

## **New “Guidance” from the U.S. EPA and Army Corps Puts More Waters at Risk of Pollution and Destruction & Adds Confusion**

*Only Clean Water Restoration Act (H.R. 2421) offers clear fix to muddied Supreme Court ruling*

In June 2007, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) issued a policy “guidance” that threatens to reverse the nation’s progress in cleaning up its waters under the country’s fundamental clean water law, the federal Clean Water Act. In response to last year’s Supreme Court decision (called *Rapanos v. U.S.*), the agencies issued a new, complicated policy that leaves many small streams and wetlands without clear Clean Water Act protections from pollution and destruction.

The agencies' new “guidance” will allow waters that have historically been protected to be polluted without controls required by the Clean Water Act. Instead of categorically protecting many rivers, streams, and wetlands (that have been protected for the last three decades), the new policy will leave continued Clean Water Act coverage of many streams, rivers, and wetlands up to an unworkable, speculative, case-by-case analysis by the EPA and Corps.

The administration claims to be in favor of protecting wetlands and even claims that this new policy will “sustain” protections for such resources. In fact, this “guidance” leaves many of those wetlands (and other waters) at risk of losing their most important safeguard against pollution and destruction.

- ❖ The new policy does not replace a 2003 EPA/Corps policy that significantly undermined protections for water bodies that are geographically “isolated” and other intrastate waters. That policy was strongly repudiated by the U.S. House of Representatives in a bipartisan vote in May of 2006. The 2003 policy already put thousands of miles of streams and tens of millions of acres of wetlands at risk of being left out of the Clean Water Act.
- ❖ The new policy, like the repudiated 2003 policy, implicates the whole Clean Water Act, affecting all of the law’s programs, not just the “section 404” program that regulates activities that “fill” wetlands and streams, but also programs that limit sewage, industrial pollution, oil spills, and require water quality standards designed to make all waters safe for fishing and swimming. There is only one definition of “waters of the United States” in the Clean Water Act and it applies to the whole law. As the Solicitor General – who argued *Rapanos* for the government – stated: “whatever this Court decides for purposes of the 404 jurisdiction, it's necessarily deciding for purposes of the 402 jurisdiction of the EPA.”

More specifically, the flaws of the new policy are many:

- ❖ It does not instruct field staff to fully protect the nation's surface water resources, instead making it more difficult for them to protect many valuable waters because of cramped interpretations of the Supreme Court rulings.
- ❖ The guidance virtually eviscerates the ability, authorized under the Supreme Court’s decision, to protect waters by demonstrating the collective importance of waters “similarly situated” over a large, regional scale. Justice Kennedy gave an example of how small waters in the upper Mississippi watershed contribute nutrient pollution that creates an enormous “dead zone” in the Gulf of Mexico. In contrast, the “guidance” only allows agencies to

consider the collective impacts for wetlands next to just one tributary, defined as one particular order of a stream. Thus, the agencies can only consider each headwater stream segment and its associated wetlands in isolation – ignoring the very significant combined impact of all headwater streams and associated wetlands in the “region” on the rivers or lakes downstream. This will make it vastly more difficult to protect many small streams with intermittent or ephemeral flow and their associated wetlands under the Clean Water Act.

- ❖ The “case-by-case” analysis embodied in the new policy no longer guarantees protections for many streams and rivers that do not flow all year long – streams and rivers that have long been protected by the Clean Water Act. The required case-by-case review will effectively eliminate protections for some streams and rivers, even though the Supreme Court did not strike down existing agency regulations that protect these tributaries.
- ❖ Heavy reliance on case-by-case determinations for which waters should be covered will virtually guarantee further litigation, administrative delays, and confusion amongst regulated industries and the public.

The EPA and Corps have even admitted that they don’t know what amount of water resources will be destroyed or polluted under this new guidance.

As scientists have overwhelmingly documented, small streams and wetlands perform essential roles in our environment, storing floodwater, filtering out and processing pollutants that would contaminate downstream waters, and providing critical habitat for many species of fish and other aquatic life. Safeguarding these waters from pollution is fundamentally important to keeping our drinking water sources clean and minimizing flood risks in our communities.

### **Congress Must Act Now**

There is only one way that the American people can be assured that all the waters they care about will remain safe from pollution and destruction. Congress must pass the bipartisan Clean Water Restoration Act (H.R. 2421) to restore protections for the nation’s water bodies. The inadequacy of this most recent guidance – especially when piled on top of the also deeply-flawed 2003 policy – is all the more reason that Congress must act now and reaffirm its original intent to broadly protect the nation’s waters from pollution and destruction. Representatives James Oberstar (D-MN), John Dingell (D-MI) and Vernon Ehlers (R-MI) and 155 other original co-sponsors have introduced this bi-partisan bill. In the Senate, long-time clean water leader Russ Feingold (D-WI) has announced he will reintroduce similar legislation soon.

Each day that Congress delays passage of the Clean Water Restoration Act is another day when our nation’s streams, wetlands, rivers and lakes can be needlessly polluted and destroyed in direct contradiction to the goals of the Clean Water Act.

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