Senate advances bill to limit the Clean Water Act to "traditional navigable waters"

John R. Weinberger, June 10, 2015.

The continuing saga over which streams and wetlands are protected by the Clean Water Act played out in the Senate Environment and Public Works Committee this morning where Senators voted along party lines to advance a bill introduced by John Barrasso (R-WY) to block EPA's new final rule.

Last month EPA published its final rule defining "waters of the United States" in the Clean Water Act in order to give property owners, municipal governments and states clarity about whether federal permits are needed to fill, drain or discharge waste in streams, ponds and wetlands. The new rule is based on the concept of connectivity of waters and that a body of water affecting the chemical, physical or biological integrity of downstream surface drinking water sources should be covered by Clean Water Act protections. However, in order to address complaints from the agricultural community, real estate developers and others, the EPA limited federal jurisdiction over wetlands and ponds to those that are within a 100-year floodplain or within 4000 feet of a river channel. Wetlands and ponds outside of a 100-year flood plain or beyond 4000 feet of a river are, for the first time, excluded from Clean Water Act protection regardless of whether they have a significant physical, chemical or biological relationship with protected waters. Furthermore, the rule maintains existing exemptions for farmers and farm activities.

The bill that advanced in committee today, S. 1140, would order the EPA to go back to the drawing board and come up with a rule that only protects "traditional navigable waters." The Clean Water Act has never been interpreted so narrowly. As Patrick Parenteau of the Vermont Law School Environmental and Natural Resources Law Clinic wrote in his May 19 hearing statement on S. 1140,

> The Act has never been interpreted to protect only traditionally navigable waters. In Train v. City of New York, 420 U. S. 35, 37 (1975) the [U.S. Supreme] Court described the 1972 amendments as establishing "a comprehensive program for controlling and abating water pollution," rejecting the notion that the purpose of the Act was to protect navigation. The Supreme Court has ruled on a number of occasions, including in SWANCC and Rapanos, that the Act is not limited to traditionally navigable waters….In United States v. Riverside Bayview Homes, Inc., 474 U. S. 121, (1985) the Court said the interests served by the statute embrace the protection of "'significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites'" for various species of aquatic wildlife. There is simply no legal support for the statement that the purpose of the Act is confined to protecting traditionally navigable waters.

Limiting the scope of the Clean Water Act to "traditional navigable waters" essentially removes all streams and wetlands from federal environmental protection. Interestingly, in arguing for S. 1140, Republican Senators did not dispute the scientific basis of EPA's rule – that streams and wetlands and

wetlands have a hydrological and biological relationship to downstream navigable waters and have a direct impact on the quality of rivers and lakes that provide drinking water for millions of people. The arguments put forth in support of S. 1140 this morning were entirely political. Republican Senators on the Committee don't trust the EPA, they don't trust the Obama Administration and they don't like federal regulation. They are evaluating the EPA rule, not in terms of what it does for clean water, but strictly in terms of whether it expands federal power.

In truth, the rule does not even expand federal power. Up until now, the EPA has made a case-by-case determination of whether a body of water is covered by the Clean Water Act. This has caused uncertainty and confusion among land owners. The new rule provides specific limits on which waters are covered and gives property owners a clearer understanding of whether or not they need a federal permit for any activities that affect streams or wetlands. S. 1140 was drafted and introduced before the final rule came out and seems to address an imaginary rule – one in which the EPA is going to control every puddle and ditch on every farm field in the U.S. The actual rule does no such thing. It prohibits upstream water pollution which would contaminate downstream drinking water. The rule should go into effect.