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**Water Quality****Clarity on Which Waters Are Protected Needed to Aid in Enforcement, Stoner Says**

April 7— The proposed “waters of the United States” rule was prompted by the lack of clarity over which waters and wetlands are protected under the Clean Water Act, which in turn made enforcement difficult, the acting head of the Environmental Protection Agency’s water office said April 7.

Speaking at an EPA webinar about the proposed rulemaking, Nancy Stoner, EPA acting assistant administrator for water, said “clarity” is essential to enforcing the Clean Water Act to ensure people know which waters and wetlands are protected.

“In an enforcement action in particular, it’s very important that the entity that was required to do something under the Clean Water Act had a reasonable way to know that they were required to take action to get a permit or to take some other kind of action under the Clean Water Act,” she said.

The EPA and the U.S. Army Corps of Engineers jointly released a proposed rule on March 25 that would bring under federal jurisdiction all tributaries of streams, lakes, ponds and impoundments as well as wetlands that affect the chemical, physical and biological integrity of larger, navigable downstream waters (2014 WLPM, 3/26/14).

The proposed rule would affect developers, home builders, mining companies, landowners and other applicants for dredge-and-fill permits issued under Section 404 and pollutant discharge permits issued under Section 402 of the Clean Water Act.

**Difficulties With Enforcement**

During the webinar, Stoner cited several examples of enforcement difficulties that arose as a result of confusