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Clean Water Authority Restoration Act of 2003 H.R. 962 and S. 473

Reestablishing protection for our nation's wetlands:

Over the last 30 years, the Clean Water Act has enabled great strides in improving the health of our nation's waters by protecting them from unfettered pollution, filling, and destruction. However, a 2001 Supreme Court decision, and recent attempts by the regulatory agencies to re-define Clean Water Act jurisdiction, now jeopardize protection for many of our nation's wetlands, ponds, lakes and streams. This situation not only endangers wildlife and wild places, but also puts people at risk. H.R. 962 and S. 473 address this problem by reaffirming protection for these waters as originally intended by Congress.

The SWANCC Decision

The 2001 U.S. Supreme Court decision in Solid Waste Agency of Northern Cook County v. United States Army Corps (*SWANCC*), limited the authority of federal agencies to extend Clean Water Act protections to non-navigable, intrastate, isolated waters based solely on their use by migratory birds.

Although the Court's *SWANCC* ruling was quite narrow, various industry groups, administration officials, and some federal regulatory staff have sought to stretch its meaning in order to remove protection from many additional waters. This has had broad consequences as waters no longer determined to fall under the jurisdiction of the Clean Water Act no longer have protection from the discharge of pollutants and other destructive activities. And since very few waters are actually "isolated," (most are connected to other larger waters in some way), pollution and/or destruction of these waters is very likely to impact other waters, including public drinking water supplies.

As a result of these efforts, the kinds of wetlands most at risk include prairie potholes, playa lakes, bogs, fens, vernal pools, Carolina bays and many others. These wetlands absorb floodwaters, prevent pollution from reaching our rivers and streams and provide crucial habitat for most of the nation's ducks and other waterfowl as well as hundreds of other bird, fish, shellfish and amphibian species. Loss of these waters would have a devastating effect on our economy as well as the environment.

Administration Efforts

In January of 2003, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers went far beyond the *SWANCC* decision and issued new guidelines directing their field staff to stop protecting *all* so-called "isolated" waters. At the same time, the

administration also issued an “Advance Notice of Proposed Rulemaking” (ANPRM) that set the stage for stripping federal safeguards from many other types of non-navigable waters such as ponds, lakes and streams. After 133,000 public comments and half of the House of Representatives told the administration that they strongly oppose *any* changes to the Clean Water Act, the ANPRM was rescinded, but the confusing and inappropriate guidelines are currently in effect and are having extremely detrimental consequences to our Nation’s wetlands.

The administration itself estimates that the new guidelines remove all Clean Water Act protections from approximately 20 million acres of the nation’s wetlands, or 20 percent of the remaining wetlands in the lower 48 states. Additionally, because of the confusing interpretation of the *SWANCC* decision in the guidelines, many streams that do not flow year-round are at risk, as well as ponds and even large lakes. More than 60 percent of stream miles in the United States are streams that do not flow year-round. In arid regions of the Southwest, this figure is much higher.

H.R. 962 and S. 473:

H.R. 962 and S. 473 would end this debate by reaffirming Congress’ original intent to broadly interpret the Clean Water Act’s jurisdiction in order to meet the Act’s goal of restoring the chemical, physical and biological integrity of the nation’s waters. The bills simply restore the level of protection for the nation’s waters that existed prior to the *SWANCC* decision by:

- 1) Adopting a statutory definition of “waters of the United States” based on the longstanding definition in the Corps’ of Engineers’ regulations (at 33 CFR 328.3.)
- 2) Deleting the term “navigable” from the Act to clarify that Congress’s primary concern in 1972 was to protect the nation’s waters from pollution rather than just sustain the navigability of waterways.
- 3) Including a set of findings that explain the factual basis for Congressional assertion of constitutional authority over waters and wetlands, including those that appear to be hydrologically “isolated.”

There is no “new” protection in this legislation. These bills simply restore the protections afforded these crucial water resources prior to the 2001 *SWANCC* ruling. No existing exemptions in Clean Water Act regulations (including those for ongoing farming and silvicultural activities) are affected. The bills reaffirm the common understanding that “waters of the United States” should be interpreted broadly— the understanding that Congress held when the Act was adopted in 1972 — as reflected in the law, legislative history, and longstanding regulations, practice, and judicial interpretations.