
Environment Committee

HB 2720

Brief Description: Protecting private property rights by aligning the jurisdictional scope of the state water pollution control act with the jurisdictional scope of the federal clean water act.

Sponsors: Representatives Scott, Taylor, Schmick, Dent, Van Werven, Buys, Griffey, McCaslin, Holy, Manweller and Shea.

Brief Summary of Bill

- Eliminates groundwater and certain isolated wetlands from the scope waters subject to state water pollution control laws.
- Aligns the scope of state water pollution control laws with the scope of the federal Clean Water Act, as that scope was interpreted by a United States Supreme Court decision in 2006.

Hearing Date: 1/28/16

Staff: Jacob Lipson (786-7196).

Background:

The Federal Clean Water Act.

The federal Clean Water Act (CWA) includes several programs, including the Section 402 national pollutant discharge elimination system permit program (NPDES), the Section 404 wetland dredge and fill permit program, the Section 322 oil spill prevention response program, and the Section 401 state water quality certification program. Administration and enforcement of the federal CWA is shared by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps), although states may elect to administer their own programs in place of the EPA and assume some of the Corps' authority. Jurisdiction under the federal CWA extends to "navigable waters," which are defined in the federal CWA as "waters of the United States, including the territorial seas."

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The EPA and the Corps' jurisdictional rule that addresses the scope of the federal CWA says that jurisdictional "waters of the United States" includes: waters used in interstate commerce; interstate waters and wetlands; waters that could affect interstate or foreign commerce; certain water impoundments; the territorial seas; tributaries to covered waters; and wetlands adjacent to covered waters. The federal CWA does not cover discharges to groundwater.

The federal CWA exempts discharges related to normal farming, ranching, and silviculture activities from the federal CWA's jurisdiction. The federal CWA jurisdictional rule also does not cover prior converted croplands, which are lands that might have formerly have been jurisdictional waters but that were drained prior to 1985 and that have been in continuous use for agricultural purposes.

Recent Regulatory and Judicial Interpretations of the Jurisdictional Scope of Waters Covered by the Federal CWA.

Between 1985 and 2006 the United States Supreme Court issued three decisions interpreting the scope of jurisdiction of the federal CWA in the context of the Corps' Section 404 wetland dredging and fill permitting program. The third of these cases, *Rapanos v. United States*, 547 U.S. 715 (2006), featured five separate opinions from the court regarding the meaning of the federal CWA, including a concurring opinion by Justice Kennedy that has been frequently cited by subsequent courts interpreting the jurisdiction of the federal CWA. The Kennedy opinion held that a critical question in determining whether a water is covered by the federal CWA is whether the water, and any similarly situated waters, has a "significant nexus" to downstream navigable waters that are covered by the federal CWA.

In June 2015 the EPA and the Corps finalized a new rule that interpreted the federal CWA in light of the *Rapanos* decision, and defined certain types of waters that are automatically interpreted to be jurisdictional due to a significant nexus, as well as types of waters that require a case-by-case analysis to determine whether a significant nexus with navigable waters exists.

In October of 2015 the United States Court of Appeals for the Sixth Circuit put a nationwide stay on the implementation of the 2015 rule.

Water Pollution Regulation in Washington State under Federal and State Laws.

Washington state law authorizes the Department of Ecology (ECY) to implement the federal CWA's NPDES discharge program, and also to implement state water pollution control laws.

Washington state's water pollution control law defines waters of the state to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters, and all other surface waters within the state's jurisdiction. Notably, this places underground water and certain isolated wetlands that are not covered by the federal CWA under the jurisdiction of the state CWA. For waste discharges to waters, the ECY typically issues a state waste discharge permit for discharges to groundwater, while a joint federal NPDES and state discharge permit is issued under dual authority for discharges to surface waters. The exception to this practice is that discharges by federal facilities and on tribal trust lands are permitted and administered by the EPA, rather than the ECY.

Fill and dredge activities are administratively addressed via a federal-state joint aquatic resources permit application (JARPA) process, which results in the issuance of a federal Section 404

permit by the Corps. For some Section 404 permits, a state Section 401 water quality certification is also required and may attach additional conditions on the federal permit to ensure compliance with state water quality laws. For isolated wetlands not covered by the federal CWA, the ECY regulates fill and dredge activities by issuing an administrative order under state law. The issuance of a Section 404 permit or an ECY administrative order often requires compensatory mitigation to unavoidable impacts to wetlands and other waterbodies.

Summary of Bill:

The scope of waters regulated under state water pollution control laws is limited to match the waters regulated under the federal CWA, as defined in 2006 federal law and rule, and as it was interpreted by the United States Supreme Court in the *Rapanos* decision. The scope of state water pollution control laws does not include groundwater or isolated waters that are not covered by the federal CWA.

The declaration of public policy in the state water pollution control laws directs that private property rights be respected while enforcing water pollution control laws.

Appropriation: None.

Fiscal Note: Requested on January 19, 2016.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.