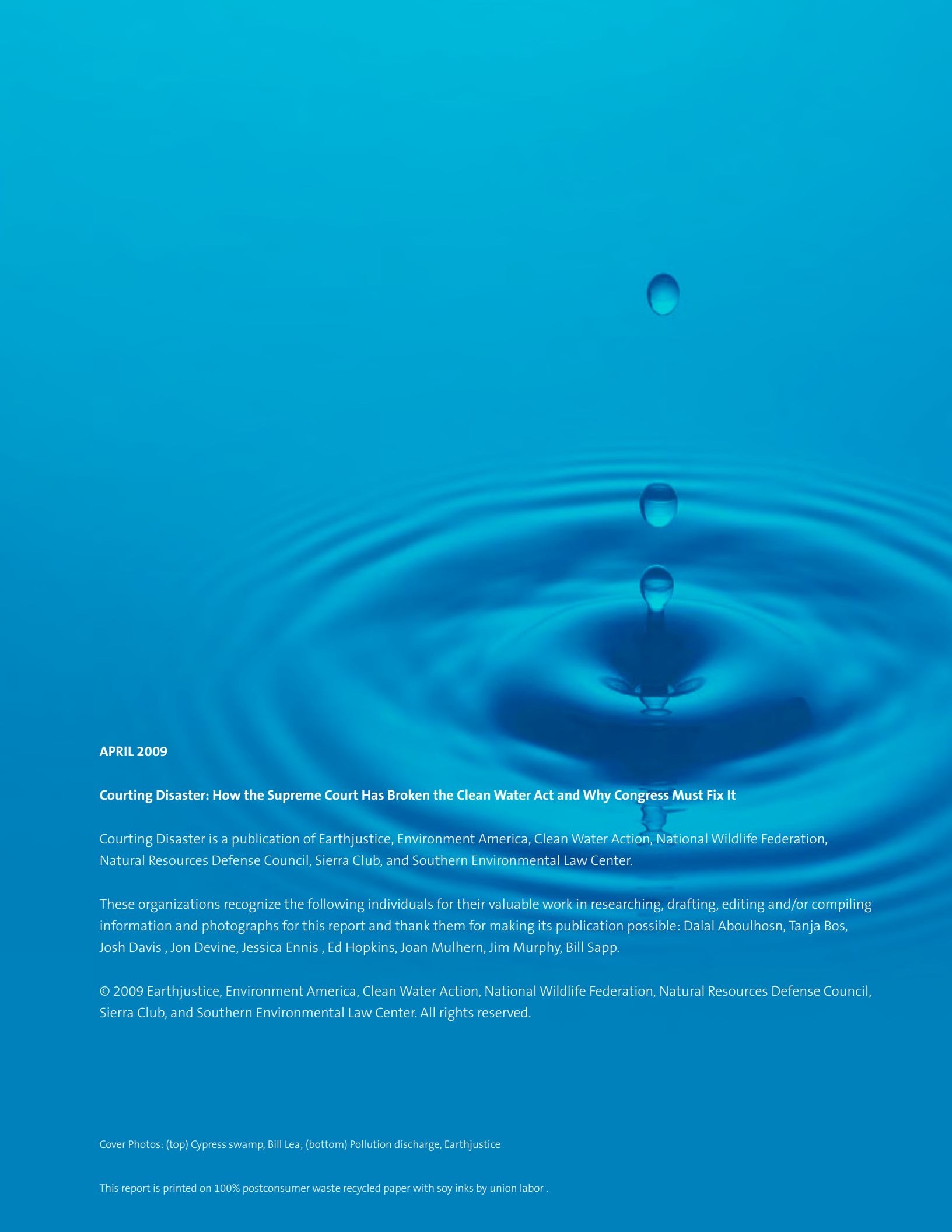
Courting Disaster: How the Supreme Court Has Broken the Clean Water Act and Why Congress Must Fix It



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Cover Photos: (top) Cypress swamp, Bill Lea; (bottom) Pollution discharge, Earthjustice

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Executive Summary

For decades, the Clean Water Act protected the Nation's surface water bodies from unregulated pollution and rescued them from the crisis status they were in during the late 1960s and early 1970s. Now these vital protections are being lost. This report details the threat to our Nation's waters by examining dozens of case studies, and highlights the urgent need for Congress to restore full Clean Water Act protections to our waters.

Wastewater must be regulated to ensure all waters of the U.S. remain healthy.

In 1972, Congress passed an expansive Clean Water Act to protect all "waters of the United States." For almost 30 years, both the courts and the agencies responsible for administering the Act interpreted it to broadly protect our Nation's waters. However, in two recent decisions, *Solid Waste Agency of Northern Cook County* v. U.S. Army Corps of Engineers (SWANCC) in 2001 and *Rapanos v. United States* in 2006, the Supreme Court misinterpreted the law and placed pollution limitations for many vital water bodies in doubt. After the decisions, the Bush administration's Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) excluded numerous waters from protection and placed unnecessarily high hurdles to protecting others.

These decisions shattered the fundamental framework of the Clean Water Act. Today, many important waters – large and small – lack critical protections against pollution or destruction. The case studies in this report provide telling examples of how dire the situation is and how urgent it is for Congress to take action.

Congress must reverse the damage done by the Supreme Court's decisions and the agency policies that followed by restoring Clean Water Act protections that were in place prior to 2001. Without such action, a generation's worth of progress in cleaning up our Nation's waters may be lost. We cannot afford to return to the days of dirty water.

Background

We cannot survive without clean water. We need it to drink, to grow our crops, and supply our food. Many of us rely on it for the things we enjoy most: swimming, boating, duck hunting, paddling, and fishing.

The next generation deserves clean water.

Clean water depends on the health of all water bodies, from small streams, to woodland vernal pools, to our greatest rivers, lakes, and coastal waters. Science overwhelmingly shows that headwater streams and wetlands are vital parts of the aquatic system. Indeed, small streams and wetlands in the upper reaches of our watersheds often account for the vast majority of the chemical, physical, and biological activity that takes place throughout the water cycle. These waters provide the foundation of the food chain upon which aquatic life depends. They filter pollutants, store flood waters, and recharge flow in our greatest waterways. Just as our circulatory system can not function without its capillaries, the water cycle cannot function without its smaller waters.

When Congress passed the Clean Water Act in 1972, our waters were in dire shape. The Cuyahoga River had caught fire several times, Lake Erie was all but devoid of life, oil spills commonly occurred on our coasts, and industrial polluters treated rivers and lakes as open sewers.

Although work remains, the Clean Water Act is primarily responsible for the remarkable clean up of our waters and the dramatic slowing of wetland loss. Part of the law's success comes from its broad scope; many of the law's pollution control programs apply to every "water of the United States." This is true of the requirement that industrial facilities and sewage treatment plants use advanced pollution controls on their discharges. It is true of the Act's provisions requiring certain facilities to prepare oil spill prevention plans. It is true of the program to identify waterways that do not meet state water quality standards and develop a pollution budget to help clean them up. And it is true of the requirement to get a permit before discharging dredged or fill material into waters.

Sadly, progress under the law has been undermined by attacks on what kinds of water bodies qualify as protected "waters of the United States."

Making a Mess: *SWANCC* and *Rapanos*

In 2001 and 2006, the U.S. Supreme Court dealt a one-two punch to water quality. The first blow came when it decided *SWANCC*, a 5-4 ruling that certain isolated, intrastate ponds were not protected by the Clean Water Act, even though the Justice Department argued that the Act covers water bodies used as migratory bird habitat. The Supreme Court suggested that Congress's use of the term "*navigable* waters" in the Act indicated an intent to restrict protections to waterways somehow related to navigable ones. The court fundamentally ignored the fact that Congress defined "navigable waters" broadly to mean the "waters of the United States," and the Court similarly brushed aside its own prior decision saying that the word "navigable" was of "limited import."

The second blow came five years later in *Rapanos*, when the court revisited the issue of which waters are covered by the law. *Rapanos* involved wetlands near to tributaries of traditionally navigable waters. Rather than providing clarity, the Supreme Court created further confusion, failing to reach any majority decision, in several opinions with fundamentally contrary rationales. A four-member plurality would protect only "relatively permanent waters" connected to traditionally navigable water bodies, as well as wetlands with a "continuous surface connection" to other protected waters. In a solo concurring opinion, Justice Anthony Kennedy would require that certain wetlands have a "significant nexus" to traditional navigable waters in order to be protected and gave little guidance as to what such a "nexus" requires, leaving the courts and the agencies to figure that out on a cumbersome case-by-case basis.

Insult to Injury: Agency "Guidance"

To make matters worse, following both *SWANCC* and *Rapanos*, the Bush administration issued new policies instructing field staff how to apply the Supreme Court decisions. These documents made it significantly harder to protect various water bodies, including tributary streams, rivers, and wetlands. In 2003, following *SWANCC*, the administration essentially removed protection for non-navigable "isolated" water bodies, including prairie pothole wetlands, playa lakes, and vernal pools that are invaluable for wildlife habitat, groundwater recharge, and flood control. The U.S. House of Representatives specifically voted to reject the use of the agencies' post-*SWANCC* policy in 2006, but it remains in effect to this day.

In 2007, the EPA and Corps released a second guidance document purporting to instruct agency officials on how to implement *Rapanos*. The *Rapanos* guidance is even more confusing and less protective than *Rapanos* itself. In addition to the isolated waters written off by the *SWANCC* guidance, the *Rapanos* guidance puts intermittent and ephemeral streams and many adjacent wetlands in danger of losing protections, a result not required by either court decision. In particular, the *Rapanos* guidance strips categorical protections for tributaries of larger waters; presumes certain types of ephemeral streams and waters are no longer protected; creates a binding, unpredictable, and time and resource intensive case-by-case process for determining what is protected; and ignores science to interpret important and relatively protective aspects of Justice Kennedy's approach in a manner that makes them nearly meaningless. The agencies revised the *Rapanos* guidance in December 2008 and made it even less protective, wrongly interpreting long standing case law to make it more difficult to determine whether a water is "traditionally navigable," a determination that impacts protection of both specific waters and waters in the upper reaches of watersheds.

These confusing and unworkable directives put countless water resources at risk. They can be rescinded by the new administration — and should be. However, because *Rapanos* and *SWANCC* are interpretations of the Clean Water Act itself, the agencies responsible for administering the Clean Water Act cannot fix the problems created by these damaging decisions. Only Congress can do that.

The Threat to Our Waters

The impact *SWANCC, Rapanos,* and the agency directives have had on our water resources is alarming. The Environmental Protection Agency estimated that approximately 20 percent of the over 100 million acres of wetlands in the continental U.S. are geographically "isolated," a troubling statistic when one considers that the agencies stopped protecting isolated, non-navigable intrastate water ways after *SWANCC*.[1] Additionally, about 60 percent of the stream miles in the continental U.S. do not flow year-round; post-*Rapanos* interpretations directly threaten those kinds of streams. These waters not only serve as valuable wildlife habitat, store flood water, return water to aquifers, and filter pollutants, but they also provide some or all of the supply for drinking water systems serving roughly 111 million Americans.

