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Love That Dirty Water

By Ted Williams

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No crisis confronting America's fish and wildlife is more pressing and more fixable than the emasculation of the Clean Water Act. In neutering this landmark legislation, the Bush administration twisted two bizarre Supreme Court decisions into enforcement "guidance" that rendered "isolated" wetlands, headwaters, vernal pools, intermittent streams and ephemeral streams—which, together, comprise at least 60 percent of the nation's waters—unprotected.

The first of the Supreme Court decisions, in 2001, was SWANCC (Solid Waste Agency of Northern Cook County), busted by the Army Corps of Engineers for destroying wetlands in Illinois without a permit. The authority of the Clean Water Act rests with the U.S. Constitution's Interstate Commerce Clause, which allows the feds to regulate business across state lines. For the interstate connection, the EPA had used the presence of migratory birds simply because it was easy to determine and apply (the "glancing goose test," as developers, property-rights zealots and other critics like to call it). But there are many other ways the Commerce Clause can be applied. One would be fishing; others: hunting, boating, birding, flooding because it can cause interstate damage; delivery of pollutants because it can cause interstate damage, groundwater flow, even evaporation and precipitation. In the SWANCC case, the court ruled only that the federal government cannot regulate pollution in non-navigable "intrastate" waters (those completely in one state) simply because they provide habitat for migratory birds.

For any executive branch not openly hostile to fish and wildlife, SWANCC would have been meaningless. Instead, with its 2003 guidance document the Bush administration twisted the decision into a tool to unleash polluters on most U.S. waters. Controlling pollution in navigable mainstems but not non-navigable waters that feed mainstems is insane—like giving a free pass to polluters hidden by trees.

Equally insane is the notion that "isolated" waters are somehow unimportant or, for that matter, that a stream, lake or wetland can be "isolated." Everything's connected through the ground or by seasonal surface flow. And intermittent and ephemeral streams are often more important to fish than perennial ones. In spring and fall they provide spawning habitat for salmonids and other fish; and in winter they provide fish with refuge from violent currents, silt, road salt and, because these streams often issue from the ground, anchor ice.

In 1969, Jim Martin, now conservation director of Pure Fishing (an entity sired by tackle companies), was a fisheries biologist researching the world-famous summer steelhead population of the Rogue River for the Oregon Department of Fish and Wildlife. He found that they spawned primarily in intermittent streams.

"At that time," he told me, "developers were diverting and damming these streams, cutting down their riparian forests, building houses next to them, all because they were thought to be inconsequential."

Later, Martin and his colleagues checked the rest of the state's stream-spawning salmonids, finding that water that had been dry in summer was packed with fish in winter. With this data, Martin's department was able to get major restrictions on logging, roading and other watershed development.

The Supreme Court's 2006 decision—or, rather, indecision—known as Rapanos involved two Michigan developers constrained from building shopping malls on wetlands. Four justices held that enforcement could only happen if a wetland abutted a non-navigable water that feeds a navigable one; four took the opposite view; and one (Anthony Kennedy) opined that there had to be a "significant nexus" between the two. Kennedy didn't say what he meant by "significant," leaving that to the Army Corps of Engineers to decide on a case-by-case basis until it hatched specific regulations—a prescription for chaos. Because the other justices were split, Kennedy's "significant nexus" rule became primary by Supreme Court precedent.

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Instead of defining "significant nexus" in its guidance, the Bush administration spewed gobbledygook, further confusing and paralyzing state and federal field agents. The Corps even published a 60-page "significant nexus" guidebook rife with photos of water bodies that supposedly needed to be tested for "significant nexuses" but not offering a hint about which water bodies might have them or why.

The one thing the administration did make clear, however, was its endorsement of a presumed right to pollute, thereby forcing the EPA, Corps and state regulatory agencies to spend time, money and manpower demonstrating harm before shutting down polluters. According to EPA data, Rapanos (and, more importantly, the administration's decision to use it to suspend enforcement) significantly impeded field agents in 500 Clean Water Act cases in just nine months. And EPA reports that 16,730 facilities with pollution permits (roughly 40 percent of all such facilities) discharge into headwaters, intermittent streams or ephemeral streams that had been protected before Rapanos and the guidance it spawned.

