

CLEAN WATER AT RISK

*A 30th Anniversary Assessment of the Bush
Administration's Rollback of Clean Water
Protections*

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Natural Resources Defense Council
Clean Water Network
October 2002



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The Natural Resources Defense Council is a national nonprofit environmental organization with more than 500,000 members. Since 1970, our lawyers, scientists, and other environmental specialists have been working to protect the world's natural resources and improve the quality of the human environment. NRDC has offices in New York City, Washington, D.C., Los Angeles, and San Francisco. Visit us on the World Wide Web at www.nrdc.org.

ABOUT THE CLEAN WATER NETWORK

The Clean Water Network is an alliance of over 1,000 public interest groups from around the country working together to protect our nation's rivers, lakes, coastal waters, and wetlands. The Clean Water Network members represent environmentalists, commercial fishermen, recreational anglers, surfers, boaters, farmers, faith communities, environmental justice advocates, labor unions, urban communities, consumers, and recreationalists. Find out more at www.cwn.org.

ACKNOWLEDGMENTS

NRDC and the Clean Water Network would like to acknowledge the generous support of Beldon Fund; Naomi and Nehemiah Cohen Foundation; Bertram J. and Barbara Cohn; Geraldine R. Dodge Foundation, Inc.; Henry Philip Kraft Family Memorial Fund of The New York Community Trust; The McKnight Foundation; The Moriah Fund; Charles Stewart Mott Foundation; The Mary Jean Smeal Clean Water Fund; Turner Foundation, Inc.; and Victoria Foundation, Inc., and our 500,000 members, without whom our work would not be possible. We would also like to thank Joan Mulhern, Betsy Otto, Robbin Marks, Julie Sibbing and Elliott Negin for their review and expertise, Matt Freeman for his editorial assistance, and Carol James and Julia Cheung for their work laying out this report.

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CHAPTER 1

INTRODUCTION

Thirty years ago, the United States Congress confronted stark choices about the future of America's waterways and drinking water. Faced with President Richard Nixon's veto of the long-debated Clean Water Act of 1972, Congress mustered overwhelming majorities in both houses for a dramatic override. The result was a sharp departure in clean water policy, a turning point in the environmental movement, and, as the law began to do its work, a quantum improvement in the safety and environmental health of the nation's waterways. In the years since, the Clean Water Act has come to be a model for every subsequent environmental law.

Ironically, on this 30th anniversary of the October 1972 passage of the Clean Water Act, the Bush administration is working to hobble the law. It is planning or has already taken a variety of steps to delay or derail the cleanup of impaired waters, to allow the dumping of solid wastes into waterways, to reduce protection for wetlands, and to weaken requirements for the treatment of raw sewage. It has even worked to make many currently protected rivers, lakes, wetlands, and other waterways ineligible for federal protection.

The necessary course for protection of America's waterways is clear. The United States can ill afford to allow its waters to become increasingly polluted and dangerous. Instead, the Bush administration's retreat from the national commitment to healthy and safe water should be rejected, and the business of cleaning and protecting the nation's water resumed.



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CHAPTER 2

THE CLEAN WATER ACT: HISTORY, RESULTS AND CHALLENGES

[T]oday, the rivers of this country serve as little more than sewers to the seas. Wastes from cities and towns, from farms and forests, from mining and manufacturing, foul the streams, poison the estuaries, threaten the life of the ocean depths.

With this chilling assessment on November 2, 1971, Sen. Edmund Muskie, then-chairman of the Senate's Subcommittee on Air and Water Pollution, introduced legislation that would eventually become the Clean Water Act.¹ The law's passage came none too soon, for the nation's waters were indeed troubled at that time.

- In March of 1969, a blowout at a Union Oil Company well off the coast of Santa Barbara, California released 200,000 gallons of crude oil, blanketing more than 400 square miles of water with a 6-inch thick layer of crude oil, and covering at least 30 miles of beach. Thousands of sea birds died, and practically all fishing in the area was wiped out for several weeks.²
- Unchecked water pollution in inland waterways accounted for record fish kills. Some 26 million fish died as a result of the contamination of Lake Thonotosassa, Florida, for example.³
- The nation's annual commercial harvest of shrimp dropped from more than 6.3 million pounds before 1936 to just 10,000 pounds in 1965.⁴
- Industry discharged mercury into the Detroit River at a rate of between 10 and 20 pounds per day, causing in-stream water to exceed the Public Health Service limit for mercury six times over.⁵
- Because of woefully inadequate water treatment across the country, just 85 million Americans were served by any kind of sewage treatment plant. As late as the 1970s, most raw sewage was simply dumped into rivers and lakes.⁶
- Less than one-tenth of U.S. watersheds were either unpolluted or only moderately polluted.⁷

CONGRESS PASSES THE CLEAN WATER ACT

The richly symbolic breaking point for mounting public anger over this steady stream of environmental indignities came in June of 1969, when Cleveland's Cuyahoga River, laden with oil and other industrial wastes, burst into flames. Public outrage led to the Clean Water Act, and it, in turn, cleared the way for several other important pieces of environmental legislation. On the day the Senate voted on his bill, Senator Muskie warned:

Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us. We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities of lakes, rivers, and bays where all forms of life have been smothered by untreated wastes, and oceans which no longer provide us with food.⁸

The bill passed unanimously in the Senate and with just 11 dissenting votes in the House.⁹ That overwhelming bipartisan support did not move President Richard Nixon, however, and neither did the endorsement of Nixon's own Environmental Protection Agency administrator, William Ruckelshaus. Nixon vetoed the bill, citing concerns about costs.¹⁰

The reaction to the president's veto was swift and decisive. Rep. Thomas "Tip" O'Neill from Boston warned his colleagues in the House of Representatives, "Should we fail to act, future generations of Americans living with dirty, unsafe rivers and lakes will know where to squarely fix the blame—with the Congress that refused to override the groundless objections of the president."¹¹ Congress heeded the future speaker's words, overriding the veto just one day after it was issued, with overwhelming bipartisan margins in both houses of Congress.¹²

THE CLEAN WATER ACT'S EFFECTIVENESS IN PROTECTING THE NATION'S WATERS

The Clean Water Act is commonly regarded as one of the most successful U.S. environmental laws. In many ways, the act turned the tide on water pollution. It resulted in a drastic reduction in the percentage of waterways deemed unsafe for fishing and swimming, led to billions of dollars of needed investment in sewage treatment plants, and cut the rate of wetlands loss by three-fourths.

In 1972, estimates are that between 60 and 70 percent of America's lakes, rivers and coastal waters were unsafe for fishing and swimming.¹³ Thirty years of Clean Water Act enforcement has cut that percentage dramatically: According to the EPA's most recent *National Water Quality Inventory*, 39 percent of rivers are unsafe for fishing and

swimming, as are 45 percent of lakes, and 51 percent of estuaries.¹⁴ Disturbingly high though those numbers are, they represent significant improvement over the pre-Clean Water Act era.

Because of the Clean Water Act, the number of Americans served by sewage treatment plants has doubled in the last 30 years.¹⁵ At the same time, the federal government's investment in wastewater and drinking water treatment has brought great progress in cleaning up the nation's rivers, lakes, and coastal waters, as well as in ensuring the safety of drinking water. As an example—just one of many—the EPA has documented a dramatic decrease in the quantity of sewage contaminants into the nation's waterways as a result of wastewater treatment plants built with funds provided by construction grants and state revolving fund programs under the Clean Water Act.¹⁶

Further illustration of the Clean Water Act's effectiveness comes from a comparison of the present state of many of America's rivers and lakes with their conditions when the law was passed. In 1970, Lake Erie was proclaimed "dead," with dissolved oxygen levels so low that its fish "were practically on respirators." Indeed, the pollution reached such levels in Erie and in other waterways in the Great Lakes system that a ban on fishing in certain parts of the system was necessary. Now, 30 years after the passage of the Clean Water Act, the fish population of Lake Erie has grown significantly, walleye and bass in particular.¹⁷

The Hudson River has seen a similarly dramatic recovery. In the 1960s, the river was considered an open sewer. Today, it is the only large river that drains into the North Atlantic with strong spawning stocks of its entire historical collection of migratory species. These fish support recreational and commercial fisheries along the Atlantic coast worth hundreds of millions of dollars.¹⁸

During the 1960s and 1970s wastewater and industrial plants discharged large quantities of harmful pollutants and nitrogen into Tampa Bay. The pollution damaged the bottom sediment and killed many organisms essential to a healthy ecosystem. As a result of the Clean Water Act, thousands of acres of sea grass on the bay floor have been recovered. An estimated 1,500 acres of marsh and mangrove habitats have been restored, including 250 acres of tidal marshes critically important to fish.¹⁹

Dramatic improvement in water quality is also readily apparent in Boston Harbor. In the 1970s, sludge was regularly dumped into its waters, pushing the ecosystem to the brink of biological death. Today, seals and porpoises swim off South Boston's Castle Island, lobsters are routinely caught, and tourists take pleasure cruises through the harbor.²⁰

WATER POLLUTION CHALLENGES REMAIN

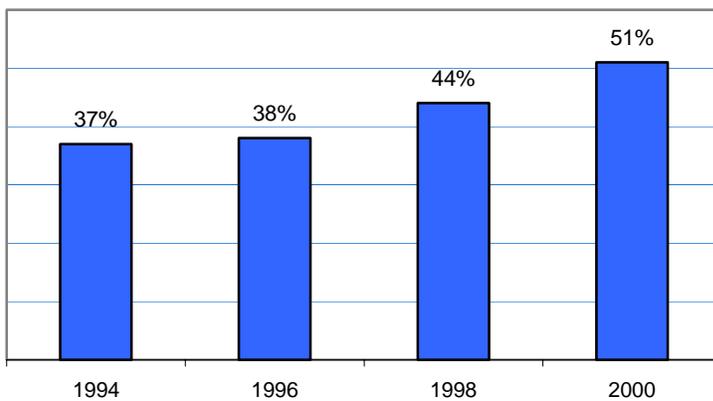
While the 30-year downward trend in water pollution is decidedly positive, recent data tell a more troubling story. Specifically, the EPA reports that the largest source of pollution into waterways is polluted runoff—the contaminated stormwater and snowmelt that runs off of urban and agricultural lands.²¹ The Clean Water Act does not adequately control this major source of pollution. This shortcoming in the law, combined with

inadequate implementation and enforcement of other Clean Water Act measures, is taking its toll on the nation's water.

After a quarter century of progress driven by the Clean Water Act, pollution levels are on the rise, with either no improvement or an increase in pollution reported in the EPA's *National Water Quality Inventory*.²² Worsening conditions are especially apparent in estuaries; between 1996 and 2000, 13 percent more became too polluted to support their uses. The implications for economic and environmental health are profound, because estuaries serve as nursery areas for many commercial and recreational fish species, as well as for most shellfish populations, including shrimp, oysters, clams, crabs, and scallops.²³

After a quarter century of progress driven by the Clean Water Act, pollution is on the rise.

Figure 1. Quality of Assessed Waters: Percentage of Impaired Estuaries



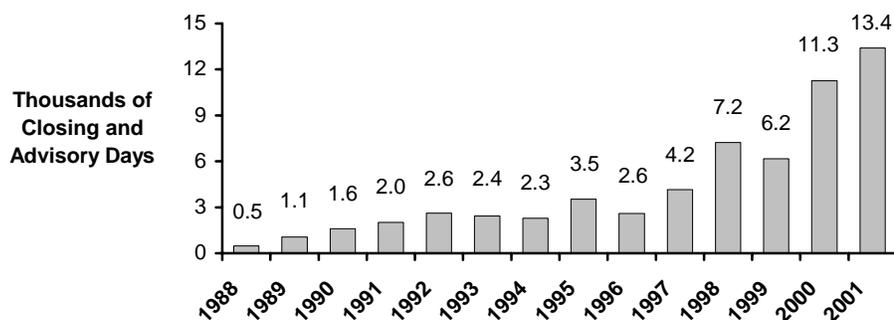
Sources: EPA, Office of Water, *National Water Quality Inventory: 1994 Report to Congress*, December 1995 (EPA841-R-95-005); EPA, Office of Water, *National Water Quality Inventory: 1996 Report to Congress*, April 1998 (EPA841-R-97-008); EPA, Office of Water, *National Water Quality Inventory: 1998 Report to Congress*, June 2000 (EPA841-R-00-001); EPA, Office of Water, *National Water Quality Inventory: 2000 Report*, August 2002 (EPA841-R-02-001).

Beach closings and beach advisories are also increasing. In its 2002 annual beach report, *Testing the Waters*, NRDC found that the number of beach closings and advisories had increased in 2001 by 19 percent in comparison to 2000—13,410 in 2001 versus 11,270 in 2000.²⁴ A slightly longer view reveals an even more ominous trend. Since 1991, the number of beach closings and advisories has increased six-fold, from 2,000 in 1991 to more than 13,000 in 2001.²⁵ Much of that increase is the result of better monitoring of beachwater quality, but that monitoring has increasingly found unsafe water quality conditions.

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The National Coastal Condition report projected that eutrophic conditions would worsen for 70 percent of U.S. estuaries by 2020.

Figure 2. Total Beach Closings and Advisories, 1988-2001 (excluding extended and permanent)



Note: Because of inconsistencies in monitoring and closing practices among states and over time, it is difficult to make comparisons between states or to assess trends based on the closing data. Source: NRDC, *Testing the Waters 2002: A Guide to Water Quality at Vacation Beaches, 12th Ed.* (July 2002).

Progress in providing effective treatment of sewage has also stopped, as a result of water pollution resulting from discharges of inadequately treated sewage from deteriorating collection systems and wastewater treatment facilities. Indeed, the same EPA report trumpeting progress to date in reducing sewage contamination predicts that, in the absence of a substantial increase in investment and treatment efficiency, pollutant loadings from domestic sewage in 2025 will be as high as they were in 1968, when the worst levels were recorded.²⁶

Overall, 44 percent of U.S. estuarine waters are degraded, according to the first *National Coastal Condition* report, released this past spring by the EPA, the National Oceanic and Atmospheric Administration, the U.S. Geological Survey and the U.S. Fish and Wildlife Service.²⁷ The report also found that the overall score for eutrophic condition of estuarine waters is poor and getting worse throughout much of the nation.²⁸ Eutrophic conditions result from excessive nutrients in the waterbody, generally causing overproduction of algae, which in turn depletes oxygen supplies in the water. The result is a body of water unsuitable for sustaining fish and other aquatic wildlife, as well as submerged aquatic vegetation.²⁹ *The National Coastal Condition* report projected that eutrophic conditions would worsen for 70 percent of U.S. estuaries by 2020.³⁰

Between 1993 and 2000 the percentage of the nation's lake acres and river miles under fish consumption advisories increased steadily.