The legal chaos spawned by *SWANCC* and *Rapanos* and the misguided EPA and Corps interpretations of them have also had devastating effects on law enforcement. In December 2008, Congressman Henry Waxman and Congressman James Oberstar wrote a memorandum

1 Eric Pianin, Administration Establishes New Wetlands Guidelines; 20 Million Acres Could Lose Protected Status, Groups Say, Washington Post, at A.5 (Jan. 11, 2003)

to then-President-Elect Obama detailing hundreds of Clean Water Act enforcement cases that the EPA shelved or downgraded, and dozens more where the legal mess forced the government to spend resources arguing about whether a particular waterbody was protected. Some of these cases included significant oil spills. The memorandum also explains how, as a result of the legal confusion, agency regulators are suffering from increased workloads, record backlogs, heightened frustration, and plummeting morale.

The Nation's waters, and in turn our public health, cannot withstand the current legal situation. After eight years of litigation, the lower courts have failed in their attempts to make sense of the Supreme Court's handiwork.

Fixing the Fractures: The Clean Water Restoration Act

The current untenable situation facing our waters simply cannot be mended by the Judicial and Executive branches. It is time for Congress to step up and remedy this problem. Environmental groups are not alone in calling for this congressional action. State governors, hunting and fishing groups, respected scientists, federal regulators, and members of the public from all across the Nation are behind this call.

In order to return to the original intent of the Clean Water Act, Congress must:

- Pass a bill that removes the confusing term "navigable" from the Act;
- Make clear that "waters of the United States" means the waters protected prior to *SWANCC;* and
- Explain the facts supporting Congress's Constitutional authority to protect such waterways.

In previous years, leaders in Congress introduced a bill entitled the Clean Water Restoration Act to achieve these ends. The Restoration Act had broad bi-partisan support in past Congresses, but it is up to this Congress to secure passage of such legislation.

U.S. Fish and Wildlife Services

Wetlands like this one in the Upper Mississippi National Wildlife Refuge in Iowa filter pollutants, store flood waters, and recharge waterways.

About this report

In the pages that follow we provide more than 30 case studies from around the U.S. of how the Clean Water Act has been misapplied since 2001. The case studies include several kinds of examples:

- An administrative agency (EPA or the Corps) limited legal protection for a given waterbody, ruling that it is no longer protected by the Clean Water Act;
- A court made a determination undercutting Clean Water Act protections for a waterbody;
- As a defense in an enforcement action, an alleged polluter raised the issue of whether the water it discharged into is a protected water;
- District officials at the Corps of Engineers originally determined a water not be protected, forcing headquarters officials at EPA and/or the Corps to step in to overrule the initial decision and protect the waterbody; and
- A discharger with a permit argued it may pollute waters without federal safeguards in the future.

Although hard to document, we also believe many polluters across the country have simply determined that specific waterways lack protection and acted to destroy, degrade or pollute that water without informing federal officials. Further, these are only case studies; we estimate that federal agencies declared over 15,000 water bodies unprotected in the past eight years. Thus, the case studies in this report represent a small fraction of the thousands of waters that have lost federal protections, officially or unofficially, since the Supreme Court's 2001 decision.

Coastal Wetlands Isolated from Ocean?

Coastal and riparian wetlands are vital pieces of South Carolina's ecosystems. According to the South Carolina Department of Health and Environmental Control (DHEC), the state's coastal zones provide habitat for a variety of wildlife, including the American Alligator, Bobcat, Red Fox, River Otter, Mink, Black Bear and Southern Bald Eagle. Such resources include a 32 acre wetland on a site owned by the company Spectre, LLC. Spectre wants to destroy this coastal wetland in order to develop the site for commercial and retail purposes. Despite historic and current hydrological connections between the wetland and navigable waters, the Corps gave the green light to Spectre by issuing a determination that the wetlands are "isolated" and not protected by the Clean Water Act.

South Carolina Department of Natural Resources

A large coastal wetland associated with the Murrells Inlet in South Carolina is being left vulnerable to federally unregulated pollution and destruction.

Historic maps indicate a stream directly connected the wetland in question to nearby Murrells Inlet before road construction activities disrupted that connection. Today, the wetland drains through a series of channels before emptying into Collins Creek, which flows a short distance before flowing into the navigable Waccamaw River, which flows into the ocean. The entire area is wet and contains many coastal and riparian wetlands.

Not all agencies agreed that this vital wetland is isolated. As part of the state permitting process, the U.S. Fish and Wildlife Service (USFWS) wrote a letter stating that the, "[p]roject plans illustrate that the wetland proposed for filling is a portion of a much larger wetland system. The illustrations do show a waterway exiting the wetland at the southeast corner and connecting to a stream." It requested the wetland be treated as jurisdictional because of "the rarity and importance of such large 'isolated' wetlands in South Carolina." USFWS also followed with a recommendation "that the filling of any portion of this unique wetland should be

Coastal zones provided critical habitat to River Otters and other wildlife.

U.S. National Oceanic and Atmospheric Administration

South Carolina coastal wetlands like the ones pictured here, create habitat for wildlife and buffer communities from storms.

completely avoided, and furthermore, the wetland in its entirety should be buffered and preserved in perpetuity." Similarly, the South Carolina DHEC denied Spectre's application for a state land disturbance or storm water permit in July of 2006 after its staff concluded the project's impact on the wetlands violated the state's Coastal Management Program.

On February 19, 2008, an administrative law court in South Carolina overturned South Carolina DHEC's denial on the basis that "[t]he terms of the [Coastal Management Program] policies do not permit review of isolated wetlands over which the Army Corps does not have jurisdiction" and therefore DHEC "has no authority to use the policies to make decisions on storm water permit applications involving impacts to isolated wetlands over which the Army Corps does not exercise jurisdiction." In other words, because state law tracks the Corps' Clean Water Act authority, the federal loss of protection undercut state-level safeguards as well.[2]

2 South Carolina Department of Health and Environmental Control appealed this decision.

What's In a Name? Water Skiing on a Lake Doesn't Prove It Is Navigable

Outdoor activities are plentiful around Greeley, Colorado. Located about 45 miles north of Denver and about 30 miles south of Rocky Mountain National Park, Greeley is a scenic tree-lined town in the shadows of the Rockies. While Colorado is known for its world famous snow sports, waterskiing and boating are also popular recreational pastimes in the state. Greeley fully embraces outdoor recreation, and was even selected by *Sports Illustrated* magazine as a town with one of the best park and recreation programs in the nation.

In November 2007, the Corps concluded that a 15 acre lake used for waterskiing was not protected by the Clean Water Act, because the lake was hydrologically "isolated" from other water bodies. The Corps said that "[t]here is no information available to show that this Ski Lake 1) is or could be used by interstate or foreign travelers [sic] for recreational or other purposes, 2) produces fish or shellfish which are or could be taken and sold in interstate or foreign commerce, or 3) is or could be used for industrial purposes by industries in the interstae [sic] commerce."[3]

Whether or not this is true, the Corps missed an obvious fact, one that should have made this lake obviously protected – it is actually *navigable*. Its name is Ski Lake, after all! Boats – power boats, in fact – are pulling the water skiers, and even the remarkably lax guidance documents that EPA and the Corps produced make it clear that if a waterbody is susceptible to commercial recreation (like boat rentals and water ski events), the water is protected by the Clean Water Act.

Google Earth

Ski Lake, the northern lake in this picture, in Greeley, Colorado.

Kids as well as adults around the Nation depend on clean lakes and ponds for sports like waterskiing.

3 U.S. Army Corps of Engineers, Omaha District, Approved Jurisdictional Determination, Terra Ceia Estates, NWO-2007-2810-DEN (Nov. 2, 2007), available at https://www.nwo.usace.army.mil/html/od-tl/jur/NWO20072810DEN%20Jackson%20Inlet%20Ditch%20and%20ski%20lake.doc

The End of Prairie Potholes?

Prairie potholes in the upper Great Plains are incredibly productive wetlands. Labeled America's "duck factory," about half of the ducks hatched in North America every year come from the prairie pothole region. In addition, these often seasonal wetlands provide tremendous amounts of flood storage and pollutant filtration. Studies demonstrate that restoring wetlands in the pothole region that have been lost since European settlement could have significantly reduced recent major flooding in waters such as the Mississippi Basin and Devils Lake in North Dakota. Notwithstanding the obvious importance of these water bodies, government information shows that since the *SWANCC* and *Rapanos* decisions, neither EPA nor the Corps have continued to afford Clean Water Act protection to these valuable prairie potholes.

U.S. Fish and Wildlife Services

U.S. Fish and Wildlife Services

Prairie potholes, America's "Duck Factory," are no longer being federally protected under the Clean Water Act.

In one case, the North Dakota Department of Fish and Game wrote a letter expressing that wetland impacts of a highway upgrade project should be avoided to the extent possible and compensated for otherwise.[4] Even with this letter, in September 2007, the Corps determined that an approximately 400 acre wetland called Runner Slough in the prairie pothole region of North Dakota was not federally protected.[5] The Corps stated that prior to the 2001 *SWANCC* decision, the wetland would have been regulated based on the fact that it provides habitat for migratory birds.

Similarly, in September 2007, the Corps declared an approximately 100 acre wetland in the pothole area of the state unprotected. This wetland, which the Corps also conceded would have been protected prior to *SWANCC*, will be impacted by a road project as well.[6]

The Corps has left countless smaller wetlands unprotected by the Clean Water Act over the last several years. For example, in yet another instance involving a highway project, the Corps sanctioned the partial destruction of over 15 small pothole wetlands by finding them not to

4 Letter from Michael G. McKenna, Chief, Conservation and Communication Division, North Dakota Game and Fish Department to Steve Thompson, Project Manager, Interstate Engineering, Inc. (August 13, 2007).

5 Approved Jurisdictional Determination, File No. NWO-2007-2606-BIS.

6 Approved Jurisdictional Determination, File No. NWO-2007-2376-BIS.

U.S. Fish and Wildlife Services

Protecting even small pothole wetlands is critical to duck habitat.

be subject to the Clean Water Act.[7] Even the concerns of the U.S. Fish and Wildlife Service, which expressed worries regarding possible impacts to the wetlands if protective measures were not taken and noted the wetlands' proximity to the Silver Lake National Wildlife Refuge in North Dakota, could not give them federal protection under the Act.[8]

Protecting small pothole wetlands is as important as protecting larger water bodies. U.S. Fish and Wildlife Service analysis suggests duck production in the prairie pothole region would decline by 70 percent if all wetlands less than an acre in size were lost.[9] To make matters worse, global warming could cause a dramatic loss of pothole habitat,[10] making it even more crucial that all potholes be protected so that a sufficient number have a chance to remain.

U.S. Geological Survey

Draining and destroying depressional wetlands, like potholes, have contributed to devastating flooding in Devils Lake, North Dakota and throughout the Upper Great Plains and Mississippi basin.

