

Guidance to Identify Waters Protected by the Clean Water Act

Americans depend on clean and abundant water. However, over the past decade, interpretations of Supreme Court rulings removed some critical waters from Federal protection, and caused confusion about which waters and wetlands are protected under the Clean Water Act. As a result, important waters now lack clear protection under the law, and businesses and regulators face uncertainty and delay. The Obama Administration is committed to protecting waters on which the health of people, the economy and ecosystems depend.

U.S. EPA and the U.S. Army Corps of Engineers have developed draft guidance for determining whether a waterway, water body, or wetland is protected by the Clean Water Act. This guidance would replace previous guidance to reaffirm protection for critical waters. It also will provide clearer, more predictable guidelines for determining which water bodies are protected by the Clean Water Act. The draft guidance will be open for 60 days of public comment to allow all stakeholders to provide input and feedback before it is finalized.

The draft guidance will reaffirm protections for small streams that feed into larger streams, rivers, bays and coastal waters. It will also reaffirm protection for wetlands that filter pollution and help protect communities from flooding. Discharging pollution into protected waters (e.g., dumping sewage, contaminants, or industrial pollution) or filling protected waters and wetlands (e.g., building a housing development or a parking lot) require permits. This guidance will keep safe the streams and wetlands that affect the quality of the water used for drinking, swimming, fishing, farming, manufacturing, tourism and other activities essential to the American economy and quality of life. It also will provide regulatory clarity, predictability, consistency and transparency.

EPA and the Corps will follow up the final guidance with rulemaking to provide further opportunity for comment and to clarify Clean Water Act regulations.

What's Covered

The proposed guidance will help restore protections for waters by providing:

- Clarification that small streams and streams that flow part of the year are protected under the Clean Water Act if they have a physical, chemical or biological connection to larger bodies of water downstream and could affect the integrity of those downstream waters. Agencies would be able to evaluate groups of waters holistically rather than the current, piecemeal, stream-by-stream analysis.
- Acknowledgment that when a water body does not have a surface connection to an interstate water or a traditional navigable water, but there is a significant physical, chemical or biological connection between the two, both waterbodies should be protected under the Clean Water Act.
- Recognition that waterbodies may be “traditional navigable waters,” and subject to Clean Water Act protections, under a wider range of circumstances than identified in previous guidance.
- Clarification that interstate waters (crossing state borders) are protected.

What's Not Covered

This new guidance does not change any of the existing agriculture exemptions under the Clean Water Act. All of the Act's exemptions from permitting requirements for normal agriculture, forestry and ranching practices continue to apply. The guidance also clearly describes waters not regulated under the Act, including:

- Certain artificially irrigated areas
- Many agricultural and roadside ditches
- Artificial lakes or ponds, including farm and stock ponds

Summary of Key Points in the Proposed Guidance

Based on the agencies' interpretation of the statute, implementing regulations and relevant caselaw, the following waters are protected by the Clean Water Act:

- Traditional navigable waters
- Interstate waters
- Wetlands adjacent to either traditional navigable waters or interstate waters
- Non-navigable tributaries to traditional navigable waters that are relatively permanent, meaning they contain water at least seasonally
- Wetlands that directly abut relatively permanent waters

In addition, the following waters are protected by the Clean Water Act if a fact-specific analysis determines they have a “significant nexus” to a traditional navigable water or interstate water:

- Tributaries to traditional navigable waters or interstate waters
- Wetlands adjacent to jurisdictional tributaries to traditional navigable waters or interstate waters
- Waters that fall under the “other waters” category of the regulations. The guidance divides these waters into two categories, those that are physically proximate to other jurisdictional waters and those that are not, and discusses how each category should be evaluated.

The following aquatic areas are generally not protected by the Clean Water Act:

- Wet areas that are not tributaries or open waters and do not meet the agencies' regulatory definition of “wetlands”
- Waters excluded from coverage under the CWA by existing regulations
- Waters that lack a “significant nexus” where one is required for a water to be protected by the CWA
- Artificially irrigated areas that would revert to upland should irrigation cease
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons
- Water-filled depressions created incidental to construction activity
- Groundwater drained through subsurface drainage systems and
- Erosional features (gullies and rills), and swales and ditches that are not tributaries or wetlands