



**EARTHJUSTICE**

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## Comparison of Existing Clean Water Act Definition of “Waters of the U.S.” vs. Bush Administration New, Limited Definition of “Waters”

The jurisdictional scope of the Clean Water Act (“CWA”) is “navigable waters,” defined in the statute as “**waters of the United States**, including the territorial seas.” *CWA section 502(7), 33 U.S.C. 1362(7)*.

“Waters of the United States” has been broadly defined in EPA and Army Corps regulations since 1975.

### Current Definition of “Waters of the US”

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) which are used or could be used for industrial purposes by industries in interstate commerce.
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.
- (8) Waters of the United States do not include prior converted cropland .... Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds ...) are not waters of the United States.

*40 CFR.230.3(s); 33 CFR 328.3(a); see also substantively similar regulatory definitions at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300, 302.3 and 401.11.*

### Bush Administration Draft Rewrite of the Definition of “Waters of the US” (Nov. 6, 2003)

- (1) the territorial seas;
- (2) traditional navigable waters;
- (3) tributaries to traditional navigable waters;
- (4) wetlands adjacent to waters listed in (1) – (3)

“Traditional navigable waters” is not defined.

“Tributaries” is defined as “waters that are part of a system of surface waters and that contribute regular and recurrent flow to traditional navigable waters ... Perennial streams and intermittent streams that contribute flow to traditional navigable waters are tributaries. Flows to traditional navigable waters must be conveyed through a continuous system of tributaries and/or tributary connections.... Tributaries do not include... discrete flows that do not have groundwater as a source, such as ephemeral washes or streams.”

“Intermittent stream” is defined as “a stream that has flowing water for at least six months in years with normal precipitation patterns, when groundwater provides water for stream flow....”

“Adjacent” is defined as “hydrologically contiguous such that adjacent wetlands provide regular and continuous flow of surface waters to waters listed in paragraph a(1) - (3). Surface flows to traditional navigable waters include flows conveyed through tributary connections. The continuous flow of surface water which connects wetlands to traditionally navigable waters must be constant except for seasonal dry periods that occur during years with normal precipitation patterns.”