



# NJ Friends of Clearwater Newsletter

March 2010

Volume 3, Number 3

New Jersey Friends of  
Clearwater  
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Meetings:

Sunday, March 7-@ 2pm  
General Meeting, Eatontown  
Community Center

Monday, March 15-@7pm  
Environmental Cmte  
Meeting, Cobblestone  
Restaurant, Eatontown

**Monday, March 29-@7pm**  
**BOD Meeting, Eatontown**  
**Public Library**

Sunday, April 11-@ 2pm  
General Meeting, Eatontown  
Community Center

**Monday, April 19-@7pm**  
**Environmental Cmte**  
**Meeting, Cobblestone**  
**Restaurant, Eatontown**

**For more info on NJFC**  
**meetings go to:**

[http://www.mcclearwater.org/  
calendar\\_New/calendar.php](http://www.mcclearwater.org/calendar_New/calendar.php)

Join us on Meetup:

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## Army Signs Bogus FNSI

By Ed Dlugosz

Despite NJFC efforts to the contrary, the Fort Monmouth Garrison Manager signed a Finding of No Significant Impact (FNSI) document on 5 February 2010, claiming completion the National Environmental Protection Act (NEPA) Base Closing process for the Army at Fort Monmouth. It was not unexpected and this is not the end of our efforts.

To summarize, the FNSI was based on a bogus, incomplete Environmental Assessment (EA) issued in early May 2009. The EA was based on only a controversial 4 year-old Phase 1 Environmental Condition of the Property (ECP) and its remediation plan and did not employ the 2008 Phase 2 ECP and its call for a more comprehensive evaluation and remediation planning on the original 43 and newly-defined 27 contaminated parcels.

Two areas of major concern expressed by our reviewers of the EA/FNSI—i.e., NJFC, COA, Fort Monmouth Earth Renaissance Peace Alliance, Eatontown Environmental Commission (EC), Birdsall, Tinton Falls EC, Oceanport EC, and even the state FMERPA—that have not been addressed in any of the preceding Army assessments are health concerns to employees, contractors, and military workers exposed to the contamination during the past 50+ years and downstream sediment testing affecting marine life.

These reviewers expressed their concerns in writing last May in the Army's call for comments. The Army refused provide timely responses or to hold an open dialog with the public on these comments. Typically, the Army provided canned and sometimes misleading or irrelevant responses to grouped public comments in appendices to the Final FNSI. Ironically, the Army while stating in their FNSI document responses that everything they needed to do was available in the existing information, answered our comment about their pollution's impacts of downstream marine and human life by responding in Attachment B:

"The analysis in the EA is based on existing information, that is, information that is available for incorporation into the analysis. The Army plans to perform a Baseline, Ecological Evaluation (BEE), as recommended by the NJDEP. The objective of the BEE is to assess whether the presence of [contaminants] of concern in sediments, surface water, soil, or groundwater on [Main Post or Charles Wood Area of FM] has the potential for adverse effects on biological receptors. The assessment will be made through examination of examinations of the site for the co-occurrence of (1) contaminants of potential ecological concern, (2) environmentally sensitive areas, and (3) chemical migration pathways to the sensitive areas. The objective will be reached by completing these tasks: a data and literature review, a qualitative site visit, limited field sampling, and data analysis and ecological hazard characterization. NJDEP is reviewing a draft BEE Work Plan." The Army would not let us see a copy of the BEE Work Plan to confirm the methodology, scope of testing, or sampling areas but we have now a clue—LIMIED FIELD SAMPLING. At the last RAB meeting they said the extent of sediment testing would be within 1 or 2 feet of the landfill streambank and none would be done downstream unless evidence from those samples indicated more needed to be done. SOS!

As reported during the last 10 months, NJFC and its partners have brought the situation to the notice of local, county, state, and our federal representatives. Last

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month we reported our outreach to our US Senators and Representatives. For further background go to the News link on our website, click: <http://www.mcclearwater.org/news.php> We are planning a press release, a media blitz, and rallies around the state to bring attention to this cause.

## **Rulings Restrict Clean Water Act, Foiling E.P.A.**

By CHARLES DUHIGG and JANET ROBERTS, Published: February 28, 2010  
NYT

Thousands of the nation's largest water polluters are outside the Clean Water Act's reach because the Supreme Court has left uncertain which waterways are protected by that law, according to interviews with regulators.

As a result, some businesses are declaring that the law no longer applies to them. And pollution rates are rising. Companies 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, who estimate that more than 1,500 major pollution investigations have been discontinued or shelved in the last four years.