Between 1993 and 2000 the percentage of the nation's lake acres and river miles under fish consumption advisories increased steadily.³¹ (A fish advisory warns the public that high levels of chemical contaminants have been found in local fish and shellfish and that eating the fish, especially in significant quantities, may not be safe.³²) River miles under advisory increased from 2 percent in 1993 to 14 percent in 2001. Lake acres under advisory increased from 8 percent to 28 percent over the same period. Twenty-eight states currently have statewide advisories, and all of the Great Lakes and their connecting waters are under advisory. As of 2001, Wyoming was the only state in the nation that had no fish consumption advisories in place.³³ Fish consumption advisories are now in place for 71 percent of the coastline in the contiguous 48 states, and 82 percent of estuarine square miles.³⁴

Mercury contamination of fish is also on the rise. In the EPA's latest *National Water Quality Inventory* report, the agency cited mercury deposition as the cause of 2,242 of the 2,838 fishing advisories reported by the states in 2000.³⁵ The result: More than 1.6 million women and children are currently at risk of mercury poisoning, and mercury levels are affecting the reproduction of birds that rely on fish—loons and eagles, for example.³⁶

While the reduction in wetlands losses is slowing, wetlands loss is still a major concern. According to the U.S. Fish and Wildlife Service, in 1997, about 105.5 million acres of remaining wetlands in the conterminous United States—more than half of the wetlands that existed when the country was settled by Europeans—have already been destroyed. From 1986 to 1997, the net loss of wetlands was 644,000 acres. The majority of these were freshwater wetlands.³⁷

The U.S. Commission on Ocean Policy, now halfway through an 18-month study, found that approximately 40,000 acres of coastal wetlands—spawning, feeding, and nursery areas for 75 percent of U.S. commercial fish catches—are disappearing each year.³⁸

Physical alterations that result from such human activities as artificial flow regulation, flood control, navigation, logging, and land-clearing for development have had a profound effect on the rivers, streams and other waters into which they flow. These alterations include changing the direction and location of river courses, dredging rivers to artificially deepen their channels, removing natural vegetation, and replacing in-stream and floodplain structures to manage flows artificially. Fish and other aquatic life have been severely affected by these physical alterations, which now rank as the third leading cause of river impairment.³⁹

In short, the Clean Water Act has produced admirable results in terms of reducing the bulk of industrial and human waste discharges, but its provisions for addressing the pervasive polluted runoff that degrades and endangers a substantial share of America's waterways need significant strengthening. Strong programs are needed to control pollution from contaminated stormwater, polluted runoff from agriculture, and air deposition. In addition, renewed efforts are needed to maximize use of the earth's natural features—soil, vegetation, and wetlands—to filter and store runoff and to recharge the groundwater.

Rather than working to strengthen the Clean Water Act's runoff provisions, the Bush administration has focused on weakening those provisions of the act that are most effective. The challenge ahead, then, is two-fold: to reverse the Bush administration's efforts to weaken implementation of the act's existing provisions, and to strengthen those provisions of the act that have proved inadequate.

The challenge ahead, then, is two-fold: to reverse the Bush administration's efforts to weaken implementation of the act's existing provisions, and to strengthen those provisions of the act that have proved inadequate.

THE CLEAN WATER ACT'S MULTI-FACETED APPROACH TO CLEANING THE NATION'S WATERS

The Clean Water Act's impressive record as one of the most successful environmental laws is all the more remarkable because it has never been fully implemented or enforced.⁴⁰ Full implementation and enforcement of all Clean Water Act provisions is

necessary, as is strengthening of provisions that are not doing the job of protecting waterways.

In devising approaches to strengthening and improving implementation of the Clean Water Act, it is important to build on the act's multi-faceted approach to reviving the nation's waters. Seven key elements emerge from a review of the act's history:

- Protecting a broad range of water resources against despoiling or destruction. Since at least 1975, this protection has been applied broadly to rivers, lakes, coastal waters and wetlands.⁴¹
- Protecting waters from industrial pollution by setting technology-based minimum standards for wastewater treatment that grow increasingly stringent over time.⁴²
- Ensuring that waters will be clean and safe to use by determining the waterway's specific uses—recreation, aquatic habitat, and drinking water, for example—and then setting limits on pollutant discharges designed to accommodate those uses.⁴³
- Building municipal wastewater treatment plants to provide effective treatment for all sewage.⁴⁴
- Requiring all discrete dischargers of pollutants (known as "point sources") to obtain permits that clearly specify the discharge restrictions necessary to prevent degradation of receiving waters.⁴⁵
- Requiring that permits be issued before wetlands and other waters can be dredged and filled.⁴⁶
- Requiring states first to identify all waters within their borders that are too polluted to be used safely, then to determine how much of the current pollutant load needs to be reduced to clean up those waters, and finally to implement a cleanup plan.⁴⁷

As described in the following chapters, each one of these core concepts is under attack by the Bush administration. We must fight to protect each of these essential elements, which together have given us hard-earned water quality improvements, and which are critical to achieving the goals of the Clean Water Act that Congress envisioned in 1972.

BUSH ADMINISTRATION ATTACKS ON THE CLEAN WATER ACT

The record clearly demonstrates that beginning on Inauguration Day 2001, the administration has worked to stop, stall, or reverse course on protecting America's water resources. The industries required by law to reduce their water pollution discharges have steadily and successfully lobbied the administration to roll back environmental protections, and have succeeded in derailing clean water advances, broadening loopholes, and legalizing previously prohibited destructive practices. The rules and policies of the Bush administration are rapidly undoing 30 years of progress on clean water and undermining the billions of dollars invested in cleanup efforts. Following are some of the most significant threats to waters posed by the Bush administration.

INCREASES IN RAW SEWAGE DISCHARGES

Issue: Proposed regulations to prevent discharges of raw sewage from “sanitary sewers” and to warn the public to avoid contact with sewage have been withdrawn by the Bush administration. Even the least controversial requirements—those that would require sewer operators to monitor their systems for overflows and warn the public and public health authorities when they occur—have been held up.

Bush administration position: On Inauguration Day, the Bush administration announced an immediate moratorium on all recent regulations. One of the proposed rules the moratorium prevented from proceeding to public comment would have controlled raw sewage discharges and required the public to be notified when overflows occur. The rule was based on consensus recommendations of a Federal Advisory Committee that met for 5 years. More than a year and a half later, the EPA is still reviewing the proposed rule and considering alternatives that would authorize permanent discharges of raw and inadequately treated sewage.⁴⁸

Background: Each year in the United States approximately 40,000 overflows of raw sewage and garbage cause syringes and other refuse, toxic industrial waste, and contaminated stormwater to wind up in rivers, lakes, and coastal waters. In addition, each year about 400,000 sewage backups pollute the basements of America's homes.⁴⁹ The EPA has estimated that between 1.8 and 3.5 million Americans become sick every year from swimming in waters contaminated by sanitary sewer overflows.⁵⁰ Centers for Disease Control (CDC) researchers have estimated that as many as 940,000 Americans



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“The fact of raw sewage floating in our river outrages us.”

become ill and 900 die from waterborne infections each year, many as a result of discharges of raw or inadequately treated sewage.⁵¹ These overflows contaminate drinking water and cause beach closings, fish kills, shellfish bed closures, and gastrointestinal and respiratory illnesses. Sewage-infested waters pose the greatest threat for children, the elderly, and those with weakened immune systems.⁵²

Sewer overflows make people sick, and in extreme cases, cause death. In the small town of Cabool, Missouri in 1990, a pathogenic strain of *E. coli* linked to a sewage overflow killed four people, hospitalized 32 and caused diarrhea and other problems for 243 more.⁵³ In 1988, sewage overflows in Ocoee, Florida periodically flooded a mobile home park during heavy rains and caused occasional outbreaks of disease, including 39 cases of hepatitis A.⁵⁴

Overflows can also do grave damage to local ecosystems. In 2000, a 34-million gallon spill in San Diego continued unabated and unmonitored for a week. By the time it was finally discovered and stopped, solid sewage covered miles of beaches.⁵⁵

The vast majority, if not all, of sewage overflows are preventable. Audit results from an EPA study indicate that about 90 percent of overflows could be eliminated just through better operation and maintenance of existing facilities.⁵⁶ The EPA rule that the Bush administration withdrew for further review would help keep bacteria-laden raw sewage discharges out of America’s streets, waterways and basements, and make public reporting and notification of sewer overflows mandatory. It would help protect the public from illnesses caused by exposure to raw sewage; improve capacity, operation and maintenance of sewer systems; and cost Americans only \$1.92 per household per year.

