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Water Pollution

EPA Study Could Be Used to Expand Reach of Law Over Waters, Wetlands

EPA Draft Connectivity Study

Key Development: Attorneys say the EPA's draft connectivity study will serve as the scientific basis for the corps and the EPA to expand jurisdiction of federally protected waters.

Potential Impact: Any expansion in jurisdiction means more waters and wetlands could be subject to Clean Water Act permitting requirements.

By *Amena H. Saivid*

Sept. 26 -- Federal regulators may be able to assert Clean Water Act jurisdiction over more waters and wetlands than are now protected on the basis of a draft scientific study that links all streams and certain wetlands with larger, downstream navigable waters, attorneys and policy analysts say.

The Environmental Protection Agency's draft study finds that all tributary streams, including perennial and the previously unprotected intermittent and ephemeral streams, are physically, chemically and biologically connected to downstream rivers.

The study, released Sept. 17, also finds that wetlands and open waters in flood plains of rivers and riparian areas are connected in the same way as streams are to downstream rivers.

The study, however, was unable to generalize that a connection exists between isolated wetlands and open waters, such as playa lakes and prairie potholes, that are located outside flood plains and downstream waters. Instead, it said the EPA and the U.S. Army Corps of Engineers could, on a case-by-case basis, evaluate whether these isolated wetlands have an aggregate impact on downstream waters.

The EPA said the study provides the first comprehensive link between headwater streams, which make up the most abundant type of streams in the U.S., and downstream navigable waters. The study, which the EPA Science Advisory Board is now reviewing, will serve as the scientific basis for a rule developed jointly by the EPA and the corps to clarify Clean Water Act jurisdiction over the nation's waters and wetlands.

EPA on Sept. 17 sent a proposed rule to the White House Office of Management and Budget for interagency review. At the same time, it withdrew draft guidance on the issue that had been at the White House since 2012

Issue of Jurisdiction.

The issue of jurisdiction carries a great deal of significance. The fact that a water is covered by the Clean Water Act has implications for permitting of pollution discharges, filling of wetlands and streams, certifications by states that activities such as dam-building or other federally permitted activities do not harm water quality and cleanup of oil spills.

Under the Clean Water Act, the EPA or responsible state authorities have responsibility for issuing permits under the Section 402 National Pollutant Discharge Elimination System program, while the corps issues Section 404 dredge-and-fill permits for construction and other development projects. The EPA oversees the Section 404 program.

Attorneys said the study could allow the agencies to assert jurisdiction in a blanket fashion over ephemeral and intermittent streams, rather than force them to try to find a significant nexus for each non-navigable tributary in question with downstream navigable waters. The so-called significant nexus test was established by the 2006 U.S. Supreme Court ruling in Rapanos v. United States, 547 U.S. 715, 62 ERC 1481 (2006).

Scientific Justification.

Brian Glass, an attorney with Bryn Mawr, Pa.-based Warren Glass LLP, said the report "is plainly an attempt to provide scientific justification for finding that certain categories of waters possess a 'significant nexus' to navigable waters and for asserting jurisdiction over them."

Glass added, "I would expect the joint draft rule that EPA and the Corps submitted to OMB to assert federal jurisdiction over all tributary streams and all wetlands and open-waters in riparian areas and floodplains."

Brent Carson, a Seattle-based attorney and partner with Van Ness Feldman LLP, agreed. “As you read the tea leaves, that’s exactly the conclusion we believe is likely--that the agencies will use the draft study to provide the scientific basis to argue all streams should be considered jurisdictional no matter the size or flow rate.”

Don Parrish, senior regulatory relations director for the American Farm Bureau Federation, said that “the study appears to give EPA the justification to regulate all waters, not just those that are navigable waters. That is contrary to what Congress authorized.”

2008 Guidance.

Under current policy, as set out in joint EPA-Army Corps guidance issued in 2008, Clean Water Act jurisdiction extends to traditional navigable waters; wetlands adjacent to traditional navigable waters; non-navigable tributaries of traditional navigable waters that are relatively permanent, including those tributaries that typically flow year-round or have continuous flow at least three months of the year; and wetlands that directly abut such tributaries.

As a result of the new study, the EPA and the corps could propose to bring all wetlands in flood plains and riparian areas, including those that abut ephemeral and intermittent streams, under federal protection. Ephemeral and intermittent streams also could fall under federal protection.

Patrick Parenteau, a professor of environmental law at Vermont Law School, and Natural Resources Defense Council attorney Jon Devine pointed out that asserting jurisdiction over waters does not automatically translate into requiring permits for dredge-and-fill activities and discharges of pollutants.

“Even if a water is jurisdictional, there needs to be proof of addition of a pollutant, be it dredge and fill or discharges, before a state or federal regulator can even require a permit under the Clean Water Act,” said Parenteau, who was formerly the regional counsel of the EPA Region 1 from 1984 to 1987.

In general, Devine said in an e-mail, “an activity typically only triggers Clean Water Act permitting requirements if it results in an ‘addition’ of a ‘pollutant’ from a ‘point source’ into a ‘water of the United States.’”