7 Information Sheet, File Number 200660429, Omaha District Office (July 24, 2006).

8 Letter from Jeffrey K. Towner, U.S. Fish and Wildlife Service, Field Supervisor, North Dakota Field Office, to Mr. Paul Seeley, Environmental Specialist, U.S. Department of Homeland Security (June 30, 2006).

9 U.S. Fish And Wildlife Service, Habitat and Population Evaluation Team Office Report, Bismarck, ND, 2001.

10 http://www.climatescience.gov/Library/sap/sap4-2/public-review-draft/sap4-2-prd-ch3.pdf site visited January 19, 2009 (detailing loss and shift of pothole habitat under various scenarios accounting for global warming).

Un-Savory Ruling for Savery Creek: Wildlife Habitat Placed at Risk

After the Corps determined that Coal Gulch in Wyoming, a non-permanently flowing tributary of Savery Creek (which in turn flows to the Little Snake River and on to the Green River) did not warrant Clean Water Act protection, the case was elevated to EPA for review. EPA found serious deficiencies with the Corps' analysis. In a letter EPA wrote that:

> *[W]e disagree with the Corps' Traditional Navigable Waters (TNW) determination as there are stream segments between Coal Gulch and Green River which are navigable in fact. ... EPA also disagrees with the Corps' determination that because the Coal Creek watershed is small the possibility of flow contribution from that watershed is "essentially non-existent." Clearly a significant rain even on a watershed of 7.6 miles will result in a significant discharge to Savery Creek. And EPA disagrees with the Corps' conclusion that the 3.6 acres of wetland which abut Coal Creek have "no meaningful habitat for aquatic or terrestrial species." The Corps does point out that the soils in the Coal Gulch watershed are easily eroded which produces poor water quality due to sediment accumulation. This recognition of erodible soils is inconsistent with the determination that a contribution from the watershed would be "essentially non-existent."*[11]

The EPA letter goes on to mention the fact that Savery Creek is listed as "threatened" by the Little Snake River Conservation District, that sediment control efforts in the creek are underway, that the Wyoming Fish and Game Department is trying to establish a trout fishery below Savery Reservoir and that "[a]dditional sediment loads from Coal Gulch will frustrate such efforts."

Notwithstanding these serious concerns, the Corps still decided not to protect Coal Gulch.[12]

Wyoming Wildlife and Natural Resource Trust (www.nrt.statewy.us/projects.funded/District2.htm)

Western trout streams, like Savery Creek in Wyoming, depend on ephemeral and intermittent headwaters for their health. Many of these vital headwater streams in the West are no longer being protected against pollution and destruction.

11 Letter from Carol Rushin, Chief, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, US EPA, Region 8, to Cheryl Goldsberry, US Army Corps of Engineers, Omaha District (July 31, 2007).

12 Approved Jurisdictional Determination Form, NWO-2007-1550 (Jan. 3, 2008).

Protected Yesterday, Not Today: Up a Creek in California

Caliente Creek is a 20 mile ephemeral stream. Water from the creek flows through a series of waterways and into a wetland. The wetland is "highly likely" to have subsurface flow to the Eastside Canal, a diversion off the Kern River. Apparently because the direction of flow in the canal is away from the Kern River, the Army Corps concluded that flow from Caliente Creek would not substantially affect the health of the river.

Protecting small streams and creeks helps protect our communities' water quality.

Previously, the Clean Water Act would have protected Caliente Creek, either because it could be considered a tributary to an impoundment of a navigable water,[13] or because it is a water in which "the use, degradation or destruction of which could affect interstate or foreign commerce" under the agencies' regulations.

The Eastside Canal is part of the Kern Delta Water District's network of supply canals, which supplies customers in Kern County; in particular, the District explains, "[s]ince its formal organization in 1965, Kern Delta Water has primarily been involved with the distribution of irrigation water to local farmers in specific areas of Kern County."[14] In other words, the water from the Eastside Canal, some of which is supplied by Caliente Creek, is used to irrigate crops, which means the water's use, degradation or destruction surely could affect interstate commerce.[15]

This is a classic example of a stream that the Clean Water Act plainly protected prior to the Supreme Court's decisions and the agencies' guidance, and one that desperately needs protection restored today.

13 *See* 33 C.F.R. §§ 328.3(a)(4) (identifying "impoundments" of certain waters, including navigable ones like the Kern River, as protected) and (a)(5) (protecting tributaries to various protected waters, including impoundments under (a)(4)).

14 Kern Delta Water District, Welcome, available at http://kerndelta.org/index.cfm.

15 Indeed, the regulations provide that the "use, degradation, or destruction" criterion is satisfied if the waters in question "are used or could be used for industrial purpose by industries in interstate commerce," and the government explained in 1986 that waters "[u]sed to irrigate crops in interstate commerce" are protected. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

Wetlands Under Attack in Connecticut

The Farmington River is a traditionally navigable interstate river, one of New England's most prized trout fisheries, a favorite destination of canoers and kayakers, and a major tributary of the Connecticut River. The Farmington River watershed also provides drinking water for the greater Hartford, Connecticut area. Yet a federal district judge ruled that wetlands neighboring the Farmington River are not protected by the Clean Water Act.

Farmington River Watershed Association

The Farmington River is a favorite destination of paddlers, anglers, and other outdoor enthusiasts from New England and beyond. A federal court ruled that polluted wetlands next to this river are not protected by the Clean Water Act.

A citizens' group alleged that the wetlands along the river were being polluted by discharges of lead from a shooting range berm on property that borders the wetlands and has been accumulating lead shot over several decades. Wetlands on the approximately 137 acre site are separated from the river on one side by a minor road called Nod Road and directly connect, at least during wet periods, to the river in another direction through a tributary called Horseshoe Cove. The wetlands are within an aquifer area that is also a major source of drinking water.

The wetlands are also within the Farmington River's floodplain. The area can flood several times per year, particularly during times of increased precipitation. The record in the case showed that sometimes water overtops Nod Road, allowing the wetlands to flow directly into the river.

The court concluded that "[i]t is undisputed that the Farmington River at least 'neighbors' the claimed wetlands on Metacon property," and cited evidence that "the area is conducive to flooding, particularly during the spring" or "with an average rainstorm."[16] The court noted photographs submitted by the neighbors "depict[ed] what occurs after heavy rains and thawing of snow and ice .... [and shows] a surface water connection between the Metacon Gun Club and [H]orseshoe Cove, which flows into the Farmington River." The court further found that "in the light most favorable to the plaintiffs, [there exists] at least a periodic physical nexus between the site and the navigable waters of the Farmington River."[17]

Alarmingly, despite these facts, the court relied upon *Rapanos* to conclude that a rational trier of fact could not find that the wetlands at issue are protected by the Clean Water Act because the record did not demonstrate a continuous surface connection between the wetlands and the river and because the pollutant of concern – lead – was not conclusively shown to be polluting the river.[18]

Farmington River Watershed Association

16 *SAPS*, 472 F. Supp. 2d at 228.
17 Id. at 229.
18 The case has been appealed to the federal appeals court seated in New York.

Coastal Plain Plainly at Risk: Near-Miss Nearly Leads to Destruction of Huge Wetlands Area

The Georgia Coastal Plain is covered by tens of thousands of freshwater wetlands that collectively create aquatic ecosystems that are vital to the health of the region. Many of these wetlands are intertwined with one another, through surface and subsurface connections.

Just twenty miles from the Okefenokee Swamp, the largest freshwater wetland in North America, lies a 6,100 acre site in the Satilla River basin that nearly lost hundreds of acres of wetlands to mining.

After the Supreme Court decided *SWANCC*, a subsidiary of an Australian mining company decided to mine titanium and zircon on this site. The mining company applied for permits from the Corps to destroy many of these wetlands but claimed that it would not need a permit to destroy over 300 acres of wetlands because they were "isolated" from other wetlands by a dirt road. The Corps obligingly determined that the wetlands had "no surface water connection to any other water of the United States," and therefore, was not protected by the Clean Water Act.

The environmental groups investigated the Corps' determination and demonstrated that many of the wetlands at issue drained into a working culvert that went under a dirt road and clearly linked the 300 acres of wetlands to other waterways downstream. After months of communications with the mining company, the Corps, and EPA and, after the threat of litigation, the Corps finally reversed its jurisdictional determination over about 120 acres, bringing those areas under Clean Water Act protection.

U.S. Fish and Wildlife Services

Okefenokee Swamp at sunset.

Reservoir Dogged: Critical Tributary Losing Protection in Thirsty Colorado

Headwater streams are an integral part of watersheds, including intermittent and ephemeral streams. These waters help ensure the quality and integrity of the waters below. In Colorado, 68 percent of streams do not flow year-round. Because these small streams are so integrated into landscapes, they are most at risk of degradation or destruction.[19]

Colorado State Parks

Marina at Cherry Creek Reservoir.

In November 2007, the Corps declared an ephemeral stream located between Castle Pines and Parker, Colorado, not to be a protected waterbody. The stream, known as the North Tributary, flows for roughly 2.6 miles before joining with the main stem of Newlin Gulch and its South Tributary, which then flows into the Rueter-Hess Reservoir.[20] If the stream flows were not caught by the reservoir, Newlin Gulch would connect with Cherry Creek and then the Cherry Creek Reservoir, a traditionally navigable waterbody.

Historically, the Clean Water Act would have prohibited unregulated pollution into Newlin Gulch, because it is a tributary to a traditionally navigable water, even though its flows are intercepted by an intervening dam. But in this case, the Corps ruled the tributary was no longer a water of the U.S. – apparently ignoring the effect this could have on the health and safety of the local drinking water supply.

The Rueter-Hess Reservoir, into which the North Tributary flows, currently holds up to 16,200 acre-feet of water that is "piped to municipal water treatment plants" or re-injected into local bedrock aquifers – in other words, it is used to replenish water supplies. In fact, work is underway to expand the reservoir to 72,000 acre-feet.[21] The plans call for the expanded reservoir to host a beach, fishing opportunities, and a boat launch.[22] More importantly, the reservoir will be an even larger water supplier in the future. The larger reservoir will store Denver Basin groundwater and water after its initial use, and it will supply regional aquifers. Consequently, "[t]he expansion would allow the reservoir to serve as a regional water management facility for multiple water providers in northern Douglas County..."[23]

Notwithstanding the fact that the North Tributary to Newlin Gulch provides water to a regional water supply reservoir, the Corps concluded that the stream has an "insubstantial nexus" to the traditionally navigable

19 See "Protecting Headwaters: The Scientific Basis for Safeguarding Stream and River Ecosystems," Stroud Water Research Center (2008.).

20 U.S. Army Corps of Engineers, Omaha District, Approved Jurisdictional Determination, Channel Work in the North Tributary of Newlin Gulch at Lagae Ranch, NWO-2007-2195-DEN (Nov. 1, 2007), available at https://www.nwo.usace.army.mil/html/od-tl/jur/NWO20072195DEN.doc.