Judging from what officials have said publicly about their deliberations, the administration’s proposal, if indeed it is ever issued, is likely to be inconsistent with the Clean Water Act goal of providing effective treatment for all sewage. So while the fate of the sewage treatment rule is discussed, raw sewage continues to flow into our waters, and Americans are still denied even rudimentary public notice of such contamination in the waters from which they drink and where they swim and fish. As the late Senator Muskie said in 1971, “The fact of raw sewage floating in our river outrages us.”⁵⁷ Thirty years later the outrage persists.

Polluter payback: The Association of Metropolitan Sewerage Agencies (AMSA), the sewer operators’ trade association, is lobbying the Bush administration to abandon portions of the sewage treatment rule, even though it earlier agreed to the rule’s provisions in a 5-year federal advisory committee process. AMSA favors a proposal that would allow its members to continue to discharge raw sewage so long as they implement a capacity, management, operation, and maintenance program. AMSA argues that the Clean Water Act’s requirement that all sewage be treated before it is discharged is too expensive. The argument was wrong in 1972 when Congress first rejected it, and 30 years of improved treatment technology and know-how have made it no more compelling. Investment in America’s sewer systems is a sound investment in cleaner water and better health.

Recommendation: The EPA should immediately move forward with the monitoring, reporting, and public notification provisions of the rule to minimize public exposure to

THE U.S. ECONOMY DEPENDS ON CLEAN WATER

A third of all Americans visit coastal areas each year, making a total of 910 million trips while spending about \$44 billion.

- The commercial fishing and shellfishing industries need clean wetlands and coastal waters to stay in business. Every year, the Great Lakes, Gulf of Mexico, and coastal areas produce more than 10 billion pounds of fish and shellfish.
- A *Money* magazine survey found that clean water and clean air are two of the most important factors Americans consider in choosing a place to live.
- Manufacturers use about nine trillion gallons of fresh water every year. The soft drink manufacturing industry alone uses more than 12 billion gallons of water annually to produce products valued at almost \$58 billion.
- Coastal waters support 28.3 million jobs and generate \$54 billion in goods and services each year.
- The travel, tourism, and recreation industries supported jobs for more than 6.8 million people and generated annual sales in 1996 of more than \$450 billion.
- Thirty-five million American anglers, aged 16 or older, spent \$38 billion in pursuit of their sport in 1996. Fishing expenditures increased by 37 percent between 1991 and 1996. If sportfishing were incorporated as a single business, it would rank 24th on the Fortune 500 list of top sales producers, surpassing such giants as General Motors, ExxonMobil, and AT&T.
- In 1996 nearly 14 million people spent about \$20 billion hunting game and migratory waterfowl. They made 223 million trips and spent \$5.2 billion on trip-related expenses and \$11 billion on equipment.
- More than 62 million people watch and photograph wildlife every year, spending more than \$29 billion.

sewage and its accompanying health dangers. The EPA should not change the Clean Water Act's current prohibition on discharges of raw and inadequately treated sewage.

Effective treatment for sewage is a must, and to accomplish it, the sewage must reach the treatment plant. NRDC and the Clean Water Network support continued use of biological treatment or a technology of equivalent effectiveness in removing pathogens from effluent. The United States cannot afford to risk the transmission of waterborne disease by allowing inadequately treated sewage to be discharged into rivers, lakes, streets, and even homes.

MORE WETLANDS LOST

Issue: For more than a decade, the cornerstone of the U.S. approach to wetlands protection has been a policy that calls for "no net loss" of wetlands, a policy that originated with the first Bush administration.⁵⁸ Over the last year, the current Bush administration has adopted two major changes to wetlands protection policy that will result in more wetlands being filled and destroyed, effectively eliminating the no-net-loss goal.

Bush administration position: In October 2001, without public notice or opportunity for comment, the Army Corps of Engineers reversed its longstanding no-net-loss policy by issuing new “guidance” dramatically weakening standards for wetland mitigation.⁵⁹ Despite an Earth Day 2001 pledge from the president to preserve vital wetlands resources, his administration has also relaxed the nationwide permit program—a key provision of Clean Water Act regulations that govern development and industrial activity in streams and wetlands. The Corps’ loosening of these “nationwide general permit” standards has made it much easier for developers, mining companies, and other industries to destroy greater numbers of streams and wetlands without public notice or opportunity for public comment.⁶⁰ The EPA and the National Marine Fisheries Service opposed the changes, but their objections were overridden and the new permits finalized.⁶¹

Background: Wetlands are transitional areas between open waters and uplands. Referred to by a variety of names, including swamps, marshes, estuaries, prairie potholes, vernal pools, bogs, fens, and playa lakes, wetlands play a critical role in protecting the environment and public health. They absorb floodwaters, filter pollution, recharge groundwater aquifers, and provide habitat for hundreds of plant and animal species, including many that are threatened or endangered.⁶²

The no-net-loss policy articulated during the first Bush administration was a response to rapid loss of wetlands to development. It was not without its environmental shortcomings because of its reliance on mitigation to try to make up for wetland losses. Misuse of mitigation has resulted in the destruction of existing wetlands in exchange for broken promises that new wetlands would be created or that newly created wetlands would provide the same environmental benefits as the destroyed wetlands. The new guidance from the current administration makes the situation much worse, by allowing wetlands to be traded for dry upland areas that do not serve the same functions as wetlands.⁶³ Despite objections to it from other federal agencies, this misguided Corps guidance has not so far been overturned.

Another policy change initiated by the Bush administration was a weakening of the standards for nationwide permits for wetlands and stream destruction. These “quick-fill” permits, unlike the more restrictive individual permits, receive almost no environmental review and allow for no public comment, yet they are used to approve more than 80 percent of all projects that harm wetlands and streams. On January 15, 2002, the Army Corps of Engineers finalized new 5-year permits that remove or weaken many protections that had been adopted by the Corps in March 2000.⁶⁴ Among the changes were greater allowances for filling and channelizing streams, the building of homes in floodplains and wetlands, and weakened mitigation requirements.⁶⁵ In general, the Bush administration’s nationwide permits fail to meet the requirements of the Clean Water Act, the National Environmental Policy Act and the Endangered Species Act.⁶⁶ The result of these changes to the nationwide permits will be greater destruction of wetlands and streams with less opportunity for comment by the public or oversight by resource agencies including the EPA, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

Since the 1800s, the conterminous United States has lost more than half of its wetlands, and the nation continues to lose about 60,000 acres of wetlands each year.⁶⁷ This rate of loss will certainly increase as a result of rollbacks of wetland protections by

the Bush administration. As America's natural wetlands are traded away for uplands, net loss of wetlands will increase. The administration's policy changes will mean greater destruction of wetlands, with less opportunity for notice and comment by the public. The loss of thousands of acres of wetlands each year will lead to more flooding, more water pollution, and less habitat for fish and wildlife.

Polluter payback: Developers and mining interests, who brought suit against the Army Corps of Engineers' previous policy for nationwide wetlands destruction permits, are urging the Bush administration to allow more wetlands destruction for development and other purposes. Both industries were also large contributors to the Bush-Cheney campaign and to the Republican National Committee in 2000 and 2002. Development interests gave more than \$15 million.⁶⁸ The mining industry contributed more than \$3 million.⁶⁹ So far, these voices appear to have outweighed those of environmental and natural resources experts and the public.

