



Clean Water Act Guidance: A Balanced Approach to Restoring Clean Water Act Protections

On April 27, the administration took a positive and balanced step to begin restoring long-standing Clean Water Act protections for U.S. streams, wetlands, and other waters. These waters are at risk of pollution and destruction due to two U.S. Supreme Court decisions: *SWANCC* (2001) and *Rapanos* (2006). The administration's proposed guidance is necessary to help the Environmental Protection Agency (EPA) and Army Corps of Engineers more consistently and efficiently implement the Act.

Issuing agency guidance – instructions to staff in the field about how to interpret laws or court decisions – is a well-established practice used by every administration. It is necessary in this case due to the confusing and complicated nature of this issue and inconsistent decision-making that frequently results. **The proposed guidance is moderate and reasonable and falls well within the limits of the Clean Water Act and Supreme Court decisions.** It will be available for public comment for 60 days.

Guidance Restores Protections for Important Waters

The *SWANCC* and *Rapanos* decisions and subsequent administration guidance issued in 2003 and 2008 continue to jeopardize critical water resources and fish and wildlife habitat. Taken together, they have removed protections for at least 20 million acres of wetlands, particularly prairie potholes and other seasonal wetlands essential to waterfowl populations throughout the country. They have also 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.**

The proposed guidance would begin to restore long-standing Clean Water Act protections to many streams, lakes, and wetlands that Congress intended to safeguard when it passed the Act in 1972. Tributary streams and wetlands that flow to larger waters, including rivers, lakes, and other wetlands that cross state lines, would be protected once again. The guidance also would begin to restore protections for wetlands with significant connections to navigable or interstate waters. These connections range from surface water flow to the direct role wetlands play in storing flood waters and filtering pollutants.

Guidance Abides by the Clean Water Act, Centrist Supreme Court Opinion, and Science



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The proposed guidance establishes a more clear and defined process for protecting specific waters that is based on the Clean Water Act, science, and Justice Anthony Kennedy's centrist *Rapanos* opinion. The opening section of the Act states, "The objective of this Act is to restore and maintain the physical, chemical, and biological integrity of the Nation's waters." Congress did not pass the law to facilitate navigation – it acted to improve water quality by limiting pollution and degradation of the inter-connected waters of the United States.

The proposed guidance is also in line with Justice Kennedy's discussion of how to determine whether the Clean Water Act protects certain waters. In his *Rapanos* opinion – which courts across the country are following for interpreting the Clean Water Act – he made clear that the law does not apply to waters if their effects on the physical, chemical, or biological integrity of other waters to which the Act applies are "speculative or insubstantial." The proposal, which closely tracks Justice Kennedy's opinion, sets forth a clear and scientifically sound process where natural water bodies will be protected *if* they are shown to have a "predictable or observable chemical, physical, or biological functional relationship" with waters that are clearly covered by the law.

Guidance is Limited and Does Not Expand the Clean Water Act



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The proposed guidance takes a moderate approach that falls within the limits of the Clean Water Act and Supreme Court decisions. **The guidance generally excludes many land and artificial water features, such as:**

- artificial stock, irrigation, and ornamental ponds excavated in dry land;
- features commonly associated with erosion, including gullies, rills, and swales; and
- ditches, including road-side ditches, that are excavated in dry land and do not carry water most of the year.

In addition, the guidance does not affect any of the existing exemptions in the Clean Water Act and therefore preserves these exemptions for a wide range of 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 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.



U.S. Fish and Wildlife Service

For more information please contact:

Scott Yaich, Ducks Unlimited, 901-758-3874, syaich@ducks.org
Scott Kovarovics, Izaak Walton League of America, 301-548-0150 x 223, skovarovics@iwla.org
Jan Goldman-Carter, National Wildlife Federation, 202-797-6894, goldmancarterj@nwf.org
Steve Kline, Theodore Roosevelt Conservation Partnership, 202-639-8727, skline@trcp.org
Steve Moyer, Trout Unlimited, 703-284-9406, smoyer@tu.org