National Affairs and Legislation Committee
The Garden Club of America
113th Congress, 2nd Session — April 23, 2014
Update #12

NEW CLEAN WATER ACT REGULATIONS

- 90-Day Comment Period
- Congressional efforts to overturn the new regulation

What you can do:

Send the EPA your own personal comment in favor of the new regulations, and encourage other members of your garden club to do likewise. The 90-day comment period ends July 21. To submit a comment, click this link to the Federal Register: https://www.federalregister.gov/articles/2014/04/21/2014-07142/definition-of-waters-of-the-united-states-under-the-clean-water-act

- Contact your representative and senators. If you favor the new regulations, tell them why and urge them to support the rules and allow them to take effect in 2015 as planned.

  Urge legislators to provide the appropriations needed by EPA and the Army Corps of Engineers to administer the regulations. Ask them to refrain from adding restrictive riders to the money bill to thwart administration of the new rule.

Clean Water Act Proposed Regulations

On March 24, the Environmental Protection Agency and the Army Corps of Engineers released a proposed rule to clarify what waters are protected under the Clean Water Act. The next step will be for the proposed rule to be published in the Federal Register. When that happens, a 90-day comment period will begin. After the comment period closes, EPA and the Corps will analyze the comments and make any adjustments in the proposed rule warranted on the basis of that public input. A final rule is expected to be issued and go into effect in 2015.

The proposed rule is the culmination of a lengthy process of consultation with stakeholders, scientists, and the public. The EPA and Corps took the lead, but the Department of Agriculture was also fully involved because of the potential impact of clean water regulations on farming and forestry. Existing exemptions and exclusions for agriculture are preserved in the rule, including 56 specific conservation practices that improve or protect water quality. Thus, the new rule is in many ways a compromise between the views of those who wished to protect every body of water and those who prefer far less protection than was provided before the Supreme Court rulings.

EPA maintains that headwater streams and wetlands are integral to the overall water system and need to be protected from pollutants, sewage, and toxic substances that otherwise would seep or flow from them into downstream waters. EPA says that the proposed rule does not protect any new types of waters that have not historically been covered under the Clean Water Act. Both EPA and the Corps emphasize that the new rule will increase the consistency, predictability, and transparency of Clean Water Act enforcement. According to EPA, under the proposed rule most seasonal and rain-dependent streams as well as wetlands near rivers and streams

would be protected. Other types of waters that have more uncertain connections with downstream water will be evaluated on a case-by-case basis to determine the extent of connection to downstream waters in the watershed. Public comment is sought specifically about options for these situations.

EPA's economic analysis of the proposed rules estimates that its benefits will outweigh its costs: "The proposed rule would provide an estimated $388 million to $514 million annually of benefits to public, including reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater. The public benefits significantly outweigh the costs of about $162 million to $279 million per year for mitigating impacts to streams and wetlands, and taking steps to reduce pollution to waterways." The EPA has provided a clear snapshot of what the guidance covers and does not cover: http://www2.epa.gov/uswaters.

EPA has attempted to base the proposed rule on scientific principles. In September 2013, EPA released a report summarizing the peer-reviewed scientific literature that addresses the degree to which waters – particularly headwater and intermittent and ephemeral streams, wetlands adjacent to such streams, and so-called "isolated" waters – have physical, chemical, or biological linkages to other, generally larger, waters. Currently being reviewed by EPA's independent Scientific Advisory Board (SAB), the rule should be finalized by yearend.

Support:
For a preliminary summary of industry, recreational, and environmental organizations that support the measure, please click here: http://water.epa.gov/lawsregs/guidance/wetlands/upload/wus_quotes_326.pdf

Opposition: Congressional and interest group opponents are already gearing up for a big fight over the proposed rule. Fifteen Senate Republicans led by Sen. Toomey (PA) [1], wrote on April 3 to EPA Administrator Gina McCarthy that the rule will "negatively impact economic growth by adding an additional layer of red tape to countless activities that are already sufficiently regulated by state and local governments." Opposition to the proposed rule is not coming only from Republicans. Senate Energy and Natural Resources Chair Landrieu (D-LA) called the proposed rule overreach and vowed to find bipartisan support to reverse it. In the House, Republicans called the regulations "overstretch" and expressed fear that the new rules will make permits for construction, mining, and farming activities more difficult and costly to acquire. Transportation and Infrastructure Committee Chairman Shuster (R-PA) argues that the regulations mean greater regulation of businesses and landowners, compelling them to apply for permits, with all the associated bureaucratic delays, before they can do something on their own property. House Appropriations Chairman Rogers (R-KY) during a hearing on March 28 warned the Army Corps Assistant Secretary for Civil Works Jo-Ellen Darcy that "getting the money to enforce [the regulations] is going to have a tough time up here." In past years, House appropriators have put language in their bills to block EPA enforcement of the Clean Water Act, but the riders were always dropped during House-Senate conference negotiations. However, the result could be different in 2014.

Agriculture: The farming community is not convinced that the regulations won't mean trouble for them, despite the fact that the proposed rule does not change any of the exemptions agricultural producers have received since the passage of the Clean Water Act in 1972. Of 180 conservation practices, only 56 were specifically preserved—leaving farmers wondering whether they would need permits for the remaining 124 conservation practices, including nutrient management and conservation tillage, for example. EPA responds that the 56 listed practices are potentially used in aquatic, riparian, and wetland areas while the remaining practices are typically used in upland situations. The National Farmers Union has praised the rule, and more than 100 small farmers

[1] Other signers included Vitter (LA), Rubio (FL), Risch (ID), Paul (KY), Coburn (OK), Cruz and Cornyn (TX), Lee (UT), Enzi (WY), Fisher (NE), Sessions (AL), Johnson (WI), Scott (SC), and Chambliss (GA).

have also expressed their support. The American Farm Bureau, however, sees the rule as a "serious threat" to farmers and ranchers. The National Sustainable Agriculture Coalition has a wait-and-see position so far.