Recommendation: The Bush administration should make "no net loss" of wetlands the cornerstone of its wetlands protection programs, not just an empty slogan. The administration should immediately modify the nationwide permits to restore the environmental conditions that it deleted when the permits were reissued in January 2002. The administration should also do a comprehensive and thorough evaluation of the environmental impacts of the nationwide permit program and modify the permits accordingly. Whenever wetland impacts are unavoidable, sufficient mitigation must be required to replace both the functions and extent of the wetlands destroyed. This will nearly always mean more than an acre-for-acre replacement of lost wetlands because recreated wetlands are usually inferior to natural wetlands. The Corps and the EPA also need to monitor whether permit conditions are being met and mitigation requirements are being fulfilled, and then bring enforcement actions against those who flout the law.

The loss of thousands of acres of wetlands each year will lead to more flooding, more water pollution, and less habitat for fish and wildlife.

MORE INDUSTRIAL WASTE IN THE NATION'S WATERS

Issue: Allowing great quantities of industrial wastes to be dumped into streams, lakes, rivers, and wetlands is in direct opposition to the Clean Water Act's central purpose of restoring and maintaining the integrity of the nation's waters. Indeed, nothing is less consistent with that goal than allowing industry to bury and permanently destroy waters under huge piles of debris.

Bush administration position: On May 9, 2002, the Bush administration finalized a rule that eliminated a 25-year-old Clean Water Act regulation prohibiting the Army Corps of Engineers from allowing industrial wastes to bury and destroy U.S. waters.⁷⁰ The decision was driven by the desire to legalize mountaintop removal mining practices in the Appalachian coal fields, but the Bush administration rule goes much further, allowing the Army Corps of Engineers to issue permits for dumping hardrock mining waste, construction and demolition debris, and other solid industrial wastes that would bury wetlands, streams, rivers, coastal waters, and other waterways.⁷¹

Background: Mountaintop removal mining uses explosives to blow off the top of mountains in order to expose and remove the coal seams beneath. In the process, millions of tons of waste-the former mountaintop-are generated. Typically, the waste rock and dirt

As a result of valley fills, these streams, and the aquatic and wildlife habitat they support, are destroyed—buried by hundreds of millions of tons of rocks and dirt.

are dumped into nearby valleys and into the networks of streams located in those valleys. As a result of valley fills, these streams, and the aquatic and wildlife habitat they support, are destroyed-buried by hundreds of millions of tons of rocks and dirt.⁷²

Turning waters into waste dumps is exactly what the Clean Water Act was intended to prevent. The very first sentence of the act declares, “It is the objective of this chapter to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁷³ Allowing industries to bury and obliterate waterways with waste will have severe adverse effects on water quality, water supplies, fish and wildlife habitat, flood control, and floodplain management.⁷⁴ Already, in West Virginia and Kentucky alone, more than 1,000 miles of streams have been authorized for destruction by mountaintop removal waste fills.⁷⁵ EPA studies have found that mountaintop removal mining adversely affects habitat not directly filled as well, by blocking the headwaters of streams, adding toxic pollutants to waterways, fragmenting mature forest habitat, adversely affecting bird populations, and impairing aquatic life in remaining streams.⁷⁶

A federal judge who has enjoined implementation of the new regulation in the Huntington, West Virginia district of the Army Corps of Engineers, wrote the following assessment of the evidence:

When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality.⁷⁷

Polluter payback: The polluters—coal mining companies, gold and copper mining companies, and other industrial polluters—made a top priority of securing these changes. According to government documents, these industries met with the EPA and other Bush administration officials to pressure them to rewrite clean water rules to industry specifications. These same mining interests donated more than \$3 million to the Bush-Cheney campaign and the Republican National Committee in the 2000 and 2002 election cycles.⁷⁸

The mining interests got just what they sought in the Bush administration's rollback, including removal of a restriction that would have prevented waste dumps in waters from including hazardous wastes or other material “unsuitable” for fill material.⁷⁹ That exclusion was removed at the request of the National Mining Association so that the Corps could issue permits allowing every type of waste material to be dumped into streams, lakes, ponds, coastal waters, and wetlands.⁸⁰

Industry’s strong influence on this rule can be seen not only in its content, but also in the process by which it was approved. Unlike most rules, which the White House Office of Management and Budget evaluates for 90 days pursuant to a federal executive order,

this regulation was cleared by the OMB in less than 48 hours without any substantial analysis of costs or benefits. It was also approved before the environmental impact analysis required by the National Environmental Policy Act had been completed.⁸¹

Recommendation: The Bush administration should withdraw this regulation and reinstate the previous EPA and Corps regulations precluding the use of waste materials as fill.

PUBLIC SUPPORT FOR CLEAN WATERⁱ

- More than half of the American population worries about pollution of rivers, lakes and reservoirs a great deal (Gallup poll, conducted March 3-7, 2002).
- Water becoming more polluted is the top environmental concern of Americans (Greenberg Quinlan Rosner Research and the Tarrance Group, conducted April 13-19, 2002).
- 81 percent of voters indicated that clean water, clean air, and open space are important in deciding how they vote in elections (Greenberg Quinlan Rosner Research and the Tarrance Group, conducted April 13-19, 2002).
- The National Association of Home Builders found that proximity to a water body raises the value of a home by up to 28 percent (NAHB, *Housing Economics*, 1993).
- Proximity to dirty water lowers the value of homes (T. Schueler, "The Economics of Watershed Protection," *Watershed Protection Techniques*, June 1997).
- 71 percent of Americans are extremely concerned about clean water (League of Conservation Voters, 2000).
- When deciding where to live, clean water ranked as the top priority above crime rate, health care, and taxes (*Money* magazine, April 2000).

ⁱ U.S. EPA, *Liquid Assets 2000: America's Water Resources at a Turning Point* (2000).

MORE CONTAMINATED RUNOFF

Issue: Stormwater pollution is an enormous and growing water pollution problem. As more and more development covers the natural landscape with pavement and other impervious surfaces, rainwater is unable to percolate through soil and vegetation. Instead, it gathers pollution and concentrates in great volume and with increased velocity in places where it can escape impenetrable surfaces. A number of effective technologies can be used to control runoff from new development and its detrimental effect on waterways. But the EPA has failed to propose any baseline technology standards to control runoff from new construction and development, its obligation under the Clean Water Act's effluent guidelines requirements to do so notwithstanding.

Bush administration position: On June 24, 2002, the EPA announced it would not propose technology standards for controlling stormwater runoff pollution from new development.⁸² Earlier this year, the EPA recommended to the White House that

Stormwater or urban runoff—the pollution from construction activities and from buildings, parking lots, and other paved surfaces—is one of the largest and fastest growing sources of water pollution in the United States.

stormwater standards be set, on the grounds that they were needed to address stormwater pollution's adverse effects on water quality, that a variety of techniques had been demonstrated to be effective, and that they were economically achievable by the development industry.⁸³ At the request of developers, the White House Office of Management and Budget overruled the EPA's scientific, technical, and economic experts and killed the proposed rules. The EPA's withdrawal of the proposed rule is contrary to Congress's mandate to minimize environmental damage from construction and development by setting federal minimum technology standards. So not only does this reversal set the nation on a course toward increasingly degraded waters, it also violates the law.

Background: Stormwater or urban runoff—the pollution from construction activities and from buildings, parking lots, and other paved surfaces—is one of the largest and fastest growing sources of water pollution in the United States. Stormwater is contaminated with sediment, metals, pesticides, fertilizers, oil and grease, excessive nitrogen and phosphorous, bacteria and viruses, and trash. Urban stormwater runoff is the largest source of impairment in U.S. coastal waters and the second largest source of water pollution in U.S. estuaries.⁸⁴ It is also the largest known source of the bacterial contamination that closes thousands of beaches in the United States each year.⁸⁵ The pollutant loads and increased volume and velocity of stormwater runoff cause dramatic changes in hydrology and water quality, resulting in increased flooding, erosion and scouring of stream banks, habitat loss, increased water temperature, and polluted water.

