



Clean Water Act: Myths and Facts

What Waters Are Protected Under the Clean Water Act? (Or Were Until the Bush Administration Came Along)

Myth 1: The Clean Water Authority Restoration Act (CWARA) goes too far – even protecting bird baths, mud puddles, and ditches.

Reality: The CWARA does not add any new protections to waters, nor would it protect any waters that were not long-protected under the Clean Water Act. The Act was never construed so broadly as to protect bird baths, mud puddles or ditches. The bill would simply reaffirm the historic scope of the Clean Water Act as it has been understood by the Congress, the courts and the public since it was passed in 1972.

Myth 2: The Bush Administration has simply been following what the Supreme Court said about isolated waters.

Reality: In its two major rulings since 2001, the Supreme Court held:

- That the Clean Water Act could not be read so broadly as to include protections for intrastate, isolated, non-navigable waters solely on the basis of their use by migratory birds (the SWANCC case). It did not remove protection from all “isolated” waters. The ruling was extremely narrow.
- That there has to be a “nexus” between navigable streams and wetlands in order for them to fall under Clean Water protection (the Carabell and Rapanos cases). That this nexus exists is well established and documented by biologists and other scientists for the vast majority of streams, wetlands and other waterbodies.

Neither ruling necessitated any changes to existing Clean Water Act rules. Nevertheless, the administration has pursued a policy of excluding many waters that should still be protected under rules and administrative “guidance” it has been attempting to put forward since 2003.

Myth 3: The administration’s response to Supreme Court rulings is only about whether the Corps allows people to fill a few wetlands.

Reality: This issue is not solely about wetlands, nor is it solely about dredge and fill activities. Where the federal agencies determine that a water is not a “water of the United States” none of the Clean Water Act’s protections apply, even those requiring permits for point-source discharges and preventing oil spills. The administration’s 2003 policy directive talks about which “waters” the agencies believe should be excluded from Clean Water Act protections. The directive suggests that not just wetlands, but also seasonal streams, small tributaries a significant distance from navigable waters, ponds, terminal basins, and waters that have been made to run through a man-made conveyance such as a pipe, ditch or culvert, may no longer be protected by

the Clean Water Act. Already, Clean Water Act protections have been withheld from numerous large lakes, streams, and even rivers.

Myth 4: The waters in question are isolated. Concern about pollution of downstream waters is a ‘red herring’.

Reality: From a scientific standpoint, there are few, if any, “isolated” waters. The so-called isolated waters targeted for exclusion from CWA protection are virtually all connected, either through subsurface flows, groundwater connections, sheet flow, etc. to other waters. If you dump pollution in small vernal pools or ephemeral streams, that pollution will eventually make its way down into the waters that supply our water for drinking, irrigation, or recreational use. Exclusion and subsequent degradation of these waters will also intensify the conditions that lead to drought, flood and water quantity shortages in our ground water and lakes, rivers and streams and will exacerbate both local and worldwide climate change.

Myth 5: The wetlands and streams involved play an insignificant role in the environment.

Reality: A wide range of waters are jeopardized by the administration’s policy. Some of the waters at risk include ephemeral streams that are primarily fed by rainfall or snowmelt, and wetlands that only remain “wet” for a limited part of the year. However, these small streams and wetlands are some of the most critical for absorbing floodwaters, filtering pollution, providing critical wildlife habitat, and providing base flow and recharge in both arid and non arid regions alike. In fact, the EPA recently stated that some 90% of surface water protection areas critical for providing safe drinking water for some 110 million Americans contain start reaches, intermittent or ephemeral streams. The Clean Water Act was intended to protect these waters from the beginning.

Myth 6: Since the Bush Administration’s proposed rulemaking to exclude many waters from protection was halted in 2003, America’s waters are no longer in danger.

Reality: In January 2003, the Bush Administration proposed a rulemaking to exclude many waters from protection, that was subsequently rescinded, and issued a Policy Directive by the EPA and Army Corps that remains in effect and instructs EPA and Corps field staff to withhold Clean Water Act protections from what EPA estimates is about 20 percent of the country’s remaining wetlands, as well as many lakes, streams, rivers and other waters. Specifically, the directive tells staff that they should not extend protections to any water they consider to be “isolated” without first getting permission from headquarters in Washington, DC.

Myth 7: The regulated community just wants “certainty” as to what is protected.

Reality: “Certainty” can be restored by reaffirming the historic scope of the Clean Water Act. This however, is strongly opposed by the regulated community. When the industry groups say that they want “certainty,” what they seem to mean is that they want certainty that most of the nation’s waters won’t be protected.

Myth 8: Other federal programs exist to protect waters that are excluded from Clean Water Act protection.

Reality: Other federal programs do not effectively substitute for federal Clean Water Act protections from pollution. There are many other programs dedicated to wetlands besides the Clean Water Act, but those programs are intended as supplements to, not substitutes for, the Clean Water Act.

Myth 9: The administration has committed to achieving a “net gain” of wetlands.

Reality: While the President, in his 2004 Earth Day speech, announced an initiative to restore one million acres, enhance one million acres, and protect one million acres of wetlands over the next five years – and to achieve a net gain of wetlands, in reality there is little, if anything “new” behind this pledge. The administration is still failing to fully fund the Wetlands Reserve Program and still refuses to withdraw their policy directive that has left 20 million acres of wetlands at risk. When pressed, the administration also admits that their restoration/enhancement/protection program won’t necessarily lead to a net gain of wetlands. As recently as March 2006, the administration continued to mislead the public about wetlands trends. A Bush administration report on wetland trends counted ponds as wetlands when attempting to demonstrate a net gain for wetlands across the country. The report did not distinguish between actual wetlands and ponds used for treating wastewater, stormwater and other effluent and as amenities for subdivisions. Man-made ponds are not wetlands. If these ponds were removed from the figures presented in this report, the supposed “net gain in wetlands” would be eliminated.

Myth 10: My state has a program that protects wetlands so we do not have to worry about the federal weakening of clean water protections.

Reality: While some states do have strong wetland protection programs in place that will serve as a backup if federal protections are stripped for these types of water resources, many do not. Also many watersheds rely on strong upstream protection of water resources that flow from other states that may not have adequate protections in place therefore potentially degrading the quality or lessening the quantity of flow from the upstream states. Further, strong federal protections are useful even in states with strong wetland programs as a backstop for agency errors or permits that might be used because of in-state political pressure.

April 2007

4455 Connecticut Ave. NW
Washington DC 20008
202-895-0420
www.cleanwateraction.org