

## Wetlands drowning in legal quagmire

By KATHRYN EASTBURN The Daily News Feb 9, 2019



Jordan Macha is the executive director of Bayou City Waterkeeper, a Houston-based group w Water Act violations in the Galveston Bay area.  
STUART VILLANUEVA/The Daily News

A prairie pothole wetland in Galveston County may look to the naked eye like a field of weeds. There is no open water feature, no flowing creek, not even a visible ditch to transport the waters that collect on them all the way to Galveston Bay.

Step foot on one of them, however, and you'll know the water is there.

These wetlands are embedded in coastal plains, thousands of acres of them, being continually purchased, bulldozed, denuded, filled in and paved over to make way for a subdivision or a strip mall somewhere in the county.

They are often referred to as "isolated" wetlands because they lack visible connections to "navigable" waters, which the U.S. Army Corps of Engineers is charged with protecting.

The connection between these waters has been highly contested in courts over the past two decades, leading divisions of the corps, including the Galveston Division, to conservatively apply or deny jurisdictional protection under the Clean Water Act to prairie pothole complexes in Galveston County.

A closer-to-the ground perspective was described by the Texas Parks & Wildlife Department in a 2003 letter to the Environmental Protection Agency, urging the agency not to narrow its definition of wetlands the corps was required to protect.

The Texas Parks & Wildlife Department, in charge of protecting waters for fishing and other purposes in Texas, offered the letter as a public comment to the federal government at a time when interpretation of the Clean Water Act, Section 404 protecting wetlands, was poised to exclude so-called isolated wetlands from legal protection after a key 2001 Supreme Court decision.

The Texas Parks & Wildlife Department said the use of the term "isolated" was ill-advised because it was not based on scientific knowledge about wetlands.

These prairie pothole wetlands, depressed areas of highly vegetated prairie with dense clay soil, capture rainfall runoff and hold it, because the land is generally flat and the soil percolates slowly, an addendum to the letter said. Some of that water seeps in the ground and is stored. Some of it evaporates. And some of it, when the wetland is full, flows downslope to another wetland until, finally, the water reaches a tributary that flows into the navigable waters of Galveston Bay.

Unseen to the human eye are “very large volumes of water treated by these isolated wetlands,” according to the department. An estimate of about 25 percent of the water that falls on these wetlands eventually makes it to the bay, according to wetland scientists. Without treatment, it carries with it all of the pollutants the surrounding environment has surrendered.

Jurisdictional status, a legal definition of which waters should be protected under the Clean Water Act, should be based on wetlands’ function of keeping pollutants out of downslope waters, rather than on whether they are visibly connected to navigable waters, the department argued in its letter.

Fifteen years later, that argument is still being made by scientists and environmental groups and by the government agencies sworn to protect the nation’s waters.

But states’ rights advocates, business interests, the doctrine of economic growth and another Supreme Court case resulting in an unresolved split decision in 2006, have fueled a continuing argument on the other side, seeking to limit protections under the Clean Water Act and, subsequently, the Clean Water Rule of 2015, enacted by the Obama administration.

In Galveston this year, that battle will play out in one of many federal lawsuits around the nation, seeking to either uphold the 2015 Clean Water Rule, to abolish it and replace it with new weakened guidelines proposed by the two-year-old Trump administration, or to leave things as they are.

#### A BACK-AND-FORTH PROCESS

At the local and regional level, courts sometimes settle differences on whether violations of the Clean Water Act have occurred and wetlands have been encroached upon illegally. Houston environmental attorney Jim Blackburn said he has used the courts many times to settle environmental issues.

“That’s the best place to work these things out,” he said. “If I really think there’s a violation, then I go to federal court. It’s not personal. It’s legal. It’s about principles and legal interpretations, and some cases you lose.”

These cases are valuable because of their long-term effect, not so much because of their immediate outcome, Blackburn said.

“An important issue has been raised and considered,” he said. “Success comes from the back and forth of the process.”

The Environmental Protection Agency in Galveston County is empowered to enforce violations of the Clean Water Act, and more often than not settles those cases at an administrative level rather than in court, demanding compliance action from some offenders.

Of 80 cases in Galveston County from 1983 to 2018, listed on the agency’s Enforcement and Compliance History online, 22 resulted in compensatory action and 21 were taken to court and resulted in federal penalties. That averages out to a little more than one case per year that resulted in a payoff.

Two of the largest settlements were with the city of Galveston in 1996, when the agency required \$1.3 million in compliance action in each case.

A 2000 case involving an Amoco Oil Co. pipeline in the county resulted in a federal penalty of slightly more than \$1 million.

Three actions have been brought by the agency in League City over those 35 years, resulting in nearly \$2 million in required compliance action.