Stormwater pollution increases with development, and development is surging in the United States. Total urbanized land in the United States increased by 47 percent between 1982 and 1997, while population increased just 17 percent.⁸⁶ This increase in development is translated directly into increased stormwater pollution. For example, a 1-acre parking lot produces 16 times the runoff of an undeveloped meadow.⁸⁷

Effluent limitation guidelines (ELGs) are technology-based requirements for categories of point source dischargers. The effluent guidelines are based on the degree of control that can be achieved using various levels of pollution control technology, and “which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.”⁸⁸ The Clean Water Act directs the EPA to promulgate ELGs for categories or subcategories of industrial point sources that reflect the level of pollutant control attained by available technologies that are economically achievable.⁸⁹

The effluent guidelines program was one of the principal features of the Clean Water Act of 1972.⁹⁰ In adopting the effluent guidelines program, Congress recognized that the previous program, which was based entirely on attempts to enforce ambient water quality standards, was a failure.⁹¹ The Senate Committee on Public Works described that ambient standards approach as “inadequate in every vital aspect.”⁹² The effectiveness of a technology approach, as opposed to the water quality standards approach, is that it focuses on “the preventable causes of water pollution”⁹³ and requires universal, categorical application of the technologies that can be used to prevent pollutant discharges.⁹⁴ Thus, the program was designed to ensure that effective treatment technologies already in use somewhere in the country would become the minimum

requirement applicable to segments of the industry that were not yet implementing effective technologies to reduce pollution.

A number of techniques in use in communities across the nation have proven themselves effective at reducing the adverse impacts of stormwater pollution from construction and development.⁹⁵ Among these are a variety of approaches that capture, retain, and filter stormwater before it is discharged into waterways or back into groundwater.⁹⁶ The EPA's initial recommendation to the OMB was based on its determination that technology standards for new development would be technically feasible, of reasonable cost, and economically achievable.⁹⁷ Still, despite the EPA's own documentation that stormwater best management practices are being used effectively across the country to reduce stormwater pollution in a cost-effective manner, the OMB would not allow the EPA to propose long-term stormwater controls for new development. The EPA's failure to propose technology controls is both illegal and environmentally irresponsible.

Polluter payback: Developers have been the chief opponents of effective wetlands protection in the United States for decades. They are also big contributors to the Republican Party and to President Bush's campaign, in particular. The construction industry donated more than \$15 million to the Bush-Cheney campaign and the Republican Party in the 2000 and 2002 election cycles.⁹⁸ Representatives of the construction industry met with the OMB on February 4, 2002, to oppose technology standards for new development.⁹⁹ Once again, the administration chose to give in to industry demands instead of protecting the nation's waters.

Recommendation: The EPA should re-propose effluent guidelines for the construction and development industry. The new proposal should set minimum standards to control stormwater pollution from active construction and long-term development based on the latest scientific and technical information available, and should require minimization of polluted runoff through beneficial reuse and groundwater recharge wherever feasible.

DERAILING CLEANUP OF POLLUTED RIVERS, LAKES, AND COASTAL WATERS

Issue: On September 30, 2002, the EPA released its biennial national water quality inventory. Among its findings: More U.S. waters are polluted than ever before.¹⁰⁰ Nevertheless, the EPA is now planning to propose regulations to severely weaken the Clean Water Act's chief program for cleaning up these polluted waters, the total maximum daily load (TMDL) program.

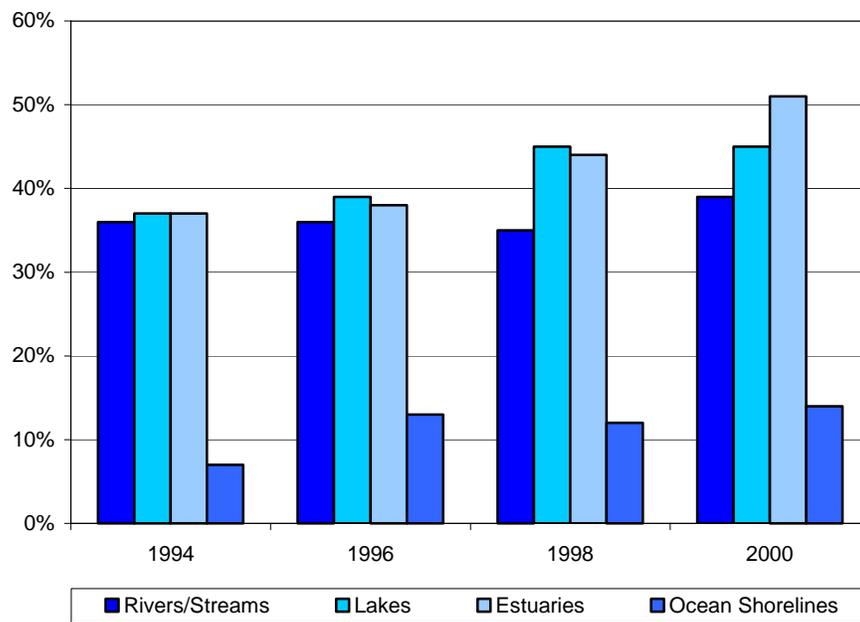
Bush administration position: The EPA is now poised to propose a rule that would cripple the TMDL program, the Clean Water Act's primary program for cleaning up polluted waters. If adopted, the draft of the proposed rule would weaken EPA oversight of state administration of the program, make it easier for states to ignore polluted waters and to weaken water quality standards for protecting human health and ecosystems, delay cleanups, and actually make pollution worse by allowing increased point source

The EPA is now poised to propose a rule that would cripple the TMDL program, the Clean Water Act's primary program for cleaning up polluted waters

discharges.¹⁰¹ If finalized, the Bush administration’s proposal will ensure that dirty waters remain polluted, and become even more polluted, for decades to come.

Background: Thirty years after passage of the Clean Water Act, 218 million Americans live within 10 miles of a polluted river, lake, or coastal water.¹⁰² These waters are not safe for fishing, swimming, or boating, much less as a source for drinking water or for other basic uses. Indeed, the EPA’s water quality inventory shows that the nation’s waterways are getting more polluted.¹⁰³ The polluted waters include approximately 270,000 miles of rivers and streams, 7.7 million acres of lakes, and 15,000 square miles of estuaries that have been assessed and found to be impaired—polluted by discharges of sediments, nutrients, and pathogens, as well as by pesticides and other toxic chemicals.¹⁰⁴

Figure 3. Quality of Assessed Rivers/Streams, Lakes, Estuaries, and Ocean Shorelines



Sources: EPA, Office of Water, *National Water Quality Inventory: 1994 Report to Congress*, December 1995 (EPA841-R-95-005); EPA, Office of Water, *National Water Quality Inventory: 1996 Report to Congress*, April 1998 (EPA841-R-97-008); EPA, Office of Water, *National Water Quality Inventory: 1998 Report to Congress*, June 2000 (EPA841-R-00-001); EPA, Office of Water, *National Water Quality Inventory: 2000 Report*, August 2002 (EPA841-R-02-001).

The principal reason for the lack of progress cleaning up polluted waters is the absence of effective controls on polluted runoff from farm fields, urban streets, forestry operations, and other “nonpoint sources.”¹⁰⁵ In fact, agriculture, the vast majority of which is completely unregulated, is the largest source of water quality impairment in U.S. rivers, lakes, and wetlands.¹⁰⁶

In 1972, the drafters of the Clean Water Act created a program to ensure that where the law’s technology requirements limiting pollution from factories, sewage plants, and other “end-of-the-pipe” pollution sources were insufficient to result in clean, safe water, additional steps would be taken. That program is the “Total Maximum Daily Load”

(TMDL) cleanup program. Since 1972, the TMDL program has required states—and that failing, the EPA—to identify waterways where technology controls on point sources are insufficient to meet water quality standards, rank those waters for priority attention, and then set pollution limits for each waterbody. States are then required to allocate pollution reductions between point and nonpoint sources sufficient to meet water quality standards. Despite the law, the EPA and states largely failed to clean up waterways under the program until a wave of citizen lawsuits in the late 1980s and 1990s forced their hands.

The TMDL regulations were adopted in 1985 under the Reagan administration and amended in 1992 by the first Bush administration. These rules are still in effect today, and are the ones that the current administration objects to as onerous.

Based on EPA briefing materials, the Bush administration is expected to propose the following changes to the TMDL rule:¹⁰⁷

- *allow* currently polluted waters to be redefined as clean;
- allow states to rely upon speculative and unenforceable reductions from nonpoint sources as a basis for classifying waters as “likely to achieve” water quality standards, and therefore to *avoid preparation of a TMDL clean up plan*;
- *allow increased discharges from point sources* based upon those same speculative, unenforceable future reductions from nonpoint sources;
- *curtail the EPA’s oversight* of the states’ implementation of the TMDL program;
- *delay clean up* by frontloading cost determinations before preparing the TMDLs, effectively requiring states to analyze whether cleanup might be too expensive, before they determine how to conduct such a cleanup;
- *delay TMDLs* by extending existing schedules whether more time is needed or not; and
- *weaken existing requirements for watershed planning*, thereby reducing states’ obligations to update plans and the EPA’s obligation to approve them.

Polluter payback: Further delays in implementing the TMDL program would please a variety of polluting industries, their trade associations, and a number of recalcitrant states. The Bush administration proposal would allow all polluters to discharge more, but the biggest winner would likely be agribusiness, which might well be relieved under the new rules of any responsibility for cleaning up polluted waters. Agribusiness contributed more than \$19 million to the Bush-Cheney campaign and to the Republican National Committee during the 2000 and 2002 election cycles.¹⁰⁸

Recommendation: Rather than rolling back this core Clean Water Act program, the Bush administration should focus on ensuring that the states properly implement the current TMDL program. The president should direct the EPA to abandon efforts to postpone or weaken the new TMDL regulations or the underlying TMDL program.

CUTTING TRIBUTARIES, STREAMS, AND WETLANDS OUT OF THE CLEAN WATER ACT

Issue: For at least the past quarter century, the EPA and the U.S. Supreme Court have read the Clean Water Act to provide federal protection from pollution for lakes, rivers,

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federal protection for
those waters.*

estuaries, coastal waters, and wetlands to the full extent authorized by the United States Constitution. In the past, that has been interpreted so as to protect waterways whose destruction or degradation would harm larger waterbodies.¹⁰⁹ Excluding tributaries, intermittent and ephemeral streams, man-made watercourses, and wetlands adjacent to larger bodies of water from the Clean Water Act would remove federal protection for the majority of stream miles and wetlands acres in the country and would likely destroy the ecology of those that would remain “protected.”

Bush administration position: On September 19, 2002, Principal Deputy Assistant Secretary of the Army Dominique Izzo and U.S. Environmental Protection Agency General Counsel Robert Fabricant told the House Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs that the Bush administration had decided to propose new regulations defining which waters should no longer be covered by the Clean Water Act. The agencies did not expressly commit to the position they would take in the rulemaking, although they said that they now “question” whether the act should apply to non-navigable tributaries of navigable waters, intermittent and ephemeral streams, man-made watercourses connecting these waters, wetlands adjacent to such waters, and so called “isolated” wetlands. These waters have been protected by federal law for decades. The rules now questioned by the Bush administration have, since 1975, explicitly defined U.S. waters broadly in order to implement the Clean Water Act’s goal of restoring and maintaining the “chemical, physical, and biological integrity of the Nation’s waters.”

A move by the administration to remove federal Clean Water Act protection for non-navigable tributaries of navigable waters, including intermittent and ephemeral streams, man-made watercourses connecting these waters, and wetlands adjacent to these waters, could reverse almost 30 years of national policy. Such a step would have grave implications for pollution control, communities' health, habitat protection, and flood-control efforts. Reopening the definitions of which waters should be included in the Clean Water Act would undermine many rules and court decisions that have protected the nation’s waters for decades.

Background: Since 1975, Clean Water Act regulations have defined “waters of the United States” to include all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing.¹¹⁰ The administration can claim no scientific basis for excluding any of these waters from federal protection. Wetlands, intermittent and ephemeral streams, and tributaries are integral parts of watersheds that affect the health of all water systems, even those that are seemingly “isolated.” These waters drain into larger waterbodies and groundwater sources, so pollution or fill dumped into them destroys important water resources and eventually ends up in larger lakes and rivers. According to the EPA, about 60 percent of all river miles, or 2.15 million miles in the lower 48 states, are intermittent streams.¹¹¹ This is likely a gross underestimation since many small waterways are not mapped.

Removing waters from the Clean Water Act's protection would not only subject wetlands and streams to destruction by dredging and filling, but would end *all* federal protection for those waters. Since the contemplated redefinition of "waters" would apply to the *entire* act, protections for these waters against industrial pollutant discharges, waste oil, animal feedlot wastes, and any other discharge of pollutants would be gutted as well.¹¹²

Scientists have documented the immense benefits of so-called "isolated" waters and wetlands:

- *Curbing damage from floods.* Every year in the United States, floods cause approximately 200 deaths and some \$3 billion in property damage. Wetlands and headwater streams help curb this loss by absorbing flood waters and impeding the rush of storm runoff, allowing for a slower discharge of water flow.¹¹³
- *Replenishing water supplies.* Wetlands help replenish the drinking water supplies on which communities depend. For example, in west Texas, the Ogallala aquifer is recharged by thousands of scattered wetlands called "playa lakes."¹¹⁴
- *Improving water quality.* Dubbed the "kidneys" of the landscape, wetlands remove excess nutrients, toxic materials and sediments from the water that flows through them. "Restoring just one percent of a watershed's area to appropriately located wetlands has the potential to reduce polluted runoff of nitrates and herbicides by up to 50 percent... [S]mall wetlands are at least as effective as the same acreage in a larger wetland."¹¹⁵
- *Reducing excessive nutrients.* Small streams in a watershed are the places in which nutrients are most effectively absorbed and retained. Thus, if these streams are eliminated, more nutrients will be transported downstream with the possible result of increased eutrophication and groundwater contamination in lakes, estuaries, coastal waters, and drinking water sources.¹¹⁶
- *Providing wildlife habitat and ensuring biodiversity.* Wetlands are crucial stopovers for millions of migrating waterfowl and shorebirds and provide food and cover for breeding and nesting. Without prairie potholes, the majority of ducks in the mid-continental United States would be at risk.¹¹⁷
- *Offering habitat for amphibians.* Temporary or seasonal isolated wetlands are critical to the survival of vulnerable amphibian populations. Juvenile frogs, toads and salamanders depend on small wetlands as a haven from fish predation. The loss of small wetlands can wipe out whole populations of amphibians.¹¹⁸ Fish, aquatic invertebrate, amphibian and other species also rely on the habitat provided by small streams. For example, small, spring-fed headwater streams provide a refuge for fish from freezing during the winter and from excessive heat in the summer. The dissolved organic matter and fine particles that flow from headwaters are important food resources for ecosystems downstream.¹¹⁹
- *Protecting endangered species.* According to the EPA, 43 percent of federally threatened and endangered species, including the whooping crane, rely on wetlands for their survival. Endangered species are also at risk if headwater streams are degraded and eliminated since these streams provide unique habitats for numerous species. For example, small headwater streams provide essential breeding habitat for a federally

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No president in the last 30 years—Republican or Democrat—has ever proposed such a significant cutback in Clean Water Act protections.

endangered darter species (*Etheostoma boschungii*)¹²⁰ In the Ozarks, small streams that enter caves, harbor threatened and endangered species of cave fishes, crayfishes, amphipods and other organisms.¹²¹

- *Recreation, food and aesthetic enjoyment.* Each year, millions of Americans visit wetland areas and streams to hunt, canoe, fish and watch birds. Moreover, these places are living laboratories for students of all ages.¹²²

Administration officials describe the proposed rulemaking as a response to a January 2001 Supreme Court decision concerning so-called “isolated” wetlands and to subsequent lower court rulings concerning wetlands.¹²³ However, neither the Supreme Court ruling nor the majority of lower court rulings have suggested that any such weakening of Clean Water Act authority is warranted, let alone the sweeping proposal announced by the Bush administration.

