limitation on the federal government’s reach,” said Mr. Parrish of the American Farm Bureau Federation. “It could be a gutter, a roadside ditch or a rain puddle. But under the new law, the government gets control over it.”

Legislators say these statements are misleading and intended to create panic.

“These claims just aren’t true,” said Senator Benjamin L. Cardin [6], Democrat of Maryland. He helped push the bill through the Senate Environment and Public Works Committee. “This bill,” he said, “is solely aimed at restoring the law to what it covered before the Supreme Court decisions.”

The consequences of the Supreme Court decisions are stark. In drier states, some polluters say the act no longer applies to them and are therefore refusing to renew or apply for permits, making it impossible to monitor what they are dumping, say officials.

Cannon Air Force Base near Clovis, N.M., for instance, recently informed E.P.A. officials that it no longer considered itself subject to the act. It dumps wastewater — containing bacteria and human sewage — into a lake on the base.

More than 200 oil spill cases were delayed as of 2008, according to a memorandum written by an E.P.A. official and collected by Congressional investigators. And even as the number of facilities violating the Clean Water Act has steadily increased each year, E.P.A. judicial actions against major polluters have fallen by almost half since the Supreme Court rulings, according to an analysis of E.P.A. data by The New York Times.

The Clean Water Act does not directly deal with drinking water. Rather, it was meant to regulate the polluters that contaminated the waterways that supplied many towns and cities with tap water.

The two Supreme Court decisions at issue — *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* [7] in 2001 [8] and *Rapanos v. United States* in 2006 [9] — focused on the federal government’s jurisdiction over various wetlands. In both cases, dissenting justices warned that limiting the power of the federal government would weaken its ability to combat water pollution.

“Cases now are lost because the company is discharging into a stream that flows into a river, rather than the river itself,” said David M. Uhlmann, a law professor at the University of Michigan [10] who led the environmental crimes section of the Justice Department during the last administration.

In 2007, for instance, after a pipe manufacturer in Alabama, a division of McWane Inc., was convicted and fined millions of dollars for dumping oil, lead, zinc and other chemicals into a large creek, an appellate court overturned that conviction and fine, ruling that the Supreme Court precedent exempted the waterway from the Clean Water Act. The company eventually settled by agreeing to pay a smaller amount and submit to probation.

Some E.P.A. officials say solutions beyond the Clean Water Restoration Act are available. They argue that the agency’s chief, Lisa P. Jackson [11], could issue regulations that seek to clarify jurisdiction of the Clean Water Act.

Mrs. Jackson has urged Congress to resolve these issues. But she has not issued new regulations.

“E.P.A., with our federal partners, emphasized to Congress in a May 2009 letter that legislation is the best way to restore the Clean Water Act’s effectiveness,” wrote Mr. Silva in a statement to The Times. “E.P.A. and the Army Corps of Engineers [12] will continue to implement our water programs to protect the nation’s waters and the environment as effectively as possible, including consideration of administrative actions to restore the scope of waters protected under the Clean Water Act.”

In the meantime, both state and federal regulators say they are prevented from protecting important waterways.

“We need something to fix these gaps,” said Mr. Tierney, the New York official. “The Clean Water Act worked for over 30 years, and we’re at risk of losing that if we can’t get a new law.”

Copyright 2010 The New York Times Company