Permitting cannot be sought for waters that aren’t under the act’s jurisdiction, they said.

Supreme Court Confusion.

Asserting jurisdiction over waters and wetlands and the question of what is considered a water of the U.S. have been sources of much uncertainty, litigation and confusion because of two U.S. Supreme Court decisions that attempted to circumscribe Clean Water Act jurisdiction. The first was *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159, 51 ERC 1833 (2001), and the second was *Rapanos*.

The court in *SWANCC* said the agencies couldn’t assert jurisdiction over geographically isolated wetlands as waters of the U.S. merely because they served as habitat for migratory birds.

In *Rapanos*, the Supreme Court split on defining a standard to establish jurisdiction.

Justice Anthony Kennedy issued a concurring opinion, which said the agencies must prove on a case-by-case basis that a particular water or wetland has a “significant nexus” to a navigable water. Meanwhile, Justice Antonin Scalia’s plurality opinion said the Clean Water Act should apply to waters and wetlands with a “continuous surface” connection to navigable waters.

Kennedy said he articulated the significant nexus standard to enable the agencies to assert jurisdiction over intermittent and ephemeral streams and wetlands without a direct connection to navigable waters because the two agencies had failed to promulgate a rule that would clarify and identify which waters fell under federal protection.

Response to Rapanos.

The two agencies have chosen to use Kennedy’s concurring opinion and Scalia’s plurality opinion as the bookends for asserting jurisdiction, first through the 2008 guidance document and then through the draft guidance in 2011. Developers, builders, and environmental groups have termed these documents vague and confusing and sought additional clarification as well as rulemaking.

The confusion also had an effect on government regulatory policy, according to the EPA Office of Inspector General.

The inspector general said in an October 2009 report that the EPA dropped 77 potential Clean Water Act Section 404 cases between July 2006 and December 2007 because it was uncertain whether it could establish jurisdiction .

“In some cases, the jurisdictional uncertainty that resulted from the *Rapanos* and *SWANCC* cases makes it unclear whether a §404 violation has even occurred,” the IG report said.

Significant Nexus Test Not Needed.

According to the attorneys, the draft connectivity study obviates the need for conducting a significant nexus test on intermittent and ephemeral streams.

“The draft report is clearly a response to Justice Kennedy's concurrence in *Rapanos*,” Glass said, “What the report appears to attempt to do is provide the scientific justification for a rule asserting blanket jurisdiction over certain broad categories of waters (tributary streams and wetlands and open-waters in riparian areas and floodplains) without having to make case-by-case 'significant nexus' determinations for those waters.”

According to Carson, the main conclusion in the draft study concerning streams and wetlands and open waters in flood plains makes Scalia's direct, continuous surface connection test superfluous.

“EPA and the Army Corps may rely on this conclusion to create a 'bright line' test for regulating all wetlands located in flood plains and riparian corridors as being 'waters of the United States' and avoid the need for any 'significant nexus' analysis,” Carson and other attorneys with Van Ness Feldman wrote in a Sept. 19 [issue alert](#).

One of the key aspects of the study that is causing much concern among home builders and farmers is the possibility that geographically isolated wetlands and waters located in uplands could be considered waters of the U.S. if regulators were able to demonstrate that those upland waters have a cumulative impact on downstream navigable waters.

Those waters were deemed not to be under Clean Water Act protection by the EPA and the corps in a 2003 [memorandum](#) following the *SWANCC* decision.

Wetlands Data Insufficient.

The draft connectivity study finds the data are insufficient to conclusively link isolated wetlands--though they provide flood retention and nutrient and sediment trapping benefits--to downstream waters. However, the study suggests that the agencies could evaluate these wetlands individually or consider their cumulative impact on downstream waters on a case-by-case basis.

Glass said he would not be surprised if the forthcoming rule proposed a set of factors for determining whether all other wetlands possess sufficient connectivity to downstream waters to assert federal jurisdiction over them.

Those factors would most likely be challenged in court, where the key question would turn on whether this study provides the necessary scientific justification to satisfy the significant nexus standard set by Kennedy, he said.

Devine said he expects there will be much discussion on the impact of waters that are physically removed from flood plains. “Where all of the available science supports a finding that any of these kinds of waters collectively have a meaningful impact on other waters, they must be protected,” he said.

Parenteau doesn't expect the EPA will make prairie potholes--freshwater marshes found in the Upper Midwest that provide the benefit of absorbing snowmelt and floodwaters--jurisdictional, even in the aggregate. Instead, he said, he expects the EPA will consider such waters on an case-by-case basis.

Devine said the study, after being fully vetted by independent scientists, would provide the science for a rule that would resolve the uncertainty over which waters are protected. Moreover, “such a rule would remedy the current approach to law enforcement, for instance, where officials have largely abandoned efforts to enforce the law in the headwaters of watersheds,” he said.

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The EPA study, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," is available at <http://tinyurl.com/ldn73to>.

The final December 2008 EPA -Army Corps guidance is available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf.