We All Live Downstream

The Clean Water Restoration Act Will Protect People and Communities

Community Health and Economic Growth Rely on clean water, natural flood protection, and recreational opportunities provided by small streams and wetlands. These "non-navigable waters"– headwater, intermittent, and ephemeral streams and their adjacent wetlands – account for 53% to 59% of the total linear length of streams in the United States (excluding Alaska), and in arid regions of the country can account for even more. For example, 90% of New Mexico's waters and 75% of Texas stream miles are intermittent. Recent Supreme Court decisions, and ambiguous and complicated federal agency policy directives, have exposed these waters to uncontrolled discharges of pollutants and fill. The Clean Water Restoration Act would restore longstanding and clear Clean Water Act protections to these waters, and reduce permit delays by reestablishing certainty as to the waters that are protected.

Clean Drinking Water, Natural Flood Protection, and Vibrant Recreation require Clean Water Act protections for headwater, intermittent, and ephemeral streams and their adjacent wetlands. Loss of Clean Water Act protections for these waters could lead to uncontrolled discharges into public water supply systems; waters that support hunting, fishing, boating, and swimming; and waters that filter out pollutants and provide important flood protection benefits. This could:

- Reduce water quality in 5,646 public drinking water supply systems that rely on surface water protection areas that contain headwater, intermittent, and ephemeral streams. These systems supply water to 110 million Americans.

- Increase the costs associated with maintaining high quality drinking water. For example, 90 percent of New York City's drinking water comes from source water protection areas in the Catskill and Delaware watersheds that provide high quality drinking water without the need for filtration. New York City has estimated that loss of its filtration waiver could cost the City $6 billion in water filtration plant construction costs plus an additional $300 million a year in operating costs.

- Let industrial facilities and upstream municipal sewage treatment plants discharge untreated pollutants directly into small or intermittent streams, placing the clean-up burden on downstream communities. More than 40% of facilities (14,800) with Clean Water Act NPDES permits currently discharge into small or intermittent streams, and in arid regions of the country this percentage can be much higher. For example, approximately 50 percent of NPDES permitted wastewater discharges in Texas flow ***directly*** into intermittent streams. Some wastewater plants that discharge into intermittent waters already are petitioning EPA to allow discharges without any permit requirements at all.

- Allow the unregulated filling of small streams and wetlands that provide important flood protection and water filtration benefits. A single acre of wetland can store 1 to 1.5 million gallons of flood water, and wetlands save an estimated $30 plus billion in annual flood damage repair costs in just the continental United States. EPA reports that replacing the natural flood protection functions of a 5,000 acre tract of drained Minnesota wetlands costs $1.5 million a year. Wetlands also save cities millions of dollars annually in wastewater treatment costs because of their ability to filter out pollutants.

Community Waters are Losing Clean Water Act Protection due to the Supreme Court decisions and agency guidance. Federal agency records show that a wide variety of waters have been denied Clean Water Act safeguards in recent years, including the 150-mile-long Rio Tularosa River in New Mexico, thousands of acres of wetlands in Florida's Suwanee River watershed, the 69-mile long Folsom South canal that is used as a back-up drinking water supply in California, and the 86-acre Gurno Lake in northern Wisconsin that is a popular fishing spot.

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In 2007, the Eleventh Circuit Court of Appeals ruled that a criminal conviction for the ***knowing discharge of oil, lead, zinc and grease*** into Avondale Creek in violation of the Clean Water Act could not stand unless the U.S. Department of Justice could first prove what science already makes clear, that Avondale Creek has a chemical, physical, or biological effect on the navigable Black Warrior River into which it flows. Before the recent Supreme Court decisions, Avondale Creek had been fully protected by the Clean Water Act for more than 30 years.

Avondale Creek, Alabama (Photo courtesy of Nelson Brooke, Black Warrior Riverkeeper)

Wetland Permits are Even More Time Consuming and Burdensome due to the confusion created by the Supreme Court decisions and agency guidance. Before an applicant even gets to the permit phase, the Army Corps of Engineers now carries out a comprehensive analysis to determine whether the water body at issue has a chemical, physical, or biologial effect on a navigable water. The Ohio Department of Transportation reports that Corps of Engineers jurisdictional determinations are ***adding a 6 month delay*** to state highway construction projects. St. Louis County, Minnesota anticipates a ***year long delay*** in construction of a 4.7 mile stretch of road along Highway 47 due to jurisdictional determinations. Umatilla County, Oregon has been forced to hire a consulting firm to complete federal wetland permit applications because they have become so complicated. The Clean Water Restoration Act would remove these added burdens. Removing waters from protection is ***not*** the solution to other problems with the Corps' permitting process.

States Will Not Be Able to Effectively Protect Waters no longer covered by the Clean Water Act despite the importance of those waters to communities nationwide. Eighteen states are prohibited, as a matter of law, from protecting waters not covered by the Clean Water Act, and most of the remaining states would likely have to enact new laws to effectively protect waters not protected by the Clean Water Act. Under a piecemeal state by state approach, upstream states would be able to export their pollution to communities located downstream, and states with more stringent protections would find themselves at an economic disadvantage to states with less stringent protections. Development and implementation of new state water protection laws would take time and would impose signficant additional economic and staffing burdens on the states.

The Clean Water Restoration Act Would Restore the traditional scope of Clean Water Act protection intended by Congress and implemented by EPA for more than 30 years. Americans need these safeguards to achieve the goal of restoring and maintaining the chemical, physical and biological integrity of the nation's waters. The Act would ***not*** affect activities currently exempted from Clean Water Act protections (such as ongoing farming and forestry activities), would ***not*** impose new regulatory requirements, and would ***not*** expand the categories of waters historically protected under the Clean Water Act. The Clean Water Restoration Act (S. 787) would:

- Adopt a statutory definition of "waters of the United States" based on the longstanding definition in agency regulations (40 CFR 122.2 and 33 CFR 328.3);
- 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 to maintain navigability;
- Make findings that articulate the basis for Congress' 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.

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