The Clean Water Act was intended to end dangerous water pollution by regulating every major polluter. But today, regulators may be unable to prosecute as many as half of the nation's largest known polluters because officials lack jurisdiction or because proving jurisdiction would be overwhelmingly difficult or time consuming, according to midlevel officials.

"We are, in essence, shutting down our Clean Water programs in some states," said Douglas F. Mundrick, an E.P.A. lawyer in Atlanta. "This is a huge step backward. When companies figure out the cops can't operate, they start remembering how much cheaper it is to just dump stuff in a nearby creek."

"This is a huge deal," James M. Tierney, the New York State assistant commissioner for water resources, said of the new constraints. "There are whole watersheds that feed into New York's drinking water supply that are, as of now, unprotected." The court rulings causing these problems focused on language in the Clean Water Act that limited it to "the discharge of pollutants into the navigable waters" of the United States. For decades, "navigable waters" was broadly interpreted by regulators to include many large wetlands and streams that connected to major rivers.

But the two decisions suggested that waterways that are entirely within one state, creeks that sometimes go dry, and lakes unconnected to larger water systems may not be "navigable waters" and are therefore not covered by the act — even though pollution from such waterways can make its way into sources of drinking water. Some argue that such decisions help limit overreaching regulatory efforts.

"There is no doubt in my mind that when Congress passed the Clean Water Act in 1972 they intended it to have broad regulatory reach, but they did not intend it to be unlimited," said Don Parrish, the American Farm Bureau Federation's senior director of regulatory relations, who has lobbied on Clean Water issues.

But for E.P.A. and state regulators, the decisions have created widespread uncertainty. The court did not define which waterways are regulated, and judicial districts have interpreted the court's decisions differently. As regulators have struggled to guess how various courts will rule, some E.P.A. lawyers have established unwritten internal guidelines to avoid cases in which proving jurisdiction is too difficult, according to interviews with more than two dozen current and former E.P.A. officials.

The decisions "reduce E.P.A.'s ability to do what the law intends — to protect water quality, the environment and public health," wrote Peter S. Silva, the E.P.A.'s assistant administrator for the Office of Water, in response to questions. About 117 million Americans get their drinking water from sources fed by waters that are vulnerable to exclusion from the Clean Water Act, according to E.P.A. reports.

The E.P.A. said in a statement that it did not automatically concede that any significant water body was outside the authority of the Clean Water Act.

“Jurisdictional determinations must be made on a case-by-case basis,” the agency wrote. Officials added that they believed that even many streams that go dry for long periods were within the act’s jurisdiction. But midlevel E.P.A. officials said that internal studies indicated that as many as 45 percent of major polluters might be either outside regulatory reach or in areas where proving jurisdiction is overwhelmingly difficult.

And even in situations in which regulators believe they still have jurisdiction, companies have delayed cases for years by arguing that the ambiguity precludes prosecution. In some instances, regulators have simply dropped enforcement actions. In the last two years, some members of Congress have tried to limit the impact of the court decisions by introducing legislation known as the Clean Water Restoration Act. It has been approved by a Senate committee but not yet introduced this session in the House.

The legislation tries to resolve these problems by, in part, removing the word “navigable” from the law and restoring regulators’ authority over all waters that were regulated before the Supreme Court decisions. But a broad coalition of industries has often successfully lobbied to prevent the full Congress from voting on such proposals by telling farmers and small-business owners that the new legislation would permit the government to regulate rain puddles and small ponds and layer new regulations on how they dispose of waste.

“The game plan is to emphasize the scary possibilities,” said one member of the Waters Advocacy Coalition, which has fought the legislation and is supported by the American Farm Bureau Federation, the National Association of Home Builders and other groups representing industries affected by the Clean Water Act. “If you can get Glenn Beck to say that government storm troopers are going to invade your property, farmers in the Midwest will light up their congressmen’s switchboards,” said the coalition member, who asked not to be identified because he thought his descriptions would anger other coalition participants. Mr. Beck, a conservative commentator on Fox News, spoke at length against the Clean Water Restoration Act in December.

The American Land Rights Association, another organization opposed to legislation, wrote last June that people should “Deluge your senators with calls, faxes and e-mails.” A news release the same month from the American Farm Bureau Federation warned that “even rainwater would be regulated.” “If you erase the word ‘navigable’ from the law, it erases any limitation on the federal government’s reach,” said Mr. Parrish of the American Farm Bureau Federation. “It could be a gutter, a roadside ditch or a rain puddle. But under the new law, the government gets control over it.”

