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The Clean Water Authority Restoration Act

Restoring protection to our nation's waters:

Because of the passage of the Clean Water Act in 1972, we have made great progress in cleaning up our nation's waters. While much remains to be done, the law has protected the nation's lakes, rivers, streams and wetlands from unregulated pollution and destruction.

However, since a Supreme Court ruling in 2001, polluters have argued that the law no longer protects numerous wetlands, streams, rivers lakes and other waters historically covered by the Act. Ambiguous federal agency guidance has helped these attacks. And a 2006 Supreme Court split decision added greater confusion to the issue, putting even more waters at risk of pollution and destruction. The Clean Water Authority Restoration Act of 2007 is needed to restore the longstanding protections originally intended by Congress.

What Is At Stake?

- The EPA itself estimated that a policy directive it issued with the Army Corps of Engineers in 2003 could place as many as 20 million acres of the nation's remaining wetlands at risk.
- Based on agency records, a wide variety of waters have been denied Clean Water Act safeguards as a result of the policy, 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, representing nearly 2 million river miles.
- These small streams contribute to the public drinking water supplies of over 110 million people.
- Over 14,000 industrial facilities have Clean Water Act permits that establish the conditions under which pollution may be discharged into these streams and rivers - permits that would no longer be required by the Clean Water Act if the law is not enforced to safeguard all waters.

The Supreme Court's ruling in SWANCC:

In 2001, the Supreme Court ruled in *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers* that the Clean Water Act did not extend to an "isolated" Illinois water body simply because it was used by migratory birds. Although the Court's decision was quite narrow, some industry groups, as well as some government officials and regulatory staff, immediately sought to use the ruling to deny safeguards to many more of the nation's waters.

Very few, if any, waterbodies are truly "isolated." Even where wetlands, seasonal streams and other waters are not continuously connected to other surface waters, they typically have important connections to those waters, as well as biological and chemical connections that sustain healthy conditions in other wetlands, lakes, streams and rivers. These systems help maintain and protect drinking water supplies, and provide critical flood water storage. In addition, many of these so-called "isolated" waters, such as vernal pools, prairie potholes, playa lakes, and bogs, provide critical habitat for a wide array of migrating and resident bird and wildlife species.

The Army Corps and EPA Confuse the Issue:

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 EPA and the Corps were strongly criticized for this policy. When the agencies asked for comments on this policy and a related rulemaking effort, 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 wrote in opposition. Just last year, the House of Representatives - in a strong, bipartisan fashion - voted to halt this misguided policy. Today, however, the policy remains in place, and water bodies continue to be denied legally warranted Clean Water Act protections.

The Supreme Court's Ruling in *Rapanos* and *Carabell*:

Those opposed to Clean Water Act protections were able to convince the Supreme Court to hear two other *cases* -- *Rapanos v. US.* and *Carabell v. Army Corps of Engineers*--which questioned 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, 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 actually navigable one to protect it. Four other justices read the law very narrowly to protect water bodies that are continuously flowing or standing, and only those wetlands with a continuous surface connection to protected waters. In the wake of this decision, courts have dealt with the opinions inconsistently, and polluters are again arguing that a Supreme Court decision requires Clean Water Act safeguards to be rolled back.

Legislation is the Best Solution

The Clean Water Authority Restoration Act of 2007 would 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, the legislation would:

- 1) Adopt a statutory definition of "waters of the United States" based on the longstanding definition in EPA's (40 CFR 122.2) and the Corps' regulations (33 CFR 328.3);
- 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 provide 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 the regulatory status quo prior to the *SWANCC* and *Rapanos* rulings; it does not create "new" Clean Water Act requirements.

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