21 See Rueter-Hess Reservoir, available at http://www.reuterhess.com.

22 U.S. Army Corps of Engineers, Final Supplemental Environmental Impact Statement: Rueter-Hess Reservoir Expansion, Omaha District at Figure 2-10: Conceptual Recreation Master Plan (Nov. 2007), available at https://www.nwo.usace.army.mil/html/od-tl/eis/rueter-hess.fseis.vol1.nov2007.pdf.

23 Id. at ES-2.

Cherry Creek Reservoir. It did so in reliance on the fact that the Rueter-Hess Reservoir will likely capture all flow from Newlin Gulch. Because of this "non-jurisdictional" decision, Newlin Gulch, a contributor to regional drinking water supplies, no longer enjoys Clean Water Act protections. If this pattern repeats across Colorado, the threat would be severe; according to EPA, over 3.5 million Coloradans get drinking water from sources fed by intermittent and ephemeral waters.

Credit Colorado State Parks

Cherry Creek Reservoir.

GREAT PLAINS, GREAT PAINS: TRIBUTARIES LOSE, CONFUSION ABOUNDS

Countless miles of tributaries in the Great Plains, many of which have been altered by human activity, connect rivers, wetlands and other waters in the region. Many of these tributaries affect water supplies for communities and farmers and provide wildlife habitat. They can also transport pollution to other bodies of water. Yet, certain of these streams are being cut out of the Clean Water Act without even a cursory examination by the Corps of their relationship to other waters.

For instance, in a case involving a Corps determination for a tributary ditch in North Dakota that is over three miles long (over 18,000 feet), EPA sent a letter to the Corps which did not oppose the Corps' determination that the tributary was not subject to Clean Water Act jurisdiction but stated:

> *EPA wants to point out the difficulty it has had developing the information necessary for us to make that determination [not to oppose the Corps], and the lack of information that the Corps used to develop its preliminary jurisdictional determination.*
>
> *The Corps did not determine the distance to the nearest traditionally navigable water, nor determine if any of the other intervening tributaries were navigable. … The Corps did not define the subject water shed [sic] for the jurisdictional determination nor address the potential for agricultural chemicals to further contaminate the downstream reaches.*[24]

EPA went on to request a meeting with the Corps' Omaha District to work out difficulties in resolving "information and consistency" issues.

24 Letter from Brian Caruso, Chief, Wetlands and Watersheds Unit, Ecosystems Protection Division, US EPA, Region 8, to Cheryl Goldsberry, US Army Corps of Engineers, Omaha District (July 31, 2007).

Last Resort for Ten Mile Long Creek

Parowan Creek begins at Brian Head, Utah, at an elevation of 9,700 feet in the red-rock mountains, where it is fed by more than 35 inches of rain and snowmelt each year. The creek runs for about ten miles, supporting a population of Rainbow Trout and Brown Trout before a hydroelectric dam blocks the natural flow at about 6,000 feet elevation near Parowan. Wetlands adjacent to the creek provide habitat for migratory birds.

The creek also supports substantial economic activity, according to the Utah office of the Corps. Brian Head Resort — which provides skiing, mountain biking, off highway vehicle rentals, hiking, and other recreational activities — draws visitors from Las Vegas and other southwestern cities. The resort completed a major expansion in late 2007, linking two ski mountains, expanding snowmaking, and incorporating a new planned community with more than 400 condominiums and town homes.

In addition to supplying water for summer homes, recreation, and ski lodge sanitation, the creek provides water for more than 6,500 head of cattle and irrigation for 13,273 acres of alfalfa production. A hydroelectric plant also uses water diverted from the creek.

Based on these and other water uses, the Utah field offices of the Corps and EPA Region 8 determined that Parowan Creek qualifies as a "water of the United States" because it is used, has been used, and may be susceptible to use in interstate commerce. The Utah Corps office established this interstate use based on the resort's proximity to Arizona and Nevada and substantial out-of-state tourism.[25]

The headquarters offices of the EPA and the Corps disagreed, stating that there was insufficient evidence to demonstrate that the creek's waters are used or could be used in interstate commerce. Neither the Corps nor the EPA made information available in response to a public records request explaining the rationale for the headquarters reversal. Now, Parowan Creek and about 25 acres of associated wetlands are unprotected by the federal Clean Water Act due to these poor decisions.

U.S. Army Corps of Engineers

Beginning of Parowan Creek watershed looking downstream.

U.S. Army Corps of Engineers

Trout are present four miles downstream.

25 Approved Jurisdictional Determination Form, SPK, St.George Office, Parowan Creek 2007-01171-SG (Oct. 4, 2007).

Connected Ponds Not Considered Waters of the U.S.

In the Upper Midwest, the Corps excluded several ponds from the Clean Water Act, ironically because local officials were attempting to protect their water quality or improve public open space. This section discusses three examples.

Anderson Pond, a historic wetland in South St. Paul, Minnesota, leads into a suburban fishing lake called Seidl Lake. These water bodies are connected, so any pollution in Anderson Pond will flow into Seidl Lake. But when the city crafted a plan to reduce flooding and algal blooms in Anderson Pond, the Corps denied the pond Clean Water Act protection, saying it lacked a surface water connection to other water bodies.[26]

Even though the pre-existing connection was simply put into storm sewers during the development of the neighborhood, the Corps said nothing more than, "Anderson Pond is a storm water pond, surrounded by non-hydric soils and is not used for interstate or foreign commerce. Outflow from Anderson Pond drains via storm sewer to Seidl Lake, a naturally occurring land locked lake."[27]

Likewise, Paradise Pond in Stoughton, Wisconsin is a wetland that has turned into a large pond because of development and drainage. It is a flood-prone area that the city would like to clean up, as well as improve its recreation installments. The Corps ruled the pond to be outside the Clean Water Act's scope, saying the wetlands are "not associated with any river or lake or other waterbody," and concluding that they do not have a link to interstate or foreign commerce because they were not known to be used by interstate or foreign travelers for recreation or other purposes.[28,29]

Sue Rich

When suburbs in Minnesota requested dredge and fill permits for improvement projects, they triggered non-jurisdictional determinations by the Army Corps.

Both Paradise and Anderson ponds almost certainly had surface water connections to other waterbodies before urban development, but as happened in most cities, those connections have been buried in culverts. Polluted water still flows through the culverts to larger lakes, rivers, and drinking water sources.

Finally, the 135th Street Pond in Rosemount, Minnesota is surrounded by wetlands that were bisected by a road decades ago, but still provides habitat and open space in this growing community. The Corps found that the Clean Water Act did not protect it because the pond is in a closed basin and does not support interstate commerce.[30]

All three of these ponds lost protections as a result of municipalities trying to improve their recreational open space or prevent water pollution. Ironically, as a result of their projects, their waters were removed from federal protection under the Clean Water Act.

26 City of South St. Paul, 13 November 2007. Accessed at http://www.southstpaul.org/index.asp?Type=B_BASIC&SEC=%7B344AB625-20E2-488C-94A1-5542F2800157%7D.

27 U.S. Army Corps of Engineers, St. Paul District, Approved Jurisdictional Determination, MVP-2008-00678-BAJ Anderson Pond Improvements (4 June 2008), downloaded 30 July 2008 from http://www.mvp.usace.army.mil/regulatory/default.asp?pageid=924.

28 Stoughton Courier Hub, 21 May 2008. Accessed at http://connectstoughton.com/main.asp?SectionID=2&SubSectionID=2&ArticleID=400.

29 U.S. Army Corps of Engineers, St. Paul District, Approved Jurisdictional Determination, Waukesha, Paradise Pond Delineation, 2008-03084-SLM (31 October 2008), downloaded 11 November 2008 from http://www.mvp.usace.army.mil/regulatory/default.asp?pageid=925.

30 U.S. Army Corps of Engineers, St. Paul District, Determinations of no Jurisdiction for Isolated, Non-Navigable, Intra-State Waters Resulting From U.S. Supreme Court Decision In Solid Waste Agency of Northern Cook County V. U.S. Army Corps of Engineers, MVP-2006-1251-BAJ (4 June 2006), downloaded 12 may 2006 from http://www.mvp.usace.army.mil/regulatory/default.asp?pageid=924.

Longing for Protection: Lake Used to Store Water Not a Water?

Long Lake is a seasonal lake that stretches more than three miles long and covers approximately 1,500 acres in Oregon. The valley area surrounding the lake provides recreational as well as commercial value. In a July 2007 memo, EPA wrote that Long Lake sits in the "heart" of the Pacific Flyway that "attracts birders from all over the world." The memo notes that "[t]he size and location of Long Lake would provide optimal birding habitat" for visitors to the area. EPA also noted the use of the lake and its wetlands as irrigation sources for crops and cattle sold in interstate commerce.

Oregon Wild

View of Long Lake.

Despite these facts, on November 15, 2007, the Corps and EPA Headquarters – with little explanation other than a bald statement that such information is "not sufficient" – issued a joint memorandum declining to protect the lake under the Clean Water Act. This failure to assert Clean Water Act protections is noteworthy not only for the size of the lake, but also because the project proposed to impact the lake will, according to the Corps, be used for water storage and directly connect it to Upper Klamath Lake. In other words, the Corps is saying Long Lake is not a waterbody when it knows there are plans to fill it with water and directly connect it to navigable waters.

The Corps' determination came about because of a request from the Bureau of Reclamation to use Long Lake as water storage for the controversial Klamath Project, a massive federal works project designed to provide irrigation to the wildlife-rich Klamath River basin. The Bureau's project would create up to 350,000 acre-feet of deep water storage by pumping water from Upper Klamath Lake, which is less than three miles away, to Long Lake during wet periods. Stored water would be pumped back to Upper Klamath Lake in drier months.

While it is unclear from the records how exactly the project will impact the lake, it appears given the amount of water to be stored, that the project will likely turn wetlands bordering the lake into open water, destroying or altering habitat, and directly connecting to Long Lake to Upper Klamath Lake. The determination document even writes that the project "will create a direct chemical, physical, biological and hydrological connection [from Long Lake] to Klamath Lake a [traditionally navigable water]."

This conclusion presents a troubling question as to whether pollutants that might be dumped into Long Lake and then get pumped directly into Upper Klamath Lake and the Klamath Basin will face any regulation under the Clean Water Act. Given that Long Lake is no longer considered to be protected, the answer could very well be that such pollution dumped into Long Lake will not be federally regulated.

Land O' Fewer Lakes: Minnesota's Water Resources Placed in Jeopardy?

Minnesota is known as "The Land of 10,000 Lakes." But the state nearly lost the Clean Water Act as a safeguard against polluting two big Minnesota lakes because of the Supreme Court's decisions. At risk were Boyer Lake, a 310 acre lake in Becker County, and 70 acre Bah Lakes in Douglas County.

According to the Minnesota Department of Natural Resources, Boyer Lake has several small islands, bays and peninsulas, and boasts a public boat ramp as well as boat access from the highway. Anglers catch northern pike, Largemouth Bass, Walleye, and Panfish in Boyer Lake. The state even stocks the lake with Walleye and other fish.

