

Restoring the Clean Water Act

Why Do We Need a Restoration Act?

Since Congress passed the Clean Water Act in 1972, we have made great progress in cleaning up our nation's waters, but that progress is in jeopardy today. The law historically has protected the nation's lakes, rivers, streams and wetlands from unregulated pollution and destruction. Today, however, many water bodies are being denied the Act's protections against pollution. Polluters argue that Supreme Court decisions from 2001 and 2006 mean that the law's safeguards are only available for "navigable" water bodies (or for waters that are significantly linked to such water bodies). They claim the Act no longer protects numerous wetlands, streams, rivers, lakes and other waters that historically had been covered. Ambiguous federal agency policy directives have helped these attacks. The Clean Water Restoration Act is needed to restore the longstanding protections originally intended by Congress.

What is at Stake?

- Based on agency records, a wide variety of waters have been denied Clean Water Act safeguards in recent years, including a 150-mile-long river in New Mexico, thousands of acres of wetlands in one of Florida's most important watersheds, a 69-mile long canal used as a drinking-water supply in California, and an 86-acre lake in Wisconsin that is a popular fishing spot.
- An estimated 53-59% of America's stream miles outside of Alaska are seasonal waters or headwater streams (or both), representing over 1.8 million river miles. Depending on whose interpretation of current law prevails, many of these streams could be at risk of losing protection, or at least be harder to protect in practice.
- These small streams contribute to the public drinking water supplies of over 110 million people.
- Based on available geographic information, over 14,000 industrial and municipal facilities have permits that limit their pollution discharges into these streams and rivers. Some opponents of comprehensive Clean Water Act protections have relied on the Court's decisions to argue that they do not need such permits to discharge to these types of waterways.
- EPA and the Army Corps of Engineers acknowledge that they have not been enforcing requirements of their Clean Water Act regulations for numerous so-called "isolated" water bodies. There are roughly 20 million acres of "isolated" wetlands in the continental U.S.

What Did the Supreme Court Decide?

The Supreme Court's recent opinions on the scope of the Clean Water Act did not limit Congress's authority over any kind of water bodies, meaning that Congress can re-establish that the Act protects a wide range of aquatic resources in order to maintain water quality.

In 2001, in *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, the Supreme Court rejected the government's interpretation that the Clean Water Act covered an "isolated" Illinois water body simply because it was used by migratory birds. Thus, the Court's decision was quite narrow.

In 2006, the Supreme Court decided *Rapanos v. U.S.* — a case in which a variety of industry groups argued that the law does not fully protect non-navigable tributaries and their adjacent wetlands. The result was a messy split decision; its various opinions suggested different tests and have led to significant debate about what the law now requires. Justice Kennedy, who provided the swing vote, would require the agencies to show a physical, biological, or chemical linkage—a "significant nexus"—between a water body and an traditionally navigable one to protect it. Four other justices took the radical view that the law protects "only those relatively permanent, standing or continuously flowing bodies of water" and only those wetlands with a "continuous surface connection" to protected waters. These five justices only

agreed on one point: that the case should be sent back to the lower courts. They did not hold that the existing rules were invalid.

Have the Army Corps and EPA Fully Protected Water Bodies Consistent with the Court's Decisions?

No. After both *SWANCC* and *Rapanos*, the agencies have issued policy directives that, if followed, would curtail Clean Water Act protections more than the Court required.

In January 2003, the Environmental Protection Agency and the Army Corps of Engineers directed their field staff to stop applying Clean Water Act protections to virtually all so-called "isolated" waters without prior permission from agency headquarters in Washington, D.C. This policy directive far exceeds the scope of the *SWANCC* ruling, effectively denying protection to many waters that still warrant it under existing regulations. The agencies received highly critical comments on this policy and a related rulemaking effort from a large majority of state agencies, as well as water and wildlife experts, sportsmen and women, floodplain managers, public health officials, conservation organizations and several EPA regional offices. In 2006, the House of Representatives – in a strong, bipartisan fashion – voted to halt this misguided policy. Yet the policy is in place today.

Last June, the agencies issued "guidance" for their field staff on the *Rapanos* case. The new "guidance" erroneously indicates that tributary streams which do not flow all year will not be uniformly protected, even though tributaries to various protected water bodies have long been covered by the law, and even though the Supreme Court's decision did not require such a result. Moreover, the agencies have read the Court's ruling too broadly by largely ignoring parts of the decision that would allow the government to protect water bodies when they collectively are important to water quality.

Why is Legislation the Best Solution?

Legislation is needed to restore the traditional scope of protection intended by Congress. Americans need these safeguards to achieve the goal of restoring and maintaining the chemical, physical and biological integrity of the nation's waters.

Specifically, legislation should:

- 1) Adopt a statutory definition of "waters of the United States" based on the longstanding definition in EPA's and the Corps' regulations;
- 2) Delete the word "navigable" from the Act to clarify that the Clean Water Act is principally intended to protect the nation's waters from pollution, and not just maintain navigability;
- 3) Make findings that articulate the basis for Congress's assertion of constitutional authority over the nation's waters, as defined in the Act, including so-called "isolated" waters, headwater streams, small rivers, ponds, lakes and wetlands.

This legislation would restore clear protections to water bodies that had been covered before the *SWANCC* and *Rapanos* rulings.

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