



Continue Protecting ALL of the Nation's Waters Under the Clean Water Act

- **New proposed rulemaking and policy guidance threaten the nation's waters**
 - **Bush Administration actions could open many streams, wetlands, ponds and other waters to unregulated pollution, filling, and destruction**
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The Administration recently took steps to remove federal Clean Water Act protection from many waters (including creeks, streams, small ponds, and wetlands) that have long been protected by the Act. **We call on Congress to:**

- **Ensure all waters of the U.S. continue to be protected under the Clean Water Act.**
- **Ask the Bush Administration to stop the rulemaking and rescind the guidance memo.**

On January 15, 2003 the EPA and Army Corps of Engineers published in the Federal Register an Advance Notice of Proposed Rulemaking (ANPRM) raising questions about the jurisdiction of the Clean Water Act. Simultaneously, they released a guidance memo to their field staff regarding Clean Water Act jurisdiction over certain so-called "isolated," non-navigable, intrastate waters.

The agencies claim these actions are necessary because of a 2001 Supreme Court ruling (the "SWANCC" case). The 5-4 majority in that case held that the presence of migratory birds cannot be the sole reason for asserting Clean Water Act jurisdiction over what the court termed "isolated" non-navigable intrastate waters. **But both the guidance memo and the ANPRM go far beyond the holding in SWANCC.**

The **guidance** takes effect right away and will have an immediate impact on many of the nation's wetlands, creeks, ponds, and streams. It tells the Corps and EPA staff to stop asserting jurisdiction over so-called "isolated" waters without first obtaining permission from headquarters. **Based on this guidance, waters that the EPA and Corps are likely to now judge to be outside the Clean Water Act will be filled, dredged, and polluted without a permit** or any other long-standing Clean Water Act safeguard.

The ANPRM announces the administration's intention to consider **even broader changes to Clean Water Act coverage through rulemaking.** Specifically, the rulemaking questions whether there is any basis for asserting Clean Water Act jurisdiction over **any** so-called "isolated" water.

A critical issue to both the guidance and ANPRM is what types of waters the Administration will treat as "isolated." The term "isolated" is not used anywhere in the Clean Water Act. It is clear from the language and history of the law that the Act is meant to protect all waters of the U.S. Depending on how broadly "isolated" is defined by the Administration, the number of waters placed in jeopardy by the guidance and ANPRM could be very large – and will affect every state in the nation.

Very few waters are "isolated" from a scientific perspective, since pollution in or destruction of even small wetlands, headwater streams, and seasonal waters will have serious effects on the chemical, physical, and biological integrity of other waters. But the ANPRM and the guidance memo open the way for developers, mining companies, and other industries to argue to the Corps and EPA that all kinds of streams, non-navigable ponds, wetlands and other waters – even some tributaries – are "isolated."

Also, the ANPRM notice invites other "views as to whether any other revisions are needed to existing regulations on which waters are jurisdictional." This opens the door for industry groups to suggest that even more waters be cut out of the Act's protections.

None of the waters thrown into question by this proposed rulemaking were held to be outside the scope of the Clean Water Act by the Supreme Court ruling. Congress clearly intended for the Clean Water Act to cover *all* waters of the U.S.

What are the impacts?

Both the guidance and the rulemaking could affect the entire scope of Clean Water Act jurisdiction. The law has one definition of waters that applies to the *entire* Act, so whatever waters the rulemaking and guidance put aside would no longer receive federal legal protection against *any* pollution or destruction.

The waters put at risk by the administration's actions are critical to public health, our natural environment, and the U.S. economy. Abandoning these waters to destruction and degradation will:

- **Pollute more waters;** EPA's most recent data show that the nation's waters are already getting dirtier and almost half of the rivers, streams, lakes and coastal estuaries are not safe for fishing, swimming, or boating.
- **Increase flooding,** as wetlands – nature's sponges – are no longer available to absorb excess water.
- **Threaten public health** from contact with bacteria, pathogens, toxics, and other pollutants from waters that would no longer be regulated for all types of industrial discharges.
- **Place community water supplies at risk,** and increase treatment costs to remove pollutants.
- **Deplete drinking water sources** (like the Ogallalla aquifer in Texas) that are recharged by playa lakes, and other wetland and stream systems.
- **Reduce and potentially extinguish endangered or threatened wildlife species** – 43 percent of which (including the whooping crane) rely on wetlands for survival.
- Place at risk the **breeding habitat used by over half the ducks** in North America.
- **Eliminate** many seasonal wetlands that serve as **nurseries for juvenile frogs, toads, salamanders** and other species, and small streams that also are essential to sustain healthy populations of **fish, amphibians and other aquatic species.**

The guidance went into effect when it was printed in the Federal Register on January 15. There is a 45-day comment period for the ANPRM that ends on March 3. Following the comment period, the administration will decide whether to pursue a rulemaking regarding the jurisdiction of the Clean Water Act.

What Members of Congress can do:

Congress must ensure that all the waters of the United States remain protected under the Clean Water Act. We urge Congress to take the following actions:

- 1. Co-Sponsor the Clean Water Authority Restoration Act** to be reintroduced soon (introduced in the 107th as H.R. 5194 and S. 2780) to reaffirm Congress' original intent in 1972 to protect all waters of the U.S., and prevent future, unwarranted attacks on the scope of the Clean Water Act.
- 2. Ask the Bush Administration and the agencies not to move forward with the proposed rulemaking.**
- 3. Tell EPA and the Army Corps of Engineers to rescind their January 15, 2003 guidance memo** on the scope of the Clean Water Act, because it goes well beyond the Supreme Court's ruling and would eliminate protections for many waters.

For more information about the Administration's proposal, please contact these members of the Clean Water Network Steering Committee: Betsy Otto, American Rivers, 202-347-7550; Paul Schwartz, Clean Water Action, 202-895-0420; Joan Mulhern, Earthjustice, 202-667-4500; Barbara Elkus, League of Conservation Voters, 202-785-8683; Julie Sibbing, National Wildlife Federation, 202-797-6832; Sean McMahon, National Audubon Society, 202-861-2242; Daniel Rosenberg or Nancy Stoner, Natural Resources Defense Council, 202-289-6868; Ed Hopkins, Sierra Club, 202-675-7908.