In general, based on the relatively few documented compliance actions, companies and municipalities try to meet federal standards, obtain proper permitting from the Corps of Engineers and try to comply under the corps' interpretation of the Clean Water Act.

But the water is muddied when it's unclear which wetlands must be protected under federal law.

#### MUDDY WATERS

In 2015, the Environmental Protection Agency attempted to clarify many years of confusion and mixed legal interpretation about what constituted protected waters and passed the Clean Water Rule.

This involved a massive scientific review process and roughly 2 million public comments, according to Clean Water Rule documents. The rule's authors asserted their purpose was to ensure that "waters protected under the Clean Water Act are more precisely defined, more predictable, easier for businesses and industry to understand, and consistent with the law and the latest science."

Under the rule, Texas prairie pothole complexes and coastal marshes were specifically defined as essential wetlands that should be protected.

"Wetland complexes could have connections to downstream waters through stream channels even when the individual wetland components are geographically isolated" and those should be included among the protected Waters of the United States, the 2015 rule determined.

Almost immediately, states began filing lawsuits against the Environmental Protection Agency and the U.S. Army Corps of Engineers, including in the U.S. District Court for the Southern District of Texas in Galveston.

In June 2015, the state of Texas, along with the states of Louisiana and Mississippi, filed suit in the Southern District Court against the Environmental Protection Agency and the Corps of Engineers, challenging the legality of "the final rule titled 'Clean Water Rule: Definition of the Waters of the United States.'"

Other plaintiffs whose cases have been consolidated into the states' case include the American Petroleum Institute, the American Road and Transportation Builders Association, the National Association of Home Builders, the National Association of Manufacturers and the American Farm Bureau Federation, among others.

The plaintiffs argue federal agencies have improperly redefined Waters of the United States to expand Clean Water Act jurisdiction over time and that the Clean Water Rule harms them by expanding the number of waters subject to federal regulation. The rule erodes states' authorities over their own waters, increasing the states' burdens and diminishing their abilities to administer their own programs, plaintiffs argue.

Plaintiffs characterize the Clean Water Rule's definition of Waters of the United States as "capricious and arbitrary."

Meanwhile, two national environmental organizations — the National Resources Defense Council and the National Wildlife Federation — have signed on as intervenor defendants in the case alongside the Environmental Protection Agency and the U.S. Army Corps of Engineers. Defendants are urging Judge

George C. Hanks Jr., who's presiding over the case, to uphold the Clean Water Rule and the expanded protections it affords for wetlands, including those on the Texas coastal prairie.

#### THE FACE OF THE WETLANDS

Locally, Bayou City Waterkeeper, a Houston-based group with a history of monitoring Clean Water Act violations in the Galveston Bay area, has filed a brief in support of the Clean Water Rule, the defendants and the intervenor defendants.

Attorney Kristen Schlemmer wrote the amicus brief filed in November. When the two national environmental organizations joined the lawsuit, Bayou City Waterkeeper didn't see the need to completely duplicate their efforts but wanted to offer a close-up view of area wetlands to the court, Schlemmer said.

"Practically speaking, this is litigation that Bayou City Waterkeeper is obviously very interested in and wants an environmental voice in court," Schlemmer said. "We saw a small gap and wanted to talk more about the factual aspects of the Clean Water Rule and the protections it offers for Texas coastal prairies.

"We wanted to put a face to the coastal wetlands for the court."

The brief holds up the regional importance of Texas coastal prairie wetlands to surrounding communities and to water quality of navigable waters, most notably Galveston Bay. It also argues there has been a history of under enforcement of the Clean Water Act in the Galveston-Houston area as a result of confusion over its application to Texas coastal prairie wetlands.

Schlemmer argues in the brief that the Texas coastal prairies provision of the 2015 Clean Water Rule is well-grounded in scientific research that establishes their connectivity to navigable waters and confirms their influence on the biological, physical and chemical integrity of navigable waters by filtering out runoff and providing floodwater storage capacity by capturing substantial amounts of rainfall.

If the defendants prevail in court, it would be a big deal, Schlemmer said, but actions by the Trump administration have further muddied the legal waters.

"It's either very significant or not very significant at all," she said.

"If the court in Galveston were to say the Clean Water Rule is invalid, Texas coastal wetlands oversight would default to what the corps was doing already, and they've been very conservative up to now in what they cover."

If the court were to uphold the Clean Water Rule, that could potentially expand federally mandated protection for wetlands, a very big deal.

But at the same time these lawsuits, dating back to 2015, are finally about to be heard, the Trump administration has taken action of its own, further tying up the courts.

Trump's appointed head of the Environmental Protection Agency, Scott Pruitt, had been a key player in several lawsuits against the agency before taking the helm, including cases challenging the Clean Water Rule. In February 2017, Trump signed an executive order, the Presidential Executive Order on Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the Waters of the United States Rule, directing the agency to review the Clean Water Rule for conflicts with his economic growth agenda.

