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Protecting America's Clean Water Legacy

The U.S. Senate Must Reject the Barrasso-Heller Amendment to H.R. 2354

From the stream that feeds your drinking water supply to the wetlands that provide habitat for nesting ducks, America's water resources are under threat. The law that has long protected these types of water bodies from unregulated pollution, filling, and destruction—the Clean Water Act—is under attack by an amendment to be offered by Senators Barrasso (R-WY) and Heller (R-NV) on a spending bill the Senate will consider for the Army Corps of Engineers. The amendment would kill a good government initiative to clarify the types of waters the Clean Water Act protects. ***To stop the rollback of our nation's clean water protections, the U.S. Senate must oppose the Barrasso-Heller Amendment to the Fiscal 2012 Energy and Water Appropriations bill (H. R. 2354).***



When crude oil was discharged into Edwards Creek, an intermittent stream near Talco, Texas, the EPA did not attempt to pursue enforcement because it was too complex to prove the water was protected under the Clean Water Act. More than half the residents in the area get their drinking water from sources dependent on intermittent streams. *Source: EPA's Office of Enforcement and Compliance Assistance (OECA).*



The EPA discontinued all enforcement cases in the San Pedro River area of Arizona because it was so time-consuming and costly to prove that the Clean Water Act protects these rivers. *Photo: EPA/Tana Kappel © The Nature Conservancy.*



Enforcement efforts against discharges of animal manure from a factory farm were hampered in Georgia because of confusion about waterway status under the law. Unhealthy levels of viruses and bacteria were found downstream in Lake Blackshear, which is used for waterskiing and recreation. *Source: EPA/Georgia Department of Natural Resources, State Parks and Historic Sites*

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Congress passed the Clean Water Act (CWA) in 1972, guaranteeing that all of our nation's waters would be covered by a suite of pollution control programs. In 2001 and 2006, Supreme Court decisions created uncertainty about what types of waters are protected by the law, especially waters that are geographically isolated from others, or waters that lack permanent flow. Moreover, agency guidance issued under former president George W. Bush further limited the ability of pollution control officials to protect waters, making implementation of the law difficult, time consuming, and expensive.

Litigation over whether the CWA protects specific tributaries and wetlands is rampant. Lower court decisions to date have dealt with the Supreme Court's decision inconsistently. And this legal uncertainty has meant that hundreds of enforcement actions have been adversely affected. Yet, the legal uncertainty can be fixed. The Supreme Court decisions not only allow the EPA and the Army Corps of Engineers to clarify the coverage of the law, but also the decisions actively encourage it. Both agencies recently attempted to do this by drafting and seeking public input on new guidelines to help clarify whether and under what circumstances the CWA applies to rivers, lakes, marshes, streams, and more. The agencies also stated their intentions to develop, via rulemaking, more formal criteria to guide agency decisions.

THE DIRTY WATER RIDER

The Barrasso/Heller Amendment seeks to block the draft agency guidance and any future rulemaking from the EPA and the Corps on the matter –indefinitely. Specifically, the Barrasso/Heller Amendment prohibits any funds from ever being used by the Army Corps of Engineers to “develop, adopt, implement, administer, or enforce a change or supplement to” various rules and guidance documents. This means that unless, and until, Congress changes the law, the Corps would be permanently prohibited from clarifying its rules defining what waters are protected by the CWA, or changing a pair of policy memoranda (memos that have had the real-world effect of denying CWA coverage to countless streams and wetlands) that the EPA and the Corps issued during the Bush administration. Opposing the EPA's and the Corps's efforts for further clarity is no different than opposing the Clean Water Act itself. And it risks years of further litigation and inconsistent decisions in the courts. Such ambiguity means that numerous waters will be destroyed or polluted.

BY THE NUMBERS: QUANTIFYING THE THREAT

Streams, brooks, and headwater and irregularly-flowing creeks make up more than half the river miles in the continental United States, while wetlands filter polluted water, reduce the risk of flooding, and provide important wildlife habitat. The Obama administration's actions will make clear that the Clean Water Act protects these types of water bodies.

- **20 percent** of an estimated 100 million acres of wetlands in the continental United States are considered isolated, making them vulnerable.
- About **2 million miles** of the stream miles outside of Alaska, about 60 percent, do not flow year-round.
- Approximately **117 million** people in the lower 48 states, “get some or all of their drinking water from public drinking water systems that rely at least in part on intermittent, ephemeral or headwater streams,” according to an EPA analysis of drinking water supplies that rely on small and non-perennial streams.
- In a four-year period, more than **1,500** major pollution investigations of “[c]ompanies that have spilled oil, carcinogens and dangerous bacteria into lakes, rivers and other waters are not being prosecuted, according to Environmental Protection Agency regulators working on those cases,” as reported in the *New York Times*.
- The “EPA estimates that more than **40 percent** of the 37,000 permits with locational data discharge into either start reaches or intermittent/ephemeral streams, excluding Alaska. Approximately 28 percent of these discharges are from municipal sewage treatment systems, systems that treat domestic sewage as well as wastewater from commercial and industrial users.”