Clean Water Restoration Act just another land grab

posted at 12:15 pm on April 26, 2010 by Ed Morrissey
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Jonathan Adler follows up at Cato on the effort by Rep. Jim Oberstar (D-MN) to "restore" the authority Congress intended to grant the federal government in 1972 with the Clean Water Act (CWA). Oberstar has introduced the Clean Water Restoration Act (CWRA), which removes the word "navigable" from the law in order to get around Supreme Court decisions that circumscribed federal efforts to claim jurisdiction over lands and waterways that have nothing to do with interstate commerce. Adler presents the legal background of the CWRA and argues that it represents a massive land grab that has no connection to the original intent of the CWA:

> As written, the CWRA would extend federal regulatory jurisdiction to all "intrastate waters" and "all impoundments" of such waters, nomatter the size. As a consequence, it potentially extends jurisdiction to many waters and places that have never been subject to federal regulatory authority, including many ditches, irrigation and drainage systems, stock ponds, depressions, constructed water features, and, under a version of the bill considered by the House of Representatives in 2008, groundwater. (A finding in the Senate bill disclaims any assertion of regulatory jurisdiction over groundwater.)
>
> Whatever the merits of such a broad assertion of federal regulatory authority, it cannot be defended on the grounds that it "restores" the original intent of the CWA. Indeed, Congress has never passed legislation that would explicitly authorize such far-reaching regulatory authority over local waters and private lands as would the CWRA.

Not only does it not "restore" the original meaning of the CWA, it will not actually produce the results Oberstar purports to desire:

> It does not conform to the original meaning of the 1972 act, and will do little to advance the act's original goals. To the contrary, the CWRA will exacerbate existing uncertainty about the scope of federal regulatory authority and, if anything, impede efforts by federal agencies to set meaningful regulatory priorities that could enhance federal environmental protection efforts. In short, the CWRA will not accomplish what its sponsors and supporters say they intend.
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> The central feature of the CWRA is to expand the definition of waters subject to federal regulation under the CWA. It does this by eliminating any reference to navigability and providing that all of the

> CWA's provisions apply simply to "waters of the United States." It further defines "waters of the United States" to include all inter- and intrastate waters and impoundments thereof throughout the nation. …
>
> *SWANCC* and *Rapanos* make clear that a majority of justices on the Supreme Court continue to take seriously the idea that ours is a government of limited and enumerated powers. While the federal government has broad and far-reaching authority to adopt environmental protections, that authority is not without limits and does not extend to each and every parcel that may, at times, be inundated or exhibit wetland characteristics. Any CWA reforms that fail to respect the constitutional limits on federal regulatory authority risk exceeding constitutional limits and will inevitably provoke legal challenges that will produce additional uncertainty.
>
> The CWRA will not end confusion and litigation over the scope of federal regulatory authority. To the contrary, as written the bill guarantees that such confusion and litigation will continue. Under the new proposed definition of "waters of the United States," federal regulatory jurisdiction under the cwa will extend to all "waters" and "activities affecting" such waters that are "subject to the legislative power of Congress under the Constitution." Yet because the bill makes no effort to define what such waters are, the courts will have to determine the legitimate scope of federal regulatory authority. Stating that Congress intends to regulate to the fullest extent of its power under the Constitution does not resolve the question at all. It instead punts the question to the judiciary and requires federal courts to define the constitutional scope of Congressional power as cases are brought to federal court.

The end result? Adler thinks the Supreme Court will eventually limit the CWRA as it has done with the CWA, or at least enough of it to neuter the bill. However, before that happens, the federal government can tie the hands of property owners for a long time, forcing them to spend huge amounts of money to defend their rights, and bring economic activity on those lands to a standstill. During that period of time, it certainly amounts to an effective "land grab," and many of the people affected won't have the resources to fight it.

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The likely outcome of this will be more cases like Rapanos, in which the landowner will simply do what he wants with his own land, wait for the EPA to fine him, take EPA to court, and then win the case just like Rapanos did.

rockmom on April 26, 2010 at 12:23 PM

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>
> rockmom on April 26, 2010 at 12:23 PM

Did Rapanos recoup the legal costs that were generated by an unconstitutional grab?

thomasaur on April 26, 2010 at 12:27 PM

Given the limited understanding of the Constitution and existing law the dims have already demonstrated, could this be simply more of the same from a senator with no meaningful accomplishments to his credit? Oberstar is clearly no major player or great thinker. Could he be simply the “useful idiot” fronting for the enviro wackos with yet another nutty “save the (name your favorite endangered something-or-other thing here)” agenda??

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