The solution, of course, is for Congress to reaffirm its intent of cleansing and protecting all waters of the United States. As Rep. James Oberstar (D-MN) observes, "The opening paragraph [of the Clean Water Act] says the purpose is to 'restore and maintain the biological, chemical and physical integrity of the nation's waters.' It doesn't say the nation's navigable waters."

Accordingly, Oberstar and Sen. Russ Feingold (D-WI) introduced the Clean Water Restoration Act which would do exactly what its title says—"restore" the act by stating in language sufficiently specific to insulate it once and for all from purposeful or accidental misinterpretation by hostile or linguistically challenged bureaucrats and judges. In no way would the legislation change or broaden the Clean Water Act. It would merely restore it to pre-SWANCC condition.

The bill has failed every session since 2003. Up until 2006 it failed because the Republicans, who then controlled Congress, wouldn't give it a hearing. In the 110th Congress (2007 and 2008) it failed because, suddenly, the homebuilders, stockgrowers, miners, water diverters, property-rights groups, Farm Bureau federations and ultra-conservative think tanks saw that it actually had a chance and lobbied the bejesus out of Congress.

Which sportsmen and sportsmen's groups support this measure? Well, every intelligent, effective, legitimate one. Solidly on board and pushing hard are: Trout Unlimited, Ducks Unlimited, National Wildlife Federation, Izaak Walton League, Wildlife Forever, Pheasants Forever, Wildlife Management Institute, Theodore Roosevelt Conservation Partnership, Orion-The Hunter's Institute, International Game Fish Association, American Sportfishing Association, American Fisheries Society, Association of Fish and Wildlife Agencies, to mention just a few. Even the National Trappers Association supports the bill.

Then there are the enlightened outdoor writers who tell their readers not just "how to do it" and "where to go" but how to make sure they and their kids can keep doing and going. There are dozens of examples (many close friends), but I'll single out one I know only by his fine copy, Babe Winkelman, because he reaches a huge audience, a good part of it comprised of conservative elements especially in need of education. Writes Winkelman: "During the Bush years, many Democrats have said they support the Clean Water Restoration Act. Now it's time for them to prove it."

Alas, other outdoor writers, sportsmen and sportsmen's groups have allowed themselves to be body-snatched by polluters and property-rights crazies. When I Googled "Clean Water Restoration Act," "fishermen" and "hunters" I was distressed and disgusted to see that the entire first page, all 10 hits, were reprints or variations of a perfidious screed entitled "Sportsmen: Beware the Clean Water Restoration Act" being fired around the nation by a radical, anti-environmental think tank called the National Center for Public Policy Research whose Washington, D.C.-bound propagandists wouldn't know a trout from a pout.

"In the past none of us took sportsmen's opposition all that seriously," declares Jan Goldman-Carter, the National Wildlife Federation attorney in charge of wetlands and water. "But recently we've been hearing about someone named Remington out there blogging. We're trying to figure out how to respond to this."

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Goldman-Carter is referring to outdoor writer, sportsman and self-proclaimed fish-and-wildlife advocate Tom Remington of Clearwater, Florida. In addition to his "Open Air with Tom Remington" radio broadcasts and his frenetic blogging on hunting and fishing Web sites, he co-administers U.S. Hunting Today, a national online magazine picked up by affiliates in 41 states. Between long, rambling harangues about wolves, the Endangered Species Act and other alleged outrages, Remington pumps BS about the Clean Water Restoration Act into the ears and hard drives of his listeners and readers. His single source appears to be the National Center for Public Policy Research. Sometimes he adds his own disinformation and sometimes he regurgitates the center's verbatim.

