



At Issue

RESCUING LIBERTY FROM COAST TO COAST

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Federal Government Works To Take Away Your Water Rights—Despite 2006 PLF United States Supreme Court Victory

There's a new bill working its way through Congress, HR 2421, and it's deceptively called the "Clean Water Restoration Act." Its authors intend to dramatically expand the regulatory powers of the Army Corps of Engineers and the Environmental Protection Agency over your water and it is likely to come to a vote later this year.

For the first time ever, federal agencies would be authorized to regulate all "intrastate waters"—waters that have no impact on national commerce and do not cross state lines. This proposal would encompass virtually all wet areas in the United States including groundwater, pipes, ponds, ditches, storm drains, gutters, and any surface over which rainwater flows. The bill also would authorize federal regulation of all "activities affecting these waters." In other words, HR 2421 not only would nationalize all state waters, but it would vest federal bureaucrats with vastly expanded local land use authority.

The bill's supporters say congressional action is necessary to reverse PLF's 2006 landmark victory in *Rapanos v. United States* where the United States Supreme Court declared federal agencies do not have authority to regulate all waters in the United States. This bill is the brainchild of Representative James Oberstar (D-MN) and he and his allies claim Congress intended to regulate all interstate and intrastate waters when it passed the Clean Water Act in 1972. But the Act does not say so. It only prohibits discharges to "navigable waters" and expressly states Congress intended to "recognize, preserve, and protect the primary responsibilities and rights of the States" to protect and control local waters.

Rather than restore the intent of Congress, the bill distorts it.

That's why last year when PLF principal attorney Reed Hopper—who won the *Rapanos* case—was called to testify before Congress, he said that "this bill pushes the limits of federal power to an extreme not matched by any other law, probably in the history of this country."

Never in the Nation's history has federal power reached so far.

It's no wonder that a poll released by the Western Business Roundtable shows 63% of Americans oppose the bill while 47% strongly oppose the bill. Likewise, a survey conducted by Wilson Research Strategies revealed that 54% of those responding oppose the measure. Politicians supporting this misguided bill are clearly out of touch with the people and forget the lessons of history. James Madison said, "I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent

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and sudden usurpations.” Madison was warning against the insidiousness of incrementalism whereby our rights are worn away a little bit at a time by the erosion of overreaching government. But this bill is such a blatant and unprecedented power grab as to qualify as a “sudden usurpation.”

Federal bureaucrats boast they already process over 90,000 Clean Water Act permits a year. Imagine the impact when the Corps and EPA start asserting authority over every pond, puddle, and ditch in the country under the insidious “Clean Water Restoration Act.”

In a travesty of understatement, a plurality of justices in *Rapanos* stated: “The burden of federal regulation on those who would deposit fill material in locations denominated [jurisdictional] ‘waters of the United States’ is not trivial.” They noted with dismay that in deciding whether to grant a permit for a discharge into jurisdictional waters, the Corps of Engineers “exercises the discretion of an enlightened despot” relying on subjective factors such as “aesthetics,” “recreation,” or “general welfare.” According to the Court, the “average applicant for an individual permit spends 788 days and \$271,596 completing the process” while an applicant for a “streamlined” permit “spends 313 days and \$28,915—not counting costs of mitigation or design changes.”

As Mr. Rapanos found out, failing to get a discharge permit can be even more costly. He was charged millions of dollars in fees and mitigation costs and federal prosecutors sought to put him in jail for six years for clearing “wetlands” on his property without federal approval.

The Oberstar bill gives new meaning to the concept of “BIG GOVERNMENT.” It would put average citizens at risk of civil and criminal prosecution for ordinary conduct. Filling in an ornamental pond in one’s backyard would not be exempt from federal reach under the express terms of the “Clean Water Restoration Act.”

As Reed Hopper emphasized in his congressional testimony, this bill goes too far and exceeds constitutional authority. The “Clean Water Restoration Act” graphically displays the disregard many of our elected officials have for the human condition while zealously, but recklessly, pursuing their perception of popular environmental objectives. But no matter how laudable the goal, our system of government does not authorize achieving the goal by unconstitutional means.

PLF continues to fight for your rights in the courts every day, seeking reasonable limits to the Clean Water Act and other onerous laws and regulations. But we can’t bring the fight without your financial support. And imagine, if Congress successfully foists this bill on an unsuspecting public, how great will be the need for PLF to challenge it. Please send your contributions so that PLF can be among the first to seek judicial review. Quite frankly our freedom depends on it!

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