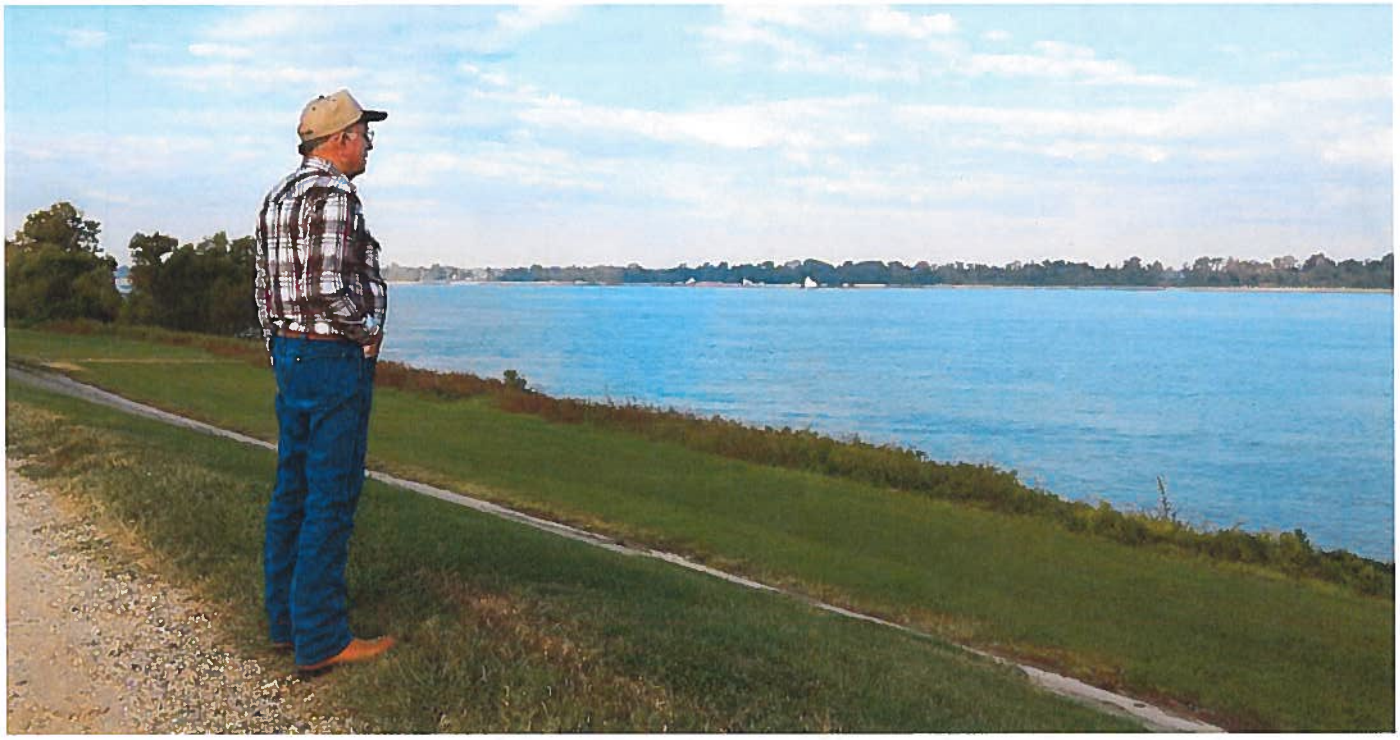
WATERS OF THE UNITED STATES REGULATORY OVERREACH PROTECTION ACT

HOUSE TRANSPORTATION & INFRASTRUCTURE COMMITTEE

Regulating Waters of the United States: A Successful Federal-State Partnership



For more than four decades, regulation of pollution and water quality for the Nation's waters has been achieved through a productive partnership between state governments and the federal government. This relationship has been successful because of the recognition that not all waters need to be subject to federal jurisdiction and that states should have the primary responsibility of regulating waters within their individual boundaries.

This federal-state partnership was established under the 1972 Clean Water Act (CWA). The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are the federal agencies that carry out the federal government's responsibilities as a co-regulator of the Nation's waters with the states.

The CWA clearly states up front that it is the "policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority under this Act."

The extent of the federal government's authority under the Clean Water Act was limited to "navigable waters," which under the CWA are defined as "waters of the United States" (WOTUS). Twice, the Supreme Court has reaffirmed the federal-state partnership under the CWA, when it told the federal agencies that there are limits to federal jurisdiction under the CWA, and that they had gone too far in asserting their authority.

