

# Rulings Restrict Clean Water Act, Foiling E.P.A.



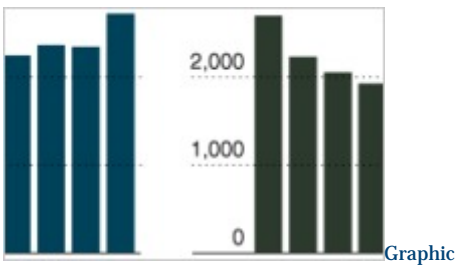
David Walter Banks for The New York Times

The mouth of Avondale Creek in Alabama, into which a pipe maker dumped oil, lead and zinc. A court ruled the waterway was exempt from the Clean Water Act.

By CHARLES DUHIGG and JANET ROBERTS

Thousands of the nation's largest water polluters are outside the Clean Water Act's reach because the Supreme Court has left uncertain which waterways are protected by that law, according to interviews with regulators.

## Multimedia



Polluters Beyond the Law



Chris Gardner/Associated Press

Senator Benjamin L. Cardin has promoted a bill “aimed at restoring the law to what it covered” before justices weakened it.

As a result, some businesses are declaring that the law no longer applies to them. And pollution rates are rising.

Companies that have spilled oil, carcinogens and dangerous bacteria into lakes, rivers and other waters are not being prosecuted, according to Environmental Protection Agency regulators working on those cases, who estimate that more than 1,500 major pollution investigations have been discontinued or shelved in the last four years.

The Clean Water Act was intended to end dangerous water pollution by regulating every major polluter. But today, regulators may be unable to prosecute as many as half of the nation’s largest known polluters because officials lack jurisdiction or because proving jurisdiction would be overwhelmingly difficult or time consuming, according to midlevel officials.

“We are, in essence, shutting down our Clean Water programs in some states,” said Douglas F. Mundrick, an E.P.A. lawyer in Atlanta. “This is a huge step backward. When companies figure out the cops can’t operate, they start remembering how much cheaper it is to just dump stuff in a nearby creek.”

“This is a huge deal,” James M. Tierney, the New York State assistant commissioner for water resources, said of the new constraints. “There are whole watersheds that feed into New York’s drinking water supply that are, as of now, unprotected.”

The court rulings causing these problems focused on language in the Clean Water Act that limited it to “the discharge of pollutants into the navigable waters” of the United States. For decades, “navigable waters” was broadly interpreted by regulators to include many large wetlands and streams that connected to major rivers.

But the two decisions suggested that waterways that are entirely within one state, creeks that sometimes go dry, and lakes unconnected to larger water systems may not be “navigable waters” and are therefore not covered by the act — even though pollution from such waterways can make its way into sources of drinking water.

Some argue that such decisions help limit overreaching regulatory efforts.

“There is no doubt in my mind that when Congress passed the Clean Water Act in 1972 they intended it to have broad regulatory reach, but they did not intend it to be unlimited,” said Don Parrish, the American Farm Bureau Federation’s senior director of regulatory relations, who has lobbied on Clean Water issues.

But for E.P.A. and state regulators, the decisions have created widespread uncertainty. The court did not define which waterways are regulated, and judicial districts have interpreted the court’s decisions differently. As regulators have struggled to guess how various courts will rule, some E.P.A. lawyers have established unwritten internal guidelines to avoid cases in which proving jurisdiction is too difficult, according to interviews with more than two dozen current and former E.P.A. officials.

The decisions “reduce E.P.A.’s ability to do what the law intends — to protect water quality, the environment and public health,” wrote Peter S. Silva, the E.P.A.’s assistant administrator for the Office of Water, in response to questions.

About 117 million Americans get their drinking water from sources fed by waters that are vulnerable to exclusion from the Clean Water Act, according to E.P.A. reports.

The E.P.A. said in a statement that it did not automatically concede that any significant water body was outside the authority of the Clean Water Act. “Jurisdictional determinations must be made on a case-by-case basis,” the agency wrote. Officials added that they believed that even many streams that go dry for long periods were within the act’s jurisdiction.

But midlevel E.P.A. officials said that internal studies indicated that as many as 45 percent of major polluters might be either outside regulatory reach or in areas where proving jurisdiction is overwhelmingly difficult.