Herewith, from the center and shoveled to America's sportsmen by Remington, a few examples:

- "The construction of fishing piers and boat docks, which can already require a permit under the CWA, would likely see enhanced scrutiny under the CWRA. Such construction could be regulated in nearly every instance, as nearly every body of water would qualify for federal oversight. This means trout and smallmouth bass fishermen could lose access to their favorite rivers and streams, as wading in these waters necessarily disturbs rocks and sediment, and therefore could be considered harmful to fish and other wildlife. Lead lures, sinkers or split-shot could be deemed pollutants. Recreational boating could be restricted or banned in certain waters due to the incidental discharge of engine cooling water, bilge water, deck runoff or ballast water."

This is all absurd fiction, clearly intended to elicit sportsman paranoia. First, it is based on the unwarranted assumption that the Clean Water Restoration Act (and in this case Remington and the center are talking about the version that died in the 110th Congress and will likely have been reintroduced in identical form by the time you read this) would somehow bring "enhanced scrutiny." Second, the bill stipulates that any activity that didn't require a permit before the 2001 SWANCC decision (such as lead terminal tackle or incidental pollution from recreational boats) won't require one in the future.

- "In addition to expanding the federal government's jurisdiction, [the Clean Water Restoration Act] eliminates permitting exemptions for agriculture, ranching, wildlife management and forestry." Another brazen untruth. The bill plainly states that these exemptions stand.
"Something as simple as constructing a duck blind on private land on or near these prime hunting waters could require hunters to submit to a costly and time-consuming permitting process. As a consequence, driving posts into water and mud near a prairie pothole for construction of a duck blind could constitute discharging dredged or fill material into the 'waters of the United States.'"

False. Again, any activity that didn't require a permit before the 2001 SWANCC decision (and duck blinds did not) will not require one in the future. And if the Clean Water Restoration Act would be such a burden on duck hunters, how is it Ducks Unlimited's executive vice president, Don Young, offers this: "We are pleased that Congressman Oberstar has introduced a bill that will clarify Congress' intent to protect significant wetland areas including geographically isolated wetlands such as the prairie potholes....This is so vital, so consistent to what Ducks Unlimited is about, that we need to take a stand now or the future of ducks and duck hunting is very much in jeopardy."

The center and other polluter fronts keep citing the alleged victimization of Ocie Mills and his son Corey of Navarre, Florida, by the Clean Water Act before the Bush administration supposedly fixed it. According to the center, Ocie and Corey "were convicted of filling a 'wetland' after placing clean fill dirt on mostly dry land. They ended up serving 21 months in prison."

The real story is less heart-rending. The Millses—well-known property-rights activists who sought to challenge federal authority to regulate pollution—purchased the land at a bargain-basement price because it had a wetlands restriction on it. Then, defying repeated warnings by the Corps and two cease-and-desist orders, they proceeded to fill very wet sections. After their conviction by jury in 1989, their sentence was reaffirmed on appeal all the way to the Supreme Court.

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Among the countless property-rights outfits recycling the above untruths is Voices From the Rural American West. Apparently it picked up most of them from Tom Remington who, as the group proudly proclaims on its Web site, endorses it as "fabulous...one more voice of reason and sanity."

Then there are sportsmen's organizations like the 325,000-member Great Lakes Sport Fishing Council, whose stated mission is to promote "clean water" and "protect and conserve our aquatic resources..." EPA reports that none of the Great Lakes are "fishable" (meaning you can't safely eat the fish) and that 84 percent of the "open waters," traditionally cleaner than shoreline waters, are impaired. So one would assume that an organization committed to "clean water" and "aquatic resources" would be in favor of restoring the Clean Water Act's extracted teeth. But no. Parroting disinformation disseminated by the center and Remington, the Great Lakes council has identified the bill as a dire threat to sportsmen. Its newsletter even ran a piece entitled "Congress moves to seize control of all U.S. Waters."

The Texas Wildlife Association exists, it claims, "to serve as an advocate for the benefit of wildlife" and to educate "all persons, especially the youth of Texas, about the conservation, management and enhancement of wildlife and wildlife habitat on private land to ensure the preservation of our cherished rural heritage for future generations."