In its January 2001 ruling in *Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers*¹²⁴ (SWANCC), the Supreme Court narrowed the scope of the Clean Water Act’s protection by invalidating the use of the so-called “migratory bird rule” as a basis for the Army Corps of Engineers and the EPA to assert Clean Water Act authority over isolated, intra-state non-navigable waters. But the Department of Justice (DOJ) has argued in nearly two dozen court cases since then that the current definition of “waters of the United States” is not only legal and reasonable, but that without broad protection of all waters, the goals of the Clean Water Act cannot be met. For example, on August 30, 2002 the DOJ filed a brief in the case of *U.S. v. Newdunn*, 195 F. Supp. 2d 751 (ED Va. 2002), appeal pending, Nos. 02-1594 and 02-1480 (4th Circ.), on appeal to the Fourth Circuit, which stated:

Federal regulations reasonably construe the [Clean Water Act] term “waters of the United States” to include wetlands adjacent to all tributaries, not just primary tributaries, to traditional navigable waters.

In criticizing the lower court’s ruling, the DOJ’s *Newdunn* brief argues that any other interpretation of the regulations would be inconsistent with the act itself:

The court fails to explain why or how Congress could have intended to regulate discharges into all primary tributaries but not secondary tributaries, regardless of their significance to the traditional navigable waters into which they flow, directly or indirectly. The regulations have consistently construed the Act to encompass wetlands adjacent to tributaries to traditional navigable waters—be they primary, secondary, tertiary, etc—since 1975, a construction that comports with Congress’s intent to control pollution at its source and broadly protect the integrity of the aquatic environment.

Despite the Justice Department's arguments, the Bush administration's response to the narrow loophole created by the SWANCC ruling is to tear open the entire Clean Water Act. No president in the last 30 years—Republican or Democrat—has ever proposed such a significant cutback in Clean Water Act protections.

Polluter payback: As with delay and derailment of the TMDL program, limiting the scope of Clean Water Act jurisdiction would benefit all polluting industries by allowing them to use formerly protected streams, ponds, wetlands, and other waters as dumping grounds for waste materials of all kinds—chemical wastes, refuse materials, effluent from treatment processes, contaminated runoff, and so forth. It would also allow development, highway construction, and farming to destroy wetlands and other waters by converting them to dry land uses. Developers, mining interests, agribusiness, and the chemical industries would probably reap the greatest financial benefits from limiting clean water protections. Testimony presented by the Foundation for Environmental and Economic Progress at a September 19, 2002, congressional hearing urged a return to 19th century concepts of navigability as the basis for Clean Water Act jurisdiction.¹²⁵ As absurd as it may sound, the Bush administration is considering the proposal, according to the testimony of its top officials.¹²⁶

Recommendation: On the 30th anniversary of the Clean Water Act, the Bush administration should demonstrate its commitment to protecting the waters of the United States and to strengthening the effectiveness of this important law. Redefining and narrowing the scope of waters covered by the law will fundamentally undermine the act. We urge the administration to issue policy guidance consistent with the legal position of the Department of Justice and not to proceed with rulemaking in an attempt to limit the scope of the Clean Water Act.

We support the U.S. position set forth in the government's brief in *United States v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. February 21, 2002), *appeal pending* No. 02-1377 (6th Cir.), which is as follows:

To exclude non-navigable tributaries and their adjacent wetlands from the coverage of the Act would disserve the recognized policies underlying the Act, since pollution of non-navigable tributaries and their adjacent wetlands can have deleterious effects on traditionally navigable waters.

That position represents both sound science and the best interpretation of the law.



CLEAN WATER AT RISK

*A 30th Anniversary
Assessment of the
Bush Administration's
Rollback of
Clean Water
Protections*

October 2002

CHAPTER 4

CONCLUSION

Passage of the Clean Water Act in 1972 was a turning point in the effort to protect the nation's lakes, streams, rivers, wetlands and other bodies of water. Without exception, these waterways play a crucial role in Americans' lives, providing drinking water and recreational opportunities; supporting tourism, commercial fishing, and a vast range of other economic pursuits; and providing habitat upon which every creature on the continent depends in some way.

Imperfect though its implementation has been, the Clean Water Act has been remarkably successful in cleaning up the bulk of the pollution sources that impair our nation's waters. While additional pollution sources need to be brought under control as well, protecting and continuing to use the traditional Clean Water Act tools—tools that have worked so well in the past—is vital.

On this 30th anniversary of the act's passage, however, the Bush administration is working to undermine it, proposing or implementing a variety of measures that would leave some of the nation's waters completely unprotected, allow others to be used as waste dumps, reduce treatment requirements for sewage, allow more wetlands to be destroyed, and hamper efforts to clean up polluted waterways.

The nation cannot afford to allow its waters to become increasingly polluted and dangerous. Rather than leading a retreat from the national commitment to healthy and safe water, the Bush administration should focus on the business of cleaning and protecting the nation's water, move affirmatively to reinvigorate implementation and enforcement of existing provisions, and support efforts to repair the Clean Water Act's weaknesses.

EPA administrator Christie Todd Whitman has identified clean water as her top environmental priority and has dubbed the upcoming year, "The Year of Clean Water." NRDC and the Clean Water Network urge her to take actions consistent with her proclaimed commitment to clean water by:

- withdrawing the fill rule;
- implementing a true no-net-loss-of-wetlands policy;
- protecting the nation's waters from contaminated runoff from new development;
- requiring sewer operators to find, detect, control, and warn the public of raw sewage discharges; and
- preserving and protecting the current scope of the Clean Water Act and the polluted waters cleanup (TMDL) program.

These actions would stay the nation's course toward clean and safe water for all Americans. As Senator Muskie asked his colleagues in urging an override of President Nixon's veto of the Clean Water Act on Oct. 17, 1972:

“Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make life possible on this planet? Can we afford life itself? These questions answer themselves.”¹²⁷

ENDNOTES

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- ¹ U.S. Government Printing Office, 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, 1253 (1973). Hereafter, Legislative History.
- ² M. Graham, *The Morning After Earth Day: Practical Environmental Politics* at 27-28. 1999), <http://brookings.nap.edu/books/081573235X/html/index.html>.
- ³ R. Adler, et al, *The Clean Water Act: 20 Years Later* at 5-6 (1993).
- ⁴ Id.
- ⁵ Id.; 2 Legislative History at 1253.
- ⁶ Congressional Research Service. *Oceans & Coastal Resources: A Briefing Book*, Congressional Research Service Report 97-588 ENR, <http://www.cnire.org/nle/crsreports/briefingbooks/oceans/appeandb3.cfm>; <http://www.mtholyoke.edu/offices/comm/oped/browner.shtml>.
- ⁷ R. Adler at 5-6.
- ⁸ 2 Legislative History at 161-62.
- ⁹ 1 Legislative History at 276-79.
- ¹⁰ 8 Weekly Comp. Pres. Doc. 1531-32 (Oct. 17, 1972)
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