

The Clean Water Act Guidance: What It Does And Does Not Do

On April 27, 2011 the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) took an important step toward clarifying and restoring long-standing Clean Water Act protections for U.S. streams, wetlands, and other waters, by releasing clean water guidance. These waters are at risk of pollution and destruction due to two fractured U.S. Supreme Court decisions: *SWANCC* (2001) and *Rapanos* (2006).

The administration's proposed guidance is necessary to help the EPA and the Corps field staff more consistently and efficiently determine what waters are protected under the Act in light of these two decisions. The proposed guidance is scientifically sound and falls well within the limits of the Clean Water Act and Supreme Court decisions. It is available for public comment through July 31, 2011. **The guidance will not become effective until issued in final form, and it will likely be followed by a formal rulemaking.**



Via flickr, Scott Butner

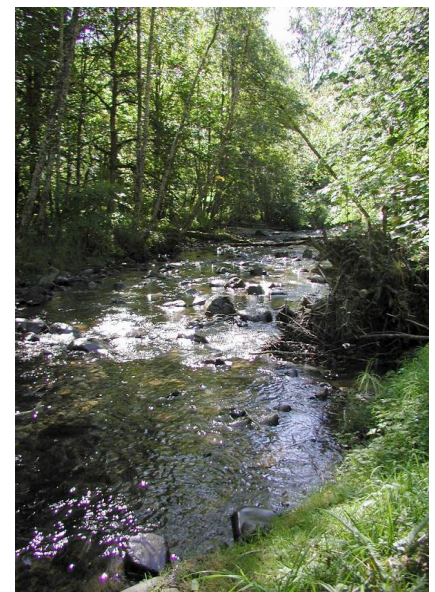
A Decade of Lost Protections and the Need for New Clean Water Act Guidance

Prior to the SWANCC decision in 2001 -- virtually all streams, wetlands, lakes, and other natural water bodies were covered under the Clean Water Act in accordance with congressional intent and the long-standing Corps and EPA definitions of "waters of the United States." The important physical, chemical, and biological connections between upstream wetlands and tributaries and downstream navigable waters were accepted and presumed to exist. As Tennessee Senator Howard Baker (R) said in his 1977 floor statement:

...the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.

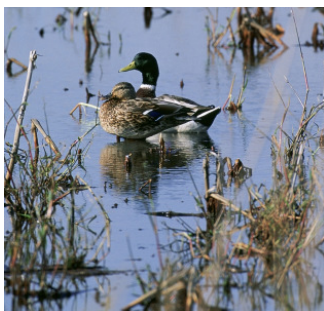
Since 2001 -- the *SWANCC* and *Rapanos* decisions and subsequent administration guidance issued in 2003 and 2008 have called into question the importance of these upstream tributaries and wetlands and, as a result, have jeopardized critical water resources and fish and wildlife habitat. Taken together, they have:

- **Removed protections for at least 20 million acres of wetlands.** These include prairie potholes and other seasonal wetlands essential to waterfowl populations throughout the country.
- **Put at risk 59% of all stream miles in the continental United States.** Many of these streams provide critical habitat for countless fish, especially trout, and feed into the public drinking water systems of more than 117 million Americans.



U.S. Fish and Wildlife Service

The Proposed Guidance More Clearly Protects Many Streams, Wetlands and Other Waters Where Supported by Science



USFWS

The proposed guidance does not, and cannot, restore protections to all the wetlands and other waters that were protected for almost 30 years prior to 2001. However, the guidance does provide for more certain and predictable protections for many streams, wetlands, and other waters by comparison to the existing 2003 and 2008 guidance documents.

The guidance would restore protections for many streams, wetlands, and other waters where it is shown that they have a “significant nexus” – a significant physical, chemical, or biological connection – to a traditionally navigable or interstate water. These connections include surface water and pollution flow, as well as the direct role wetlands play in storing flood waters, filtering pollutants, sediment trapping, recycling nutrients, and providing organic matter, food, and habitat to neighboring and downstream waters. Under the guidance, these connections must be documented to establish jurisdiction.

Consistent with sound science and Justice Kennedy’s significant nexus test, the proposed guidance calls for consideration of these important connections, taking into account the combined downstream effects of the tributaries and adjacent waters within the watershed. When these combined downstream effects are accounted for, significant nexus and Clean Water Act jurisdiction are likely to be established for these waters.

The two major categories of waters the guidance better protects based on this fact-specific showing of significant nexus are:

- tributaries to traditionally navigable or interstate waters (e.g., intermittent, ephemeral, and headwater streams that have a defined bed and bank and flow directly or indirectly to a traditionally navigable or interstate water); and
- wetlands and other waters that are adjacent to these tributaries.

