

**The Clean Water Restoration Act:  
A Wolf in Sheep's Clothing**

**Executive Summary Of White Paper  
On The Clean Water Restoration Act (HR 2421)  
Written By The Democrat Staff Of Rep. James Oberstar (D-MN)**

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**Introduction.** The Clean Water Restoration (H.R. 2421 and S. 1870) has emerged as perhaps the most significant and controversial environmental bill in American history. As Reed Hopper, the lead attorney in a successful 2006 U.S. Supreme Court case testified “.....*this bill pushes the limits of federal power to an extreme not matched by any other law, probably in the history of this country.*” And as a wise professor of Environmental Studies at George Washington University warned over 30 years ago, “*Wait until they get around to controlling non-point source pollution.*” The Clean Water Restoration Act “gets around to it,” and then some.

**The 1972 Clean Water Act.** Among the numerous and varied federal environmental laws passed by Congress in the 1960’s and ‘70’s, the Clean Water Act (CWA) is generally viewed the most popular and successful. And national polls consistently show that water quality is the number one environmental issue among Americans. It is therefore not surprising that, under the mantra of clean water, a radical bill, with 175 House co-sponsors and 20 Senate co-sponsors, would be given such serious consideration.

**CWA Implementation.** For the first quarter of a century or so, the primary focus of the Act was on cleaning up pollution from point sources—essentially anything coming out of a pipe. This was an enormous task, and required an investment in the tens of billions of dollars. Meanwhile, an effort was undertaken to preserve the nation’s wetlands, many of which had been lost due to settlement. A “no-net loss policy” was announced in 1990 by then President Bush. Since there was no federal wetlands statute, the CWA became the legal authority for wetlands regulations. In addition, many states enacted their own wetlands laws.

**The Supreme Court Weighs In.** Two U.S. Supreme Court decisions, while providing regulatory relief for landowners and local governments, have had a profound and chilling effect on the ever-expanding jurisdictional reach of the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers under the Clean Water Act. The *SWANCC* (Solid Waste Agency of Northern Cook County) decision in 2001 said that the CWA does not have jurisdiction over isolated wetlands. And the *Rapanos* decision in 2006 said that jurisdiction under the Act must show a clear connection to a navigable water, the term used in the Clean Water Act.

**The Clean Water Restoration Act.** In May of last year, the new Chairman of the Committee on Transportation and Infrastructure, Rep. James Oberstar of Minnesota, introduced H.R. 2421 with 158 co-sponsors. Senator Russ Feingold of Wisconsin subsequently introduced a companion bill, S. 1870, with 20 co-sponsors. The bill has two provisions that expand federal jurisdiction beyond anything previously seen in Congress: (1) The term ‘navigable water’ would be replaced with ‘waters of the U.S.,’ including wetlands, mudflats, sandflats, playa lakes, prairie potholes, intermittent streams, ponds, sloughs and meadows; and, (2) Adds ‘activities affecting these waters,’ a land use control provision that appears to be without limits.

**The Unhidden Agenda.** Promoted as a restoration bill, the CWRA is intended as an unprecedented expansion of federal authority over land, water and people. This is made clear in a 62-page white paper to Congressman Oberstar prepared by the Democratic staff of the House Committee on Transportation and Infrastructure, which has sole jurisdiction over the bill. The report, Waivers, Loopholes, and Rollbacks, dated October, 2006, openly states that “...*control of non-point sources is the unfinished agenda of the Clean Water Act.*” The report defines these as ‘diffuse’ sources, primarily from land use activities including sediments, lawns, nutrients, material from rooftops, parking lots, pets, construction, and atmospheric deposition, in addition to the more obvious activities such as farming, logging, and mining. The simplest way to define non-point sources is anything that doesn’t come out of a pipe. The report laments the fact that the “*Clean Water Act has no direct regulatory authority over the discharge of pollutants from non-point sources.*” In addition to expanding the definition of waters of the U.S., the Clean Water Restoration is intended to provide the authority over non-point sources through the new language “activities affecting these waters.”

**Water Flows Downhill.** Proponents of the bill have often used the phrase ‘water flows downhill’ to illustrate that what happens upstream has implications for what happens downstream. This is not rocket science. It is an ecological fact. Everything is located within one watershed or another— all land, all water, all people, all things. So watershed planning and watershed management does make sense from an ecological and social perspective, since watersheds have been instrumental in shaping landscapes, cultures, and economies. However, giving the federal government control over watersheds--the kind of power that is suggested in the CWRA-- makes

little sense from any perspective. Local and regional environmental protection alternatives have been, and can continue to be, developed and put into practice—alternatives that can be done better, faster and cheaper, with broad public support among those closest to, most familiar with, and most concerned about the resources in question.

**The Economic Factor.** Cost-effective means of environmental planning and management need to be found, and they can only be found ‘closer to home.’ One aspect of the Clean Water Act—the TMDL (total maximum daily load) provision—is particularly troublesome from a cost standpoint. According to a report from the Congressional Research Service, TMDL studies for bodies of water may average a million dollars a study. In Minnesota, for example, a state with an estimated 50,000 bodies of water, the study cost alone for all water bodies would run about \$50 billion. And that doesn’t buy one drop of clean water!

**Back to the Drawing Board.** The goal of cleaner water is a laudable one. It’s hard to find anyone who doesn’t want clean water. But it’s also hard to find anyone that understands the implications of the Clean Water Restoration Act who wants that kind of federal intervention in their life either. So any ‘compromise’ that may be brewing as the result of the marathon hearing in the House on April 16<sup>th</sup> will only make matters worse. The bill is fundamentally flawed in so many ways, that it is not fixable. The only solution is for Congress to go back to the drawing board, and in the interim, allow people at the grass-roots level to come up with solutions that will actually make sense and work on the ground. This debate is not about clean water. It’s about governance. As Jim Burling, senior attorney with the Pacific Legal Foundation said recently with respect to CWA jurisdiction, *“If our constitutional system of limited federal powers means anything, we have to win on this issue.”*

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