

CALIFORNIA CLEAN WATER LAW:

Restoring Protections for Wetlands and Impermanent Streams

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California was in the forefront of environmental law when it enacted the Porter-Cologne Water Quality Control Act in 1970. This law set up state and regional boards to oversee water quality in California, and regulates discharges of pollutants into waters of the state. Several years later Congress enacted the federal Clean Water Act, which was a similar statute, protecting "navigable waters" in the United States. The CWA has been amended several times since then, and has grown large and complex – it runs to 212 pages in my statute book.

The CWA requires permits for discharges from "point sources" into navigable waters. Point sources are things like pipes dumping wastewater from an industrial plant into a river. The U.S. EPA issues these permits, unless the state has taken over permitting, which California has done.

The CWA also requires permits for the deposit of "dredged or fill material" into navigable waters. Dredged or fill material is anything that is dredged out of the water, or obtained elsewhere, that is deposited back into navigable waters. The Army Corps of Engineers issues these permits, unless the state has taken over permitting, which California has not.

Until 2006, dredged-or-fill permits were required when filling wetlands or impermanent streams. This is because the EPA and Army Corps defined CWA "navigable waters" liberally, including virtually all wetlands as well as impermanent streams that flow only part of the time – even ephemeral streams, which flow only after a rainstorm. 66% of stream miles in California are impermanent. As you can see from the map entitled "Permanent and Impermanent Streams near Los Angeles", there are many more impermanent streams than permanent streams in the Los Angeles area.

In 2006, the U.S. Supreme Court, in the *Rapanos* case, decided that "navigable waters," as the term is used in the CWA, does not include wetlands or impermanent streams unless they have a "significant nexus" to traditional navigable waters. TNWs are bodies of water that can be used for foreign or interstate commerce by boats or barges. Passing the significant-nexus test requires that the wetland or impermanent stream significantly affect the chemical, physical and biological integrity of TNW. The test is complex and fact-intensive, and requires several days of work to apply in each case.

This decision stripped CWA protection from many wetlands and the majority of impermanent streams in the U.S. Wetlands and impermanent streams are important for water quality and the environment because they provide many ecological services. They aid groundwater recharge, and filter the water on its way to the aquifer. They dissipate the energy of floodwaters, reducing downstream erosion. They store water during times of high discharge. They support plant communities and provide important wildlife habitat and corridors.

The *Rapanos* decision may have removed water-quality protection from most of the streams shown in the map. In 2007 the Army Corps determined that only the lower 1.75 miles of the Los Angeles River were TNW, meaning that the CWA does not apply to any of its tributaries or adjacent wetlands unless they have a significant-nexus test to the lowest 1.75 miles.

Since the Supreme Court's *Rapanos* decision was based on its interpretation of the text of the CWA, Congress can effectively reverse that decision by enacting a statute defining "navigable waters" more expansively. This is what the Clean Water Restoration Act of 2009, S. 787, does. The bill is co-sponsored by Barbara Boxer, but not (yet) by Diane Feinstein. California could also take action without waiting for the federal government to fix the problem. California could amend the Porter-Cologne Act to require state permits for the deposit of dredged-or-fill material into waters of the state, just as state permits are required for point-source discharges. The California Clean Water Restoration Act would also define "waters of the state" to include all wetlands and impermanent streams. This would make more work for the Los Angeles Regional Water Quality Control Board and its counterparts in other regions of the state, and would require more funding for them. The Angeles Chapter Conservation Legal Committee, along with other environmental organizations, is evaluating the legal and political viability of such legislation. It would allow California to take control of its own water quality, which the federal government is failing to adequately protect.

From Southern Sierran, August 2009