Bah Lakes is popular for canoeing, as well as bird-watching, cross-country skiing, hiking, hunting, and snow shoeing. Ducks Unlimited is working to implement a conservation easement to preserve habitat around the lakes, and several hotels, resorts, and campgrounds exist nearby, hosting tourists who enjoy the lakes area.

Despite the use of these waters by boaters, the local office of the Corps ruled that each of these lakes is an "isolated, non jurisdictional water with no substantial connection to interstate (or foreign) commerce." This determination would have meant that the Clean Water Act would no longer constrain polluters from discharging into, or even destroying, nearly 400 acres of Minnesota's fresh waters.

Thankfully, the government ultimately reversed these misguided determinations. Officials in EPA and Corps headquarters overturned the determination for Boyer Lake. EPA headquarters ruled that Bah Lakes was still protected by the Clean Water Act, a decision the Corps refused to join.

Although the initial decisions to drop Clean Water Act protections were overturned, these near-misses underscore the threat to the health and safety of Minnesota's waters and waters nationwide as polluters and developers try to shrink the scope of the federal law.

Even though Boyer Lake, in the above two pictures, is enjoyed by sportsmen and boaters, protecting this water has come into doubt.

It's Not Just Inland Waterways – A Near Miss on the Georgia Coast

The Georgia tidelands are a mosaic of barrier islands, island hammocks, and upland peninsulas. Knit together by wide expanses of saltwater marsh and swaths of freshwater wetlands, these coastal features embody what is unique about the Georgia coast.

Like saltwater marshes, freshwater wetlands serve critical functions in the tidelands ecosystem. In a region dominated by saltwater, the wetlands provide a source of freshwater that would be otherwise unavailable. For migratory birds winging up and down the east coast each year, these watering holes prove invaluable.

U.S. Army Corps of Engineers

Julienton Plantation (Southeast Corner).

The "Julienton Plantation" development is a 1,270 acre site located on Harris Neck in McIntosh County, Georgia. This relic barrier island is also home to the Harris Neck National Wildlife Refuge and borders thousands of acres of state protected shellfish waters. Because the marsh, upland, and wetland interface is so interrelated in these coastal areas, harm to one resource invariably impacts the other two as well.

Nonetheless, when a developer sought to fill 28 freshwater wetlands covering at least 155 acres on a coastal peninsula, the Savannah District of the Corps of Engineers wrote off these wetlands. The Corps determined that the wetlands were trapped behind ridges of sand dunes and therefore had no significant nexus with other nearby traditional navigable waters. As a result the Corps found that the wetlands were not protected and the developer did not have to secure any type of permit before filling and destroying them.

If the developer were allowed to fill the freshwater wetlands and develop the uplands, the salt marsh, which includes the state-protected shellfish beds, could suffer irreparable damage from stormwater runoff.

Fortunately, the EPA regional office covering Georgia elevated the Corps' determination to the EPA and Corps headquarters offices. The two agencies reversed the District decision, noting that the wetlands "are part of an interdunal system that is in close proximity to and has a direct and/or indirect hydrologic connection to the Julienton River and Little Mud River, and are part of the interdunal landscape that makes up Harris Neck."[31] Both of these rivers are traditional navigable waters because they are tidally influenced.

What is most alarming about this case is that some of wetlands abutted the Julienton and Little Mud Rivers, yet the Corps staff initially did not find them to be covered by the law. Had the EPA been less rigorous in its review, the Corps' determination would have stood and another 155 acres of Georgia's coastal wetlands would have been lost forever.

31 U.S. EPA & U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for SAS-2007-670, 5 (Feb. 12, 2008).

L.A. River Revitalization: City's New "Front Door" Slammed By the Corps

Over 50 miles long, the Los Angeles River flows from the suburbs of the San Fernando Valley to the ocean in Long Beach. Along the way, the river passes through 14 cities and numerous and diverse neighborhoods. Originally, the Los Angeles River meandered through wetlands, marshes, willow, alder, and sycamore, providing desperately needed water for the region.

George Wolfe

The Los Angeles River is undergoing revitalization to protect people and promote a healthy river and economy.

In the late 1930s the Army Corps of Engineers initiated flood control projects and lined 80 percent of the river with concrete, essentially turning it into a large storm water conduit. The L.A. River became a no-man's land, with fences and signs discouraging its use. But today, people see the L.A. River differently and have hatched major plans to revitalize the river to protect people and wildlife, promote a healthy river, and leverage economic development – making the L.A. River a new "front door" to the city.

Unfortunately, just as these plans are underway, the Corps issued a ruling that would have undermined federal Clean Water Act protections for the headwaters and wetlands in the L.A. River Basin, threatening the health of those waters and the quality of the L.A. River itself. The June 2008 ruling determined that only two small stretches of the river – totaling a meager four miles – qualified as "traditionally navigable waters."

Ironically, the Corps argued that because the river is primarily a flood control channel, people should not be boating on or otherwise using the river for recreation. This flies in the face of reality – people do, in fact, use the river, and many community groups throughout the river basin encourage that use and work to keep the L.A. River clean. Also, treating the river like a storm drain is contrary to the revitalization plans and inconsistent with the law.

Shrinking the size of what is considered the "traditionally navigable" part of the L.A. River – leaving more than 90 percent of the river without that designation – makes it more difficult to protect the watershed's tributaries and wetlands. Losing these resources would have meant more pollution throughout the river basin. Fortunately, in August 2008 the EPA stepped in and designated the L.A. River a "special case," essentially taking the authority to determine the river's status away from the Corps. As of the time of this report, EPA had not yet acted.

No More Cruising on the Santa Cruz?

The Santa Cruz River is a significant natural resource for the communities along its banks, and an important cultural and historic resource. It begins in the high grasslands of the San Rafael Valley, between the Canelo Hills to the east and the Patagonia Mountains to the west, just north of the U.S.-Mexican border. It flows southward into Mexico and turns westward, and reenters the U.S. just to the east of Nogales. It then continues northward from the international border at Nogales past the Tumacacori National Historical Park, Tubac, Green Valley, Sahuarita, San Xavier del Bac, and Tucson to the Santa Cruz Flats just to the south of Casa Grande and the Gila River. According to Friends of the Santa Cruz River, more than 22 threatened or endangered species, including the Rose-throated Becard, Gray Hawk and Yellow-bellied Cuckoo, depend on the Santa Cruz and its tributaries.

Matt Skroch, Sky Island Alliance

The Santa Cruz River and its tributaries are important resources in the arid Southwest.

Matt Skroch, Sky Island Alliance

Developers are now in court fighting the EPA's decision to protect the Santa Cruz and its tributaries.

In May 2008, after the Corps' L.A. District staff conducted an extensive study and prepared a detailed report, the District formally ruled that two long reaches of the Santa Cruz River in southern Arizona are "traditional navigable waters" (TNWs). Soon thereafter, the Corps withdrew the findings from the agency's website suddenly and without explanation – apparently repudiating or at least reconsidering their initial ruling.

A joint investigation by the chairmen of the House Committee on Oversight and Government Reform and the Committee on Transportation and Infrastructure concluded that the Assistant Secretary of the Army (ASA) for Civil Works, John Paul Woodley, urged his staff to pull the initial determination after corporate lobbyists and other special interests complained about the staff's legal and scientific findings. His action endangered important resources; as the Corps' Regulatory Division's Deputy Chief explained:

> *If these reaches are not TNWs, there would be a profound effect on our ability to regulate tributaries of the Santa Cruz river. . . . An inability to find a significant nexus for these tributaries would lead to a wide loss of jurisdiction and ultimately pose serious water quality concerns for the area.*[32]

After additional urging by special interests, Assistant Secretary Woodley began the process to formally override the determination that certain portions of the Santa Cruz were traditional navigable waters. In doing so, he ignored his staff's own well-researched and 70-plus page report containing hydrological data, historical information about uses of the river, maps, photographs, and other data documenting the river's abundant qualification for this designation.

The Corps' action could have undercut Clean Water Act safeguards for the headwaters and wetlands in the Santa Cruz watershed. The EPA made the Santa Cruz determination a "special case" (as it did with the L.A. River) to take the decision away from the Corps. In December 2008, EPA reinstated the Corps District's initial determination that the two reaches are "TNWs" and stated that the agency will continue to evaluate other reaches of the river for that designation as well.

On March 23, 2009, the National Association of Home Builders and its local counterparts filed suit in federal court challenging EPA's ruling. The industry complaint indicates that the Association is trying to make it more difficult to protect the Santa Cruz's many headwater streams and tributaries.

32 E-mail from Mark Cohen to Chip Smith (June 13,2008; 5:55 p.m.).

Seasonal Streams Under Assault in the "Heart of America"

After the *Rapanos* decision, correspondence and EPA actions indicate that the Kansas City District of the Corps created a presumption that first order ephemeral streams were no longer protected by the Clean Water Act. The Kansas City District is responsible for the protection of waters in all or parts of Kansas, Missouri, Nebraska, Iowa, and Colorado. EPA had to intervene and reverse the District's policy, but such streams are still at risk.

In February 2008, EPA took "special case" action targeting the Kansas City District, meaning that EPA stepped in to take responsibility for determining the Clean Water Act status of water bodies in the area. EPA expressed concern with the presumption that such streams are too small to have a "significant nexus" to traditionally navigable waters.

EPA exercised its special case authority for three individual sites, and also declared "a policy special case for first-order ephemeral streams in Kansas City District, as well as for those waters in Kansas City District that are currently used for commercial recreational navigation and as a result may potentially be a traditional navigable water (TNW)." EPA stated it would be "responsible for determining the jurisdictional status of such waters (first order ephemeral streams in Kansas City District, and waters in Kansas City District that currently have commercial recreational navigation)" until the policy special cases were resolved.

In July 2008, EPA issued a memorandum repudiating the Kansas City District's illegal policy. EPA concluded that "such a presumption [that first-order ephemeral streams, as a class, are not waters of the United States] is not consistent with the Supreme Court's decision in *Rapanos* or with interagency guidance interpreting that decision."[33] Unfortunately, even this memo — which was an improvement over the prior, utterly unprotective, policy – merely reiterates the EPA/Corps policy of subjecting such streams to the ambiguous significant nexus test. *Rapanos* does not require that result; the policy fails to protect tributaries to the full extent of the law.

Finally, EPA also noted concerns with specific draft jurisdictional determinations (JDs), stating its concerns included:

> *[D]ata on the JD form that underestimated the length of the stream reaches, failure of the draft JDs to consider or address available data from site visits, and mischaracterizations of [the] ability of streams and associated wetlands to filter pollutants and otherwise affect the integrity of downstream [traditionally navigable waters].*[34]

33 Memorandum Craig Hooks, Director, Office of Wetlands, Oceans, and Watersheds, US EPA, to John B. Askew, Regional Administrator, US EPA Region VII (Jul. 10, 2008).

34 Memorandum from Craig Hooks, Director, Office of Wetlands, Oceans, and Watersheds, US EPA, to John B. Askew, Regional Administrator, US EPA Region VII (Feb. 27, 2008).