Legislators say these statements are misleading and intended to create panic. “These claims just aren’t true,” said Senator Benjamin L. Cardin, Democrat of Maryland. He helped push the bill through the Senate Environment and Public Works Committee. “This bill,” he said, “is solely aimed at restoring the law to what it covered before the Supreme Court decisions.”

The consequences of the Supreme Court decisions are stark. In drier states, some polluters say the act no longer applies to them and are therefore refusing to renew or apply for permits, making it impossible to monitor what they are dumping, say officials. Cannon Air Force Base near Clovis, N.M., for instance, recently informed E.P.A. officials that it no longer considered itself subject to the act. It dumps wastewater — containing bacteria and human sewage — into a lake on the base.

More than 200 oil spill cases were delayed as of 2008, according to a memorandum written by an E.P.A. official and collected by Congressional investigators. And even as the number of facilities violating the Clean Water Act has steadily increased each year, E.P.A. judicial actions against major polluters have fallen by almost half since the Supreme Court rulings, according to an analysis of E.P.A. data by The New York Times. The Clean Water Act does not directly deal with drinking water. Rather, it was meant to regulate the polluters that contaminated the waterways that supplied many towns and cities with tap water.

The two Supreme Court decisions at issue — Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers in 2001 and Rapanos v. United States in 2006 — focused on the federal government’s jurisdiction over various wetlands. In both cases, dissenting justices warned that limiting the power of the federal government would weaken its ability to combat water pollution. “Cases now are lost because the company is discharging into a stream that flows into a river, rather than the river itself,” said David M. Uhlmann, a law professor at the University of Michigan who led the environmental crimes section of the Justice Department during the last administration. In 2007, for instance, after a pipe manufacturer in Alabama, a division of McWane Inc., was convicted and fined millions of dollars for dumping oil, lead, zinc and other chemicals into a large creek, an appellate court overturned that conviction and fine, ruling that the Supreme Court precedent exempted the waterway from the Clean Water Act. The company eventually settled by agreeing to pay a smaller amount and submit to probation.

Some E.P.A. officials say solutions beyond the Clean Water Restoration Act are available. They argue that the agency’s chief, Lisa P. Jackson, could issue regulations that seek to clarify jurisdiction of the Clean Water Act. Mrs. Jackson has urged Congress to resolve these issues. But she has not issued new regulations. “E.P.A., with our federal partners, emphasized to Congress in a May 2009 letter that legislation is the best way to restore the Clean Water Act’s effectiveness,” wrote Mr. Silva in a statement to The Times. “E.P.A. and the Army Corps of Engineers will continue to implement our water programs to protect the nation’s waters and the environment as effectively as possible, including consideration of administrative actions to restore the scope of waters protected under the Clean Water Act.” In the meantime, both state and federal regulators say they are prevented from protecting important waterways. “We need something to fix these gaps,” said Mr. Tierney, the New York official. “The Clean Water Act worked for over 30 years, and we’re at risk of losing that if we can’t get a new law.”

### **Festival Committees Reforming**

The NJ Friends of Clearwater Festival is our annual open-air environment, music and arts festival celebrating the spirit of people working and singing together for the environment. The finest in music and dance combines with environmental activism to celebrate our waterways. We need volunteers to plan and manage the upcoming 35<sup>th</sup> Annual Clearwater Festival through the following committees:

Site	Concessions	Peacekeeping
Entertainment	Environmental Activist	Recycling
Children’s Area	Vendors	Construction
Environmental Action	Publicity	Roadies
Hospitality	Universal Access	

If you liked what you saw or would like to make a change, then volunteer by Responding to: [ClearwaterFestival@mcclearwater.org](mailto:ClearwaterFestival@mcclearwater.org) or visit us at: [http://www.mcclearwater.org/docs/clearwater-festival/Volunteer\\_Form\\_Festival.pdf](http://www.mcclearwater.org/docs/clearwater-festival/Volunteer_Form_Festival.pdf) We are still looking for committee chairpeople to fill a few vacancies. Some of our usual suspects have stepped up to new, bigger challenges but they’ve left small voids that need to be filled.

**Wearing Green is Easy!  
Being Green is a Way of Life**

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Article Deadline for the April issue of NJFC Newsletter is Monday, March 22

E-mail your articles to [newsletter@mcclearwater.org](mailto:newsletter@mcclearwater.org) By the deadline stated above, please use the phrase “MC Clearwater article” in the subject of your e-mail

NJFC Membership Info: [www.mcclearwater.org/docs/membership-form.htm](http://www.mcclearwater.org/docs/membership-form.htm)

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