Pruitt carried out that task before resigning from his office in the midst of a flood of ethics controversies.

In January 2018, the agency formally suspended the 2015 rule and announced plans to issue its own version later in the year. The suspension gave rise to lawsuits across the country, suing the administration for not enforcing pollution controls.

“Everything the Trump administration Environmental Protection Agency has done to repeal the Clean Water Rule keeps hitting road blocks because they’re moving too quickly and not following administrative procedure,” Schlemmer said.

The new agency proposal will appear next week in the Federal Register where it will be open for public comment, acting Environmental Protection Agency chief Andrew Wheeler announced on Friday.

“If they succeed, then we’ll see a bunch of litigation and court actions while the court actions already in place will continue moving forward,” Schlemmer said. “It’s kind of an administrative mess.”

All the sound and fury in the courts, in the end, will either expand or contract protection of prairie pothole wetlands in Galveston County along with other freshwater wetlands, coastal marshes and saltwater wetlands on barrier islands like Galveston or, in the end, it might not change anything.

Until then, the wetlands will keep doing their work in quiet obscurity.

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#### About the series

A six-part series — Low Lands, High Stakes — explores challenges and opportunities facing the wetland environment in Galveston County in context of historic flooding, sea rise associated with climate change, a booming population and threatened withdrawal of wetlands protections by the federal government.

Jan. 27: Part 1, The Burden of Flat Land, examines the historic loss of wetlands in this area and why now is the time to look closely at the purpose wetlands serve in Galveston County.

Feb. 3: Part 2, The Ebb and Flow Government Oversight, will examine provisions of the federal Clean Water Act designed to protect wetlands; mitigation banking as a wetlands protection strategy; and perspectives from area scientists and government workers on the shortcomings and advantages of the system in place.

**Today:** Part 3, A Legal Swamp, will look at legal efforts surrounding wetlands protection including U.S. Supreme Court decisions, Texas cases over the last decade and cases currently being filed by area activists in the face of the Trump administration's proposed threats to wetland protection.

Feb. 17: Part 4, A Wealth of Wetland Riches, will explore wetland restoration and preservation efforts in Galveston County, what they have accomplished and the future of wetland protection.

Feb. 24: Part 5, Local Governments in the Gap, will examine the role of state and Galveston County municipalities in protecting wetlands while supporting development; what local governments can do to assist private efforts to protect wetlands; and why they should be involved.

March 3: Part 6, The Future is With Us Now, will explore creative strategies, including public policy, business and citizens' efforts aimed at a future that equally values economic development and protecting wetlands.

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#### Supreme Court cases

These two Supreme Court cases form the basis of recent interpretations of the Clean Water Act, including definitions of wetlands, and set precedent for many lawsuits that have arisen out of those interpretations:

2001, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers

- The Solid Waste Agency of Northern Cook County, Illinois, was denied federal permits to develop an old gravel mine site into a landfill because migratory bird ponds had developed in abandoned excavation trenches on the property. The Supreme Court ruled that the authority granted by the Clean Water Act didn't extend jurisdiction to abandoned gravel pits with seasonal ponds.

- Following the ruling, the Environmental Protection Agency under George W. Bush issued guidelines restricting regulatory review of some 20 million acres of isolated wetlands and announced proposed rules that would narrow the scope

of Waters of the United States, weakening protections. Congress voiced strong opposition and planned legislation was abandoned, but the guidelines remained.

- Led to some divisions of the U.S. Army Corps of Engineers limiting their definition of what constituted protected wetlands.

2006, *Rapanos v. United States*

- In 1989, land developer John Rapanos filled 22 acres of wetland areas on his property without a permit and against repeated warnings from the Michigan Department of Environmental Quality. He was convicted in 1995 of violating federal law, the conviction was later overturned and then reinstated before ending up in the Supreme Court on appeal. Five justices agreed to void rulings against Rapanos but no majority decision was reached on other aspects of the case, including which wetlands he filled in were jurisdictional, leaving guidelines for future protection unclear.

- Lack of a majority opinion prompted a second set of Environmental Protection Agency guidelines directing determination of wetlands protection on a case-by-case basis. Lawsuits followed challenging the agency's regulatory authority over streams and wetlands.

- Led to Environmental Protection Agency under Barack Obama proposing new guidelines to replace those issued under George W. Bush. Obama-era guidelines, following extensive hydrological studies, interagency reviews and economic analyses, became the proposed Clean Water Rule which became effective in 2015 but was widely contested in courts around the country, including in the U.S. District Court for the Southern District of Texas, located in Galveston.

(Source: U.S. Department of Justice)

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