Paradise Lost? Stream Loses, then Regains, Federal Safeguards

Pu'uhonua O Hōnaunau National Historical Park is a 180 acre park located on the big island of Hawaii. The park lies within the watershed of the Ki'ilae Watercourse, which begins at the crest of Mauna Loa and runs through the southern area of the park before emptying into Ki'ilae Bay. In Hawaii, this land is considered sacred because it was a royal residence and contains many historic structures such as a temple and mausoleum that housed the bones of Hawaiian royalty. Despite the area's rich history, the Ki'ilae Stream was deemed unprotected by the Corps, primarily because it flows only during periods of rainfall. Ki'ilae Stream is "approximately five miles in length, draining more than 325 square miles through a channel that averages approximately 30 feet wide and five feet deep . . ."[35]

The Honolulu District of the Corps looked only "to the specific project area" rather than "the entire relevant reach" in determining whether the stream could be protected. The Corps' limited analysis resulted in a determination that there was no significant nexus between the stream and the bay. This is particularly troubling given EPA's analysis showing that:

> *Average rainfall at the nearest monitoring station, historic USGS gauging and flow data for Ki'ilae Stream, proximity to the nearest traditional navigable water, and an analysis of soil permeability in the watershed indicate that likely existence of a significant nexus to Ki'ilae Bay and the Pacific Ocean. For example, discharges from Ki'ilae Stream of sediments and other pollutants appear to have the potential to exceed the stringent water quality standards set for Ki'ilae Bay as protection for its high-quality coral reef habitat.*[36]

In light of these findings, EPA used its "special case" authority to overrule the Corps and reinstate protections for Ki'ilae Stream. This represents another waterbody barely spared, which is very lucky given that tourism is Hawaii's leading employer, revenue producer, and growth sector. People from all over the world come to see Hawaii's natural beauty and historical sites. Protecting Hawaii's water resources can help assure that not only Hawaii's beauty is protected, but also its culture.

Jack Kelly

Aerial photo of Ki'ilae Stream, which flows into Ki'ilae Bay.

35 Memorandum Craig Hooks, Director, Office of Wetlands, Oceans, and Watersheds, US EPA, to Wayne Nastri, Regional Administrator, US EPA Region IX (Jun. 11, 2008).

36 Id.

Massive Coal Industry Violations in West Virginia and Kentucky

Appalachian Mountain Streams – even those that are seasonal – provide drinking water, recreation such as fishing and wading, and flood control. These tributaries are important to the entire watershed and ecosystem of Appalachia. Unfortunately, according to a government enforcement action, Massey Energy Co., the fourth-largest U.S. coal mining company, polluted many of these waters with coal mining waste in excess of legal limits (or in some cases, without even obtaining a pollution control permit).

In May 2007, the U.S. Department of Justice filed a massive civil lawsuit against Massey and its subsidiaries seeking more than $1.6 billion in fines and alleging thousands of illegal discharges of wastewater and other water pollution caused by the company's mines since 2001. The government's complaint alleged 60,534 days of violations – some 165 years, if added together – of Massey's Clean Water Act permits. The Department of Justice's 2007 complaint covered more than one hundred Massey permits, and involved several hundred pollution discharge outfalls into waterways in West Virginia and Kentucky. Massey and its subsidiaries "have an extensive history of violating the Clean Water Act" the government said in its complaint, citing two criminal plea agreements and civil enforcement actions previously brought by state officials.

Patty Sebok

George's Branch, Laurel Creek.

The government's 2007 enforcement action did not cover all of Massey's prior water pollution problems. For instance, one alarming incident occurred Oct. 11, 2000, when a coal waste holding area at Massey's Martin County Coal subsidiary ruptured, spilling more than 250 million gallons of coal slurry into tributaries of the Big Sandy River, killing all aquatic life for 75 miles.

Massey's first line of defense to the government's enforcement case was that, based on *Rapanos*, the government had not alleged sufficient facts to show that the Clean Water Act applied to the receiving streams in question. Massey's defense was dubious, as the coal mines previously applied for, received, and were operating under, Clean Water Act permits, but it argued that "[t]he existence of federal [Clean Water Act] jurisdiction over each of the alleged violations is critical to distinguishing

U.S. Department of Agriculture

Salamanders and newts need Appalachian streams.

U.S. Geological Survey

between lawful and potentially unlawful conduct" even when permits exist. Consequently, Massey argued, dozens of tributaries in West Virginia had not been proven to be protected Clean Water Act, including:

- **Pigeon Creek** – a tributary of the Tug Fork that joins the main stem of the Tug near the town of Naugatuck, West Virginia
- **Trace Fork and Elk Creek** – tributaries of Pigeon Creek that join Pigeon Creek along Highway 65 between Delbarton and Belo, West Virginia
- **Whitman Creek and Island Creek** – tributaries to the Guyandotte River near Logan, West Virginia
- **The headwaters of Clear Fork and Clear Fork, and Marsh Fork and Little Marsh Fork** – all of which discharge into the Big Coal River
- **Buffalo Creek** – a tributary of the Elk River and site of a massive coal slurry impoundment failure in February 1972 that killed over 100 people and left thousands homeless

In the end, Massey's claims were not ruled on by the court. Instead, Massey settled with the government for $20 million and other penalties to resolve the case. But this case illustrates the ways in which industries can use *Rapanos* to impede Clean Water Act enforcement.

COMMUNITY LAKE NOT CONSIDERED A PROTECTED WATER

Houses dot the shoreline of Pine Tree Lake, a roughly nine-acre body of water in Monroe, New York. In a case brought by a local homeowners' association against a development company for allegedly discharging pollutants into the lake in violation of an applicable permit, there was evidence that there are boats on the lake. In fact, a boat was used to conduct a study of the lake.

Nevertheless, a federal jury found that the neighbors had not established that Pine Tree Lake was protected by the Clean Water Act, and the judge refused to reinstate the association's case. The judge ruled: "I conclude that 'navigable waters' under the CWA [Clean Water Act] cannot be interpreted to include an intrastate lake with no interstate or foreign commerce connection simply because it may be navigable-in-fact."[37] The judge found that his conclusion was supported by the recent decisions in *SWANCC* and *Rapanos*.

37 Decision & Order, Pine Tree Homeowners' Association, Inc. v. Ashmar Development Co., LLC, No. 04-Civ-10006, at 15 (S.D.N.Y. Jan 29, 2008).

Oil, Lead, Zinc, and Grease, Oh My! Midnight Dumpers Escape Accountability

Avondale Creek is a continuously flowing stream in north Birmingham, Alabama, that feeds into Village Creek. After 28 miles, Village Creek flows into Bayview Lake, which was created by a dam. On the other side of the lake, Locust Fork flows for 20 miles before it reaches the Black Warrior River, which is traditionally navigable.

Nelson Brooke, Black Warrior Riverkeeper

Avondale Creek.

In June 2005, a jury in Birmingham found pipe manufacturer McWane, Inc. and company managers guilty of knowingly discharging oil, lead, zinc, and grease into Avondale Creek in violation of the Clean Water Act. The district court sentenced McWane to 60 months probation and a fine of $5 million. The individuals were sentenced to fines ranging from $35,000 to $90,000 and to varying lengths of probation.

On October 24, 2007, the U.S. Court of Appeals for the Eleventh Circuit overturned these convictions. The McWane defendants challenged their sentences by claiming that the government had not shown that Avondale Creek was protected by the Clean Water Act. The court held that *Rapanos* requires the government to show a "significant nexus" between a given waterbody and a navigable one, and found that the prosecution had not done so at trial.

> *The government did not present any evidence...about the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River, and there was also no evidence presented of any actual harm suffered by the Black Warrior River.*

Consequently, the Court of Appeals reversed the convictions and sent the case back to the district court for a new trial.

In response, the judge who presided over the trial of the McWane defendants went so far as to take himself off the case, saying, "I am so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to try it again."

Yet, unless the required "nexus" can be established in a new trial, or the government can show that pollution reaches some other protected water, industrial waste can be dumped into the creek with no Clean Water Act oversight or limits.

Oil Polluter in Texas Let Off the Hook for Spill

Across much of the Western United States, oil wells dot the landscape. After crude is pumped, it travels to refineries through networks of pipelines. Unfortunately, pipelines are not fail-proof. On August 24, 2000, a pipeline operated by the Chevron Pipe Line Company failed, spilling 126,000 gallons of oil into a west Texas creek.

These pictures show the tributary to Ennis Creek where the oil spill occurred when it is dry and when it is wet.

The creek was dry at the time – just as almost 60 percent of the nation's streams are dry for a portion of the year. But even often dry creeks need Clean Water Act protections from oil spills because they are home to wildlife, they are part of a larger watershed, and when water flows, they carry pollutants to downstream waters. In this case, 500 feet from where the oil spill occurred, the unnamed creek runs into Ennis Creek (another intermittent stream), which flows for 17 miles before reaching Rough Creek, which is also intermittent. Almost 30 miles downstream, Rough Creek discharges into Double Mountain Fork of the Brazos River. Eighty-two miles downstream, it meets the Brazos River, the eleventh longest river in the U.S., called the *Rio de los Brazos de Dios* ("The River of the Arms of God") by early Spanish explorers.

The Texas headwater creeks that Chevron polluted are not dry all the time. "During times of water flow, there is an unbroken surface water tributary connection from the unnamed tributary [where the oil spill occurred]...into the Brazos River," according to the U.S. Justice Department.

Yet when the U.S. sued Chevron Pipe Line for violating the Clean Water Act, a federal trial court in Texas ruled that because no water was flowing in the unnamed tributary at the time of the spill and the government had not demonstrated that the oil had reached a traditionally navigable water, the law did not apply. This decision was issued just days after *Rapanos*, and the Texas judge concluded that denying protections to these streams was consistent with that case.

If this rationale were followed elsewhere, companies that discharge oil or other pollutants may not be held liable under the Clean Water Act unless the pollution reached a traditionally navigable water or a waterbody adjacent to such a water. Such a demonstration will be time and resource intensive and has never before been required under the Clean Water Act.

A March 2008 internal EPA enforcement memo documented that over 200 oil spill enforcement actions across the country have been dropped or de-prioritized over just an 18 month period. This is likely just the tip of the iceberg, as an official in EPA's Denver office warned in January 2008, "we literally have hundreds of OPA [Oil Pollution Act] cases in our "no further action" file due to the *Rapanos* decision. . . ."

All Bogged Down in Buzzards Bay

Buzzards Bay is an estuary 28 miles long and eight miles wide that connects to Cape Cod Bay in Massachusetts through the Cape Cod Canal. The bay supports abundant flora and fauna, including many species of shellfish such as lobsters, quahogs, and blue crabs, as well as several species of finfish, including striped bass, herring, bluefish, and American eels.

U.S. Environmental Protection Agency

Wetlands at the headwaters of the storied Buzzards Bay in Massachusetts were converted to cranberry bogs without a Clean Water Act permit. Cranberry bogs contribute harmful pollutants to the already impaired Bay. EPA has been trying to clean this pollution up, but efforts have been stalled by court wrangling.

