NRDC Legislative Facts

Restoring America's Clean Water Legacy

The 111th Congress Must Pass Legislation to Restore the Scope of the Clean Water Act

From the small stream your kids wade in to the marsh where you set up your duck blind, America's water resources are an invaluable part of our nation and our economy. The creeks, brooks, and streams that make up over half the river miles in the continental United States contribute to the drinking water of roughly 111 million people. Wetlands purify water, reduce the risk of flooding, and provide important wildlife habitat. But the law that has long protected our lakes, rivers, streams and wetlands from unregulated pollution, filling and destruction—the Clean Water Act—has been under assault in recent years. Congress must act to stop the rollback of protections that keep our water clean.

Since the passage of the Clean Water Act (CWA) in 1972, we have made great progress in cleaning up our nation's waters. While much remains to be done, the law has been the bedrock of our improvements. That's why it's so troubling that these protections have been rolled back in recent years, and why it's crucial that Congress act to stop the attacks. Legislation that restores the scope of the CWA is the best and surest solution for restoring our clean water legacy.

A History of Clean Water Act Protections

The Act safeguards all of the "waters of the United States," with several basic protections built into the law—the Act's prohibition on unpermitted point source discharges, an oil spill prevention program, and the impaired waters cleanup program, to name a few. In expanding the law in 1972 to the "waters of the United States," Congress made clear that it passed the law with the intent that it "be given the broadest possible constitutional interpretation." The EPA and Army Corps regulations implementing the law have for decades reflected this intent. They cover, among other things, tributaries of various waters, adjacent wetlands, and intrastate waters with linkages to interstate commerce.

These rules had been upheld by the vast majority of courts that examined them, including the Supreme Court. But in 2001, the Court—in a case called *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (or "*SWANCC*")—held that non-navigable, intrastate waters are not protected by the CWA solely because they could serve as habitat for migratory birds.

Unfortunately, *SWANCC* gave polluters an opening to pressure the EPA and the Corps to consider changing their rules. Though more than 130,000 commenters, including dozens of states, overwhelmingly demanded that the rules be kept intact, leading the agencies to cancel the rulemaking process, they kept in place a policy document directing the agencies' field staff to stop applying CWA protections to many waters unless they first receive permission from headquarters in Washington, D.C. Thousands of waters have been declared unprotected since the policy took effect, and some 20 million acres of wetlands are at risk nationwide because of the policy.

Polluters also seized on *SWANCC* in the courts, saying that it the law was intended to protect only waters that are actually navigable. Though this claim was largely rejected, those opposed to CWA protections were able to convince the Supreme Court to hear another case—*Rapanos v. U.S.*—which examined whether the law protects non-navigable tributaries and their adjacent wetlands.

The result was a messy split decision: The Court did not invalidate the existing rules, but the various opinions suggested different tests. Justice Kennedy would require the agencies to show a physical, biological, or chemical linkage—a "significant nexus" between a water body and an actually navigable one to protect it. Four other justices would require most water bodies to be continuously flowing or standing, and would require wetlands to have a continuous surface connection to such waters.

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Current Law Is in Disarray and Is Hurting Aquatic Resources

- EPA and the Corps routinely deny CWA protections to non-navigable, intrastate waters that are deemed to be "isolated." In effect, the agencies are treating part of their regulatory requirements as a dead letter.
- The agencies' so-called "guidance" on *Rapanos* depends in large part on the "significant nexus" concept, which will be difficult, time consuming, and expensive to implement in practice.
- Polluters are urging the agencies to write off various kinds of water bodies because of the rulings, even though there was no such directive from the Court and even though as a matter of science, tributaries and wetlands surely have a "significant nexus" to the traditional navigable waters in their watersheds.
- Litigation over whether the CWA protects specific tributaries and wetlands is rampant, and the court decisions thus far have dealt with the new decision inconsistently. According to an EPA analysis released by two Congressional leaders, hundreds of enforcement actions have been adversely affected by the legal changes.
- An industry funded legal foundation has filed a legal petition arguing that *Rapanos* generally requires the agencies to deny protection to waters unless they are continuously flowing or standing, and only protect those wetlands "indistinguishable" from other waters, based on the opinion of four Supreme Court justices that was rejected by a majority of the Court.

Legislation Is the Best and Surest Solution

- A statutory fix will prevent the political agency heads from using the court decision as an excuse to exclude certain kinds of waters from protection at the urging of polluters.
- Four Supreme Court Justices support a radical rewriting of the law, one which would exclude nearly 2 million miles of streams from protection, along with countless acres of wetlands. Specifying the waters that Congress means to protect will guard against judicial over-reaching.
- Not restoring the law risks years of litigation and inconsistent decisions. More importantly, it means that numerous waters will be destroyed or polluted.

Designing a Legislative Solution

To restore the traditional scope of protection intended by Congress and to achieve the goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, legislation must:

- Define protected "waters of the United States" based on the decades-old definition in Corps and EPA regulations;
- 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;
- Explain the basis for Congress's assertion of constitutional authority over the nation's waters, as defined in the Act, including smaller water bodies and so-called "isolated" waters.

An example of legislation that would achieve these goals was introduced in the 110th Congress—the Clean Water Restoration Act (H.R. 2421/S. 1870). When an equivalent bill is introduced in this Congress, please support it.

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