GCA Position

Clean Water Position Paper

"The Garden Club of America recognizes that all life is dependent upon clean, uncontaminated water. We support the original objective of the 1972 Clean Water Act to "restore and maintain the chemical, physical and biological integrity of the nation's waters." . . . In order to protect our water resources. . . The Garden Club of America supports . . . Ensuring a vital Clean Water Act including broad jurisdictional coverage."

NAL/Conservation Committee Letter to President Obama

http://www.gcamerica.org/members/uploads/FCKUploads/file/NAL/Policymaker%20Letters/ObamaLetterNALFeb2014.pdf In February, NAL Chairman Lindsay Marshall and Conservation Committee Chairman Jennifer Fain wrote to President Obama urging him to act quickly to issue regulations to enforce the Clean Water Act.

Background

Many major environmental laws were enacted in 1972, including the Clean Water Act. Despite the popularity of the broad clean water goals, implementation has remained problematic. Land owners do not want to be told by the Army Corps of Engineers, EPA, or other official entities that they cannot carry out certain practices, uses, or improvements on their privately owned acres, and they do not like having to apply for Clean Water Act permits to use their own land in certain ways. While agribusiness, developers, industry, and other groups have continued to push for relaxation of Clean Water Act requirements, sports, fishing, public health, and environmental groups favor strict enforcement because they view wetlands as part of the complex ecosystems that recharge and purify our water sources. The tension in administering the Clean Water Act has never been fully resolved.

The Act governs discharges into "navigable waters" and defines navigable waters as "waters of the United States." In June 2006, the Supreme Court ruled in a 4-1-4 split decision in *Rapanos v U.S. et al* that the term "waters of the United States" includes only those relatively permanent, standing, or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes. Justice Kennedy's opinion held that waters with a significant nexus or connection to navigable waters are also covered, but it did not define exactly what constituted a nexus—whether, for example, it applied to intermittent streams and wetlands. Because no single opinion garnered a majority of the court, it remained unresolved as to what test would be applied to determine wetlands jurisdiction. Are headwaters protected? Vernal pools? Or only bodies of water large enough for boating?

The Supreme Court *Rapanos* ruling occurred near the end of the 109th Congress, too late for legislation to resolve the confusion. In the 110th Congress, Rep. Oberstar (D-MN), Chair of the House Transportation and Infrastructure Committee and Sen. Boxer (D-CA), Chair of the Senate Environment and Public Works Committee, both pushed hard to legislate the Clean Water Act Restoration Act (CWARA) to spell out which waters should be protected under the Clean Water Act. Rep. Oberstar held hearings in October 2007 at which NAL Chair Derry McBride testified in support of Rep. Oberstar's bill to broadly define the scope of Clean Water Act enforcement:

> "The provisions of this Act are critically needed to reaffirm the original, intended scope of the Clean Water Act which guaranteed all Americans the right to clean water . . . We ask that both sides of the aisle recognize that the pollutants and impurities, from which Americans seek protection, travel through aquifers, marshes, and wetlands with no apparent regard for the visibility of nearly navigable water. The reach of the Act, therefore, needs to be expressed as broadly as possible. . ."

The 110th Congress failed to act, however. In the 111th Congress, a bill that Sen. Boxer said defined the "sweet spot" passed the Senate but not the House. In 2007, the EPA and the Army Corps of Engineers, in the absence of legislation, issued "guidance" for how agency field staff should determine whether waters are protected by the Clean Water Act. After a detailed review of scientific evidence regarding the role certain waterways play in the ecosystem, the EPA released the proposed regulations on March 25, 2014. Following the 90-day public comment period and Science Advisory Board's final review, the EPA will issue a final rule, most likely in 2015.

When Special Advisor to the President John Podesta addressed the NAL Washington DC legislative conference in February 2014, he emphasized how important it was that GCA members actively voice their support for broad enforcement of the Clean Water Act, and he urged us to make our views known on Capitol Hill.

How to contact your legislators:

To send e-mail to your senator, go to http://www.senate.gov/general/contact_information/senators_cfm.cfm and scroll to the senator's name. There you will see a "web form" address in red type. Click on that address and follow the directions for sending e-mail.

To send email to your representative, go to https://writerep.house.gov/writerep/welcome.shtml

To telephone any legislator, call the Capitol switchboard: 202-224-3121. Ask for your senator's office by name. When the phone is answered, say that you want to leave a message about an issue. A very young aide will take the message or send you to the legislator's voice mail. This seems impersonal, but is nevertheless effective—legislators keep track of how many calls come in on different issues and the direction in which sentiment is running. Even a relatively small number of calls are enough to warrant serious consideration of the views expressed.

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NAL updates serve in an advisory capacity, based on committee research. Individual clubs and members may act on any issue as they choose. Editors: Martha Phillips (mhphillips@optonline.net) and Suzanne Canfield (sbc@sbcanfield.com). All e-mails and faxes are sent from GCA Headquarters. To unsubscribe: Contact Sarah at GCA Headquarters, 212-753-8287, or sarah.frelinghuysen@gcamerica.org