Many Geographically Separate Waters Remain at Risk

The proposed guidance allows that Clean Water Act protections may apply to prairie potholes and other geographically separate waters, but only in very limited circumstances. The proposed guidance requires a “compelling scientific basis” before considering the combined downstream effects of geographically separate, “isolated,” non-proximate waters like prairie potholes and playa lakes.

Significant downstream connections are difficult to demonstrate when considering each pothole in isolation, while collectively the prairie potholes are known to provide invaluable flood storage and habitat functions. Restoring long-standing protections for these geographically separated waters will require marshalling scientific evidence to demonstrate the cumulative effects of these waters on downstream traditionally navigable and interstate waters. It will also likely require a formal rulemaking process and a revised “waters of the United States” rule.

The Proposed Guidance Closely Tracks Justice Kennedy’s Significant Nexus Test

Justice Anthony Kennedy set out a “significant nexus test” in his *Rapanos* opinion, which courts across the country are following for interpreting the Clean Water Act. According to Justice Kennedy, waters have the required significant nexus if they, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” In other words, waters that are “similarly situated” in a “region” (i.e., a watershed) should be considered together to determine if they collectively have a significant effect on the health of downstream waters.

Following Justice Kennedy, the proposed guidance identifies two major categories of “similarly situated” waters: tributaries and adjacent wetlands and other waters. To determine whether a certain water body has a significant nexus, the guidance instructs field staff to look at the impacts on downstream waters of all the water bodies in that category in the watershed. For example, a particular tributary stream would be covered by the Act if that tributary individually, or taken together with all the tributaries within the particular watershed has a “predictable or observable chemical, physical, or biological” connection with those downstream waters that are clearly covered by the law.

The Proposed Guidance Excludes Artificial Waters and Preserves Existing Agriculture Exemptions

The proposed guidance excludes artificial waters, preserves long-standing Clean Water Act exemptions for farming and forestry, and otherwise falls well within the limits of the Clean Water Act and Supreme Court decisions.



Via flickr, Paco Lyptic

The guidance generally excludes many artificial water features, such as:

- Non-tidal drainage and irrigation ditches not connected to a jurisdictional water.
- Artificially irrigated areas that would revert to upland should irrigation cease.
- Artificial lakes or ponds used for purposes such as stock watering.
- Artificial ornamental waters created for primarily aesthetic reasons.
- Water-filled depressions created as a result of construction activity.

The guidance preserves the existing Clean Water Act exemptions for farming, forestry, mining and certain other land use activities.

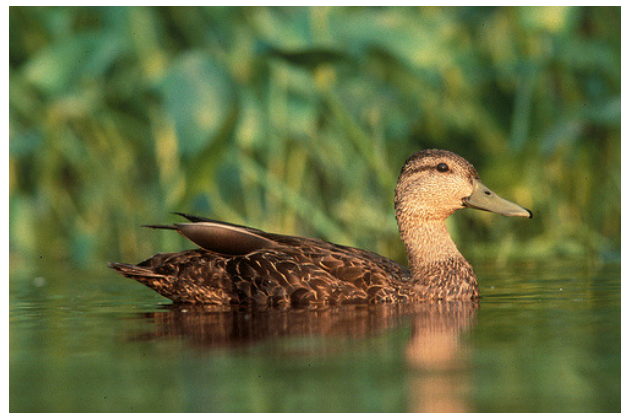
The following activities – directly quoted from the law – are exempt from the Act’s wetland and pollution discharge permitting requirements:

- most common farming and ranching practices, including “plowing, cultivating, seeding, minor drainage, harvesting for the production of food, fiber, and forest products;”
- “construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;”
- “agricultural stormwater discharges and return flows from irrigated agriculture;”
- “construction of temporary sediment basins on a construction site;” and,
- “construction or maintenance of farm or forest roads or temporary roads for moving mining equipment.”

Next Step: Clarifying Clean Water Regulations

The proposed guidance is a critical first step in restoring long-standing Clean Water Act protections to many streams, wetlands, and other waters. The administration indicates that it will take additional steps in coming months to clarify the waters subject to the Clean Water Act by proposing revisions to the agencies’ existing regulations defining the term “waters of the United States.” This new rulemaking will entail a public, transparent process with multiple opportunities for stakeholder involvement.

This next step, called for by Supreme Court justices, as well as industry stakeholders and our groups, will strengthen the Clean Water Act’s legal and scientific foundation, and will provide greater long-term certainty for landowners and protection for streams, wetlands, and other waters.



Black Duck swimming at Blackwater National Wildlife Refuge, MD, USFWS

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