The federal-state partnership, when parties have recognized and respected their roles and responsibilities, has led to significantly less pollution and cleaner water for the country.

The Administration's Federal Power Grab

Despite the partnership established under the Clean Water Act and the limits to federal authority, the Obama Administration and some lawmakers in recent years have sought to "clarify" the scope of federal jurisdiction under the CWA in a manner that would expand the federal government's regulatory power. In short: a federal power grab.

Changing the scope of U.S. law, including the CWA, is solely the responsibility of Congress, and Congress has determined this to be unnecessary. Efforts to significantly expand federal jurisdiction were the subject of failed legislation in the 110th and 111th Congresses, with strong bipartisan opposition preventing those bills from gaining traction.

Despite this strong opposition to a legislative expansion of federal authority, the Obama Administration has subsequently sought to bypass the legislative process and achieve the same expansionist agenda through agency guidance and the executive branch's regulatory process.

In April 2014, the EPA and Corps put forward a proposed rule entitled "Definition of 'Waters of the United States' Under the Clean Water Act." However, there are serious deficiencies with this rulemaking. The draft rule misconstrues and manipulates the two relevant Supreme Court holdings, effectively turning those cases that placed limits on CWA jurisdiction into a justification for the agencies to broaden their authority over all waters. The proposed rule goes far beyond merely clarifying the scope of waters subject to CWA programs. Rather, it is aimed at increasing the scope of the CWA's jurisdiction over more waters.

Overreach of Imperial Presidency

There are also substantial flaws in the economic and scientific foundations upon which the rule is based. Moreover, the sequence and timing of the actions that the federal agencies have taken to develop this rule undermine the credibility of the rule and the process to develop it.

The Administration's push to unilaterally broaden the scope of the CWA and the federal government's reach into Americans' everyday lives threatens to undermine the federal-state partnership and erode state authority by granting sweeping new federal jurisdiction to waters never intended for regulation under the Clean Water Act, including ditches, man-made ponds, floodplains, riparian areas, and seasonally-wet areas.

This expansion of federal regulatory power also could have serious consequences for the Nation's economy, threaten jobs, invite costly litigation, and significantly restrict the ability of landowners to make decisions about their property and the rights of state and local governments to plan for their own development.

These actions are yet another example of a disturbing pattern of an imperial presidency that seeks to use brute force and executive action while ignoring Congress.

Regulation must be balanced in a manner that responsibly protects the environment and recognizes the rights of states and individuals, without an unnecessary and costly expansion of the federal government and unreasonable and burdensome regulations on our small businesses, farmers, and families.

The Waters of the United States Regulatory Overreach Protection Act

- The Waters of the United States Regulatory Overreach Protection Act will uphold the federal-state partnership to regulate the Nation's waters by preserving existing rights and responsibilities with respect to "waters of the United States" under the Clean Water Act.

- The bill prohibits the Environmental Protection Agency and the Army Corps of Engineers from developing, finalizing, adopting, implementing, applying, administering, or enforcing:

    - The proposed rule that would redefine "waters of the United States" under the CWA, or using the rule as a basis for future administrative actions that would undermine the federal-state partnership or usurp Congress' express authority to change the scope of the Clean Water Act through a redefinition of "waters of the United States."

    - Any agency guidance that would expand the scope of waters covered by the CWA, as the Administration's proposed WOTUS rule and draft guidance would do.

    - The agencies' interpretive rule that would broaden regulation of the agricultural community by restricting the exemption from CWA Section 404 permitting for certain agricultural conservation practices.

- The bill also requires the EPA and the Corps to engage in a federalism consultation with the states and local governments by:

    - Jointly consulting with relevant state and local officials to formulate recommendations for a consensus regulatory proposal that would identify the scope of waters to be covered under the Clean Water Act, and those waters to be reserved for the states to determine how to regulate. The proposal would need to be consistent with the applicable rulings of the United States Supreme Court.

    - Preparing a draft report describing the recommendations for a consensus regulatory proposal developed as a result of the consultation with relevant state and local officials, and publish the draft report in the Federal Register for public review and comment.

    - Preparing and submitting to Congress a final report describing the recommendations for a consensus regulatory proposal, based on the consultation with relevant state and local officials and the public review of the draft report.