So naturally the association would push a bill to save the Clean Water Act, right? No, it has come out against it because, it says, "[C]onservation is best achieved by private land stewards managing natural resources on their own land."

Yeah, right. In 1969, when "private land stewards" were doing exactly this, a record 99,100 major fish kills were reported across the nation and Cleveland's Cuyahoga River caught fire.

Finally, consider the position of celebrated sportsman and sportsmen's mentor, Alaska Republican Congressman Don Young (not to be confused with the Don Young who runs DU). Outdoor Life magazine has recognized Rep. Don Young with its "Conservation Award"; and in two glowing pre-election profiles it described him as a "hardheaded defender of sportsmen's rights," "your kind of politician," "a top watchdog," and a "fearless Washington advocate of the sportsman's life [who] fights the good fight."

The NRA has recognized Rep. Young by naming him to its board. And he has chaired the executive council of the Congressional Sportsman's Caucus. Such a sportsmen's hero would, of course, rush to restore fish and wildlife by restoring the Clean Water Act, right? Well, no.

Rep. Young, who defines environmentalists as "my enemy," "not Americans" and "waffle-stomping, Harvard-graduating, intellectual idiots," has helped polluters spike the Clean Water Restoration Act. After all, it might (at least in the imaginations of his campaign funders) inconvenience operators of the massive Pebble Mine planned for Alaska's salmonid-rich Bristol Bay region, a project he is on record as "wholeheartedly" supporting.

In 2008 Young was recognized yet again, this time by the League of Conservation Voters, which named him to its Dirty Dozen List, consisting of the 12 worst anti-conservationists in Congress.

Our waters got significantly dirtier when the Bush administration declined to enforce even the few clean-water regulations it left intact. According to EPA data for 2005 (obtained by the Public Interest Research Group under the Freedom of Information Act):

- 57 percent of all major U.S. industrial and municipal facilities discharged more pollution than their permits allowed.
- The average facility exceeded its pollution limit by 263 percent.
- The 3,600 facilities that exceeded their permit limits did so 24,400 times.
- 628 facilities exceeded their permits for at least half the monthly reporting periods, and 85 exceeded them during every reporting period.

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But even before the Bush administration and the Supreme Court vandalized the Clean Water Act, the waters of the United States had stopped getting cleaner. One of the main reasons is the agricultural exemption that, for political purposes, Oberstar and Feingold had to retain in their bill. Preventing agricultural pollution is easy and cheap. In fact, it would save farmers and ranchers money.

For example, they aren't required to erect the streamside fencing or maintain vegetated stream buffers that would prevent cattle from destroying forage, water supplies and the trout that, increasingly, provide them added income. Nor are they required to apply fertilizer in the spring so that it is taken up by plants instead being wasted by fall and winter rains and, in the process, nuking the nearest stream or lake. But every time these and other common-sense, best-management practices are proposed as regulations, the Farm Bureau Federation shouts them down. The Farm

Bureau has also prevented regulation of concentrated animal feedlots—a k a “factory farms”—which produce three times as much sewage as this nation's human population.

Today, 40 percent of our waters flunk the federal quality standard. So now is not the time to stand by while they and others continue to degrade and while the Clean Water Act, less than adequate even in pre-SWANCC form, continues to slide toward irrelevancy.

With the Democrats in control of Congress and with a president who, through his campaign spokesmen, has pledged support for the Clean Water Restoration Act, the bill finally has a chance. Still, its enemies are richer, more politically powerful and, so far, more energetic and committed than its supporters. The fight will be long and vicious; and it will be lost unless fish-and-wildlife advocates make themselves heard. Any sportsman who doesn't actively support this desperately needed reform won't have the right to complain about lost fishing and hunting. And any sportsman who works against it is fronting for polluters...or just stupid.

*Ted Williams has written about conservation for this magazine for more than 20 years. His latest book is **Something's Fishy**; order it at flyrodreel.com.*