Increased pollution harms the natural communities of Buzzards Bay, particularly from activities that load pesticides and nutrients into the bay. Cranberry bogs are among sources that contribute to the bay's water quality problems because they replace nutrient-filtering wetlands with cranberry farms that release water loaded with nutrients and pesticides. Nitrogen is a particular concern in the bay because it stimulates algal growth, which blocks sunlight that is needed to nourish grass beds. Shellfish and finfish species are crucially dependant upon the eel grass and other submerged aquatic vegetation at different stages of their life cycles.

Charles Johnson, Genelda Johnson, and Francis Vaner Johnson operate a cranberry farm at three sites in Carver, Massachusetts. Between 1979 and 2001, the Johnsons' operation dredged and filled 50 acres of freshwater wetlands to convert them to commercial cranberry bogs. The tracts of wetlands lay among several wetlands and small surface ponds in the low elevation headwaters of the Weweantic River, a major navigable tributary river of Buzzards Bay.

At the first site, which originally consisted of a stream known as Beaver Dam Brook, an unnamed tributary to

it, as well as forested, grassy, marsh, and scrub-shrub wetlands, the Johnsons removed the trees, leveled the area with fill material, completely filled the tributary, straightened and widened the Beaver Dam Brook, and obstructed flow with a dike. At the second site, which once had a shallow reservoir formed by damming two small streams and which contained both forested and scrub-shrub wetlands, the Johnsons installed dikes in the reservoir with fill materials that flooded some of the adjacent wetlands, and they removed trees before leveling out another bog. At the third site, which originally contained forested, and scrub-shrub wetlands as well as open water, the Johnsons installed a dike in the open water and added fill material to convert much of the wetlands to cranberry bogs.

All three sites are hydrologically connected via surface waters to the upper reaches of the Weweantic River. The Johnsons never obtained permits for the activities at the three sites that polluted and destroyed these wetlands and streams.

EPA sued the Johnsons under the Clean Water Act in 1999. The district court ultimately found the Johnsons liable of violating the law, imposed a $75,000 fine and

U.S. National Aeronautics and Space Administration

Aerial view of Buzzards Bay.

ordered a $1.1 million restoration and mitigation plan for the impacted wetlands. The Johnsons appealed the decision after *SWANCC* on the grounds that the wetlands were no longer protected by the Clean Water Act. The government originally won in a 2-1 decision issued shortly prior to the *Rapanos* decision.[38] After *Rapanos*, the court reconsidered and vacated its earlier ruling, deciding to send the case back to the district court for further fact finding.[39] Now, ten years after the initial enforcement action, the case is again before a trial court, and it remains uncertain whether the Johnsons will ever have to restore the destroyed wetlands.

Cape Cod Bay Inlet.

38 *United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006), *opinion withdrawn and vacated by*, 467 F.3d 56 (2006).
39 *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *reh'g and reh'g en banc denied* (Feb. 21, 2007), *cert. denied* 128 S. Ct. 375 (2007).

Dumpers' Bill of Rights: Oil Industry Gets Off "Clean"

Apparently seeking loopholes that would allow them to avoid liability for spilling oil into our Nation's waters, the American Petroleum Institute (API) and Marathon Oil Company sued the EPA over a 2002 agency regulation defining which waters are protected by the Clean Water Act's program that helps guard against oil spills into waters of the U.S.[40]

Oil spills into our Nation's waters can have disastrous effects on critical habitat and water supplies.

On March 31, 2008, a federal district court in Washington, D.C., concluded that the EPA did not give a sufficiently detailed "reasoned explanation" for applying the oil spill prevention regulations to the same water bodies protected by other Clean Water Act programs when it rewrote the oil spill prevention regulations after the *SWANCC* decision.[41]

As troubling as this decision was, it could have been much worse; the oil industry argued that the scope of the Act should be dramatically shrunk to leave the vast majority of rivers, streams, and wetlands without protections. According to one API argument, only so-called "traditional navigable waters," shorelines adjacent to those waters, and certain ocean waters are covered by the Act's oil spill program because that section uses a slightly different jurisdictional term than the rest of the Act. This view would leave out over 90 percent of U.S. waters, including tributaries that flow directly into – and can pollute – traditional navigable

40 *American Petroleum Institute v. Leavitt*, DDC 02cv2247 PLF.
41 The case was put on hold when the U.S. Supreme Court took up the case of *Rapanos v. U.S.*

waters, and many other kinds of water bodies, such as ecologically valuable streams, wetlands and lakes in arid areas that may not have surface links to larger water bodies. An experienced attorney at the Corps, Lance Wood, described a similar argument as "the Holy Grail of polluters, the proverbial Dumpers Bill of Rights, rendering the [Clean Water Act] a toothless nullity."

API and Marathon also claimed that, at most, Justice Kennedy's "significant nexus" test from *Rapanos* is controlling, and that test should be viewed strictly to eliminate protections for many tributaries, lakes, and wetlands across the country.

The implications of the oil industry's sweeping arguments are staggering. In briefs in this case, Marathon identified a number of water bodies that it argued should not be subject to the Clean Water Act, meaning that EPA would no longer be able to require the company to take measures to prevent oil spills. Below are a few examples.

Loch Katrine

Teddy Roosevelt established Loch Katrine, located in Wyoming, as a Federal Bird Reservation on October 26, 1908. Loch Katrine is a relic of a much larger Pleistocene lake bed, which today provides habitat for a wide variety of waterfowl and shorebirds including Trumpeter Swan, Tundra Swan, Canada Geese, Snow Geese, and various species of ducks, also shorebirds such as American Avocets, Black-necked Stilts, and White-faced Ibis.

About one mile from the Loch is Marathon Oil's Battery 1 North facility, which has an aggregate storage capacity "of approximately 889,320 gallons" – "enough oil storage capacity that a spill could reach" Loch Katrine.[42]

Despite the importance of this aquatic site, Marathon apparently believes it should not be subject to regulations that would guard against spilling oil into Loch Katrine unless it could spill so much that the spill would flow out of the federally protected refuge and further on into the Big Horn River. The company's expert stated:

U.S. Fish and Wildlife Services

Loch Katrine has been a sanctuary for Trumpeter Swans for over 100 years.

> *Because the natural depression that Loch Katrine and Battery 1 North lie in is 100 feet deep and Loch Katrine itself is only four to six feet deep, a spill would have to raise Loch Katrine's water level over 94 feet to cause it to overflow the natural basin. It would be impossible for a spill to raise the water level to such a point. Even if the entire fluid capacity from the Battery 1 North facility spilled into Loch Katrine, the spill would only raise the water level of Loch Katrine by approximately 0.0013 feet.*[43]

In other words, Marathon claimed that the Clean Water Act should not apply to this plant unless the facility was capable of producing an oil spill 94 feet deep. Of course, if a spill causes the level of the Loch to rise even a fraction of an inch, it would be severely polluted.

Other Water Bodies

In addition to Loch Katrine, other examples of water-bodies claimed to no longer have federal protections include:

- The Dolores Arroyo, which is a tributary of the Rio Grande River
- Trail Creek, which flows 90 percent of the time and which is a tributary to the Red River, a navigable-in-fact waterway
- Patrick Draw and Bitter Creek, which flow through federal land and which are tributaries of the Green River, a navigable-in-fact waterway

42 Declaration of Marvin Blakesley, Advanced Health, Environment, and Safety Professional at Marathon Oil Company (June 2, 2004), at ¶ 4 (emphasis added).
43 Id. at ¶¶ 4-5.

Green River Turning Orange? Wetlands and Creek Polluted with Acid Mine Drainage

Pond and Caney Creeks are both tributaries of the Green River in Kentucky; adjacent to these creeks are two areas of wetlands, which filter and retain water. Water flowing into these wetlands was contaminated with acid mine drainage from a nearby abandoned mine. In a Clean Water Act enforcement case, the government alleged that George Rudy Cundiff and Christopher Seth Cundiff, who owned the lots, drained and destroyed the wetlands, sending their contents – including the acid mine drainage – downstream. The Cundiffs' defense? That the wetlands are no longer protected by the Clean Water Act.

Plaintiff's Exhibit, U.S. v. Cundiff. Federal District Court Case

Orange water polluted by acid mine drainage flowed from this site into tributaries of the Green River in Kentucky.

The southern lot contained approximately 85 acres of wetlands, portions of which contained orange-colored water caused by drainage from nearby mining activity. The Cundiffs dug ditches to drain the water, "sidecasting" the dredged material into the wetlands without obtaining a permit. The Corps inspected the site and issued a cease and desist order prohibiting further discharges of excavated or fill material into the wetlands. Though the Corps and EPA repeatedly ordered the Cundiffs to stop the pollution and restore the wetlands, the Cundiffs continued converting the wetlands into dry land.

The northern lot contained approximately 103 acres of wetlands, which were similarly excavated and filled. Specifically, the Cundiffs excavated a 200 foot ditch by sidecasting the dredged material into the wetland that extended from the property and into Caney Creek.

The Cundiffs claimed that they wanted to be rid of this water from their property because it "kill[s] the vegetation and make[s] the Cundiff land uninhabitable for wildlife and all but mosquitoes."[44] They further complained that if they were prohibited from draining the wetlands into the creeks, they would be "forced to use their land only for the purpose of filtering out the acid from the water so it would be purified when it flowed into the adjacent creeks."

In January of 2005, the trial court agreed with the U.S. that the Clean Water Act protected the sites' wetlands. The judge fined the defendants and permanently enjoined them from discharging dredged or fill material into waters of the U.S. unless they were in compliance with the Clean Water Act.

That did not end the saga. After the defendants appealed their trial court loss to and the Supreme Court issued *Rapanos*, the parties jointly moved for a limited remand back to the district court so that the judge could address whether the wetlands were covered by the law in light of the new opinions.

On remand, the district court found that the Clean Water Act protected the wetlands under either of the tests outlined in *Rapanos*.[45] In applying the significant nexus test, the court looked to expert witness testimony that demonstrated that the wetlands store water, filter pollutants, and support habitat for the navigable Green River. Expert testimony also showed that filling the wetlands diminished capacity for storing water, leading to flooding downstream that affected navigation and crop production, stream bank erosion, and sedimentation. Similarly, the evidence indicated that destruction of the wetlands allowed the acid mine drainage to move quickly into the neighboring creeks and downstream river without being first filtered out by the wetlands.

The court also found that the Act covered the wetlands because the wetlands flow into "relatively permanent" waters that flowed into navigable waters and because there was a continuous surface connection making it "difficult to determine where the water ends and the wetland begins." The court further noted evidence that "confirm[ed] that the wetlands at the site physically abut the South Channel, Pond Creek, and Caney Creek."

The Cundiffs appealed again, and the appeals court upheld the trial court decision early in 2009.[46] The decision came down over seventeen years after the Cundiffs' activity first triggered government action, illustrating the time and resource burden that alleged polluters can impose on the government and citizen plaintiffs by making arguments based on these Supreme Court decisions.

Plaintiff's Exhibit, U.S. v. Cundiff, Federal District Court Case

After years of time-consuming legal wrangling, a court decision has finally ensured the destruction of these wetlands will be remedied.

44 Proof Brief of Appellants, Jan. 30, 2006 at 6-7.
45 480 F. Supp. 2d at 944.
46 U.S. v. Cundiff, 555 F.3d 200 (6th Cir. 2009)

Not So High & Dry: Developer Responsible For Raw Sewage in Wetlands Tries to Evade Sanctions

Within just a few years of moving into Big Hill Acres, a 2,600 acre subdivision in Mississippi, many of the 600 families residing there began experiencing serious problems. Septic systems failed in a large number of homes, causing raw sewage to seep up from the ground and flow across families' yards. A number of the homes in Big Hill Acres also suffered from slow drainage; brown, foul-smelling water backing up into bathrooms, kitchens, laundries and sinkholes; and standing water on the lots with debris rising to the surface.[47]

The evidence indicated that developers Robert J. Lucas, Jr., Big Hill Acres, Inc., and associated individuals had filled in hundreds of acres of wetlands and built the neighborhood on top, despite warnings from public health officials that illegally installing septic systems in saturated soil would contaminate the property. EPA and the Corps issued multiple cease and desist orders over several years, yet Lucas and his associates continued to improperly install septic systems and continued to develop and sell the lots. Most of the land was sold to low and/or fixed-income families.

In early 1998, Lucas began marketing Big Hill Acres through his daughter Robbie's real estate company. Lots were advertised as "2 Acres – High & Dry land, [with] well, septic & power pole." By summer 1999 the U.S. EPA got involved. In August of that year the agency issued an administrative order warning Lucas that his ongoing construction work at Big Hill Acres was in violation of the Clean Water Act, and that if he did not stop he would be subject to civil or criminal penalties. Despite all the warnings, Lucas and others continued to develop and sell the contaminated wetlands properties at Big Hill Acres.

U.S. Department of Justice

Homes at Big Hill Acres.

When the Justice Department brought an enforcement action, Lucas and his associates argued that the wetlands bubbling with sewage were not waters protected by the Clean Water Act.

47 Much of this description of the facts in this case are based on a document released by EPA's Office of Criminal Enforcement, available at http://www.epa.gov/oecaerth/resources/cases/criminal/highlights/2006/bighillacres.pdf. Additional information was provided by The Mississippi-Alabama Sea Grant Legal Program, available at http://www.olemiss.edu/orgs/SGLC/MS-AL/Water%20Log/25.1bighill.htm.

The federal indictment filed against Lucas and his associates in June 2004 included twelve counts of discharging pollutants (sewage and other wastewater) into wetlands without a permit, ten counts of putting material (including dirt, pipes, culverts, gravel, garbage, debris, cement, and asphalt) and septic systems in wetlands without a permit, and eighteen counts of mail fraud. The grand jury made additional findings of fact that were included in the indictment; among these were that at least 250 individuals were victimized by the defendants' fraud, at a cost to the victims of over $2.5 million.[48]

U.S. Department of Justice

Unnamed Tributary by Big Hill Acres.

Attorneys for the defendants argued that the Clean Water Act did not protect the Big Hill Acres' wetlands because they were not adjacent to navigable waterways. This argument was ultimately unsuccessful, and the defendants were convicted on all counts in January 2005. But the fact that defendants in such an egregious case of water pollution directly in the Gulf of Mississippi watershed could even make a colorable argument that the Clean Water Act no longer prohibits the discharge of raw sewage into the water bodies in this case is cause for great concern.

U.S. Department of Justice

Sewage seeping from the ground.

48 U.S. v. Lucas, 516 F.3d 316 (5th Cir. 2008)

In a Clear Lake, You Can See Forever

Prior to 2003, Cedar Lake was home to fish, turtles, and other wildlife, and enjoyed by residents for water recreation. The water was clear enough that in 1998, Aquatic Sports, Ltd., a scuba diving instruction and equipment business, moved to the lake.

Sheila Fitzgibbons & Richard Ellison

Citizens claimed that stormwater polluted Cedar Lake, harming a community resource.

This roughly 40 acre lake, located in the southern part of Michigan, is about 1.4 miles long, averages 275 feet wide, and reaches a maximum depth of 33 feet. Scuba diving might not be the type of recreation that comes to mind when thinking about Michigan, but the state has the longest freshwater shoreline in the world, bounded by four of the five Great Lakes, plus Lake Saint Clair.

Sheila Fitzgibbons & Richard Ellison

Groundwater supplies most of the water in the lake, which is linked via a series of other water bodies to the Sycamore River.[49] But in recent years, the proprietors of Aquatic Sports claimed that the county storm sewer system made alterations so that it directly discharged into Cedar Lake. Thereafter, they allege, the water became much less clear, so much so that they often could no longer use it for scuba training. In addition, they report that aquatic life in and around the lake diminished.

Sheila Fitzgibbons & Richard Ellison

When Aquatic Sports and its operators sued nearby drainage districts, claiming they were responsible for increased pollution of the lake, the defendants responded by arguing, among other things, that the lake is not a "water of the United States" under the federal Clean Water Act.[50] The case was dismissed in 2008 on other grounds, so the court did not rule on whether this lake was in fact protected by the Act, leaving this lake's future status uncertain.[51]

Sheila Fitzgibbons & Richard Ellison

49 Complaint, *Fitzgibbons v. Cook & Thorburn & Hancock County Drainage Districts*, No 1:08-cv-165 (W.D. Mich., Feb. 19, 2008).

50 Brief in Support of Motion to Dismiss, *v. Cook & Thorburn & Hancock County Drainage Districts*, No 1:08-cv-165, at 19-21 (W.D. Mich., Apr. 4, 2008).

51 Opinion, *v. Cook & Thorburn & Hancock County Drainage Districts*, No 1:08-cv-165 (W.D. Mich., Dec. 8, 2008) (concluding that plaintiffs had provided insufficient notice of claims against defendants).

Waste Treatment Plants Without Permits?

Congress passed the original Clean Water Act to eliminate the use of the Nation's waters as open sewers for untreated (or under-treated) sewage and other wastewater. Now, nearly 37 years later, some wastewater treatment facilities are using uncertainty about the Clean Water Act to argue that they do not need to comply with federal pollution control permit limits on sewage discharges.

In June 2007, the Pima County, Arizona County Commissioner's office wrote to EPA suggesting that a number of wastewater treatment plants in the Southwest are no longer required to comply with the Clean Water Act, despite previously obtaining pollution discharge permits. These facilities include:

- The Aura Valley Wastewater Treatment Facility, which discharges to the Black Wash Spray Fields, and irrigates native mesquite trees. The spray fields drain into the Black Wash, a tributary to Brawley Wash, which is dry much of the year, but eventually drains into the lower Santa Cruz River and ultimately into the Colorado River near Yuma. The flow path moves through six different watersheds, covering almost 300 miles of arid desert.
- The Mt. Lemmon facility, which discharges into a ditch that links to a series of unnamed washes along Alder Canyon. After 18 miles, the washes flow into Alder Wash, which intersects with the San Pedro River six miles downstream. The San Pedro, which has run dry in 2005 and 2006, eventually drains into the Gila River and eventually intersects with the Colorado River.

Similarly, in New Mexico, Cannon Air Force Base in Curry County discharges up to 750,000 gallons a day from its wastewater treatment plant, but might soon avoid Clean Water Act limits on its pollution. For more than a decade, the facility operated under a Clean Water Act permit to treat its waste, which is then used to irrigate a nearby golf course and is discharged into a nearby playa lake. The Clean Water Act's pollution control requirements historically applied to playa lakes, but, in 2005, the base hired a consultant to study whether the Act covered the lake. The report noted that "the limited water resources in the area are extremely important for wildlife and the surrounding vegetation," but nonetheless concluded that the playa lake lacked Clean Water Act protection.

Without a Clean Water Act permit, Cannon could discharge wastewater into the playa lake without regard to that law's requirement to limit releases to comply with state water quality standards. Wastewater at the base contains selenium, oils and greases, chloride, sulfate, nitrogen, and phosphorus. If left unchecked, these chemicals could pose a threat to human health and local ecosystems. The four thousand active-duty military members and civilians who currently work on the base deserve better.

Finally, in California, the city of Taft asked the Corps to conclude that Sandy Creek, an ephemeral stream, lacked Clean Water Act protections, so that the prison it operates would not have to comply with stricter pollution controls at its sewage treatment plant. Initially, the Corps complied, but had to withdraw its determination when EPA pointed out to the Corps that the Corps does not have authority over discharges from wastewater plants. But in the end, EPA Region 9 ruled that the creek is no longer a "water of the U.S." so the wastewater plant will no longer be subject to federal pollution limits.

Conclusion

The more then 30 case studies described in this report illustrate the unprecedented risk our waterways now face. These examples demonstrate how recent Supreme Court decisions and agency policies have removed or jeopardized safeguards for many of America's important waters. Currently, countless small streams, rivers, lakes, and wetlands across the country are being polluted, ditched, piped, and filled because they are not afforded the protections they deserve under the Clean Water Act.

Congress must act now to restore the Clean Water Act.

These case studies reveal merely the tip of the iceberg. What makes the current state of affairs particularly pernicious is that much of the destruction to our waters occurs well below the radar of public scrutiny. Unless a neighboring property owner alerts a local watchdog organization about a polluting activity or a concerned citizen questions regulatory officials directly, many waters are likely degraded or destroyed without the general public's knowledge. To capture the case studies we have included in this document, we dug deep into the agencies' files, because when a regulator decides that a water is not protected by the Clean Water Act, oftentimes the only individuals to even know are that regulator, the property owner, and an overworked EPA case reviewer. Corps decisions declaring water bodies unprotected are posted only on difficult-to-navigate websites, and sometimes for only a short time; these decisions are not subject to public notice and comment.

The stakes are enormous – inaction jeopardizes safe and sufficient water. We cannot afford to let the current rollbacks and legal confusion erase three decades of progress and return us to the days of widespread dirty water. Currently the law cannot work, as demonstrated by questionable decisions in the field endangering streams, rivers, lakes, and wetlands across this country.

Congress must enact the Clean Water Restoration Act now to stop the bleeding and restore basic Clean Water Act protections to our waters. This legislation restores protections by:

- Removing the confusing term "navigable" from the Act;
- Making clear that "waters of the United States" means the water bodies protected prior to 2001; and
- Articulating the Congress's broad constitutional authority to protect such waters.

Until Congress restores the Clean Water Act, the waters of this country are going to suffer irretrievable harm, the regulated community is going to experience unnecessary delays, and regulatory resources will be stretched to the breaking point.

By enacting legislation to restore pre-2001 Clean Water Act protections, Congress would fix all of these problems and re-establish the Clean Water Act as the comprehensive water quality protection statute that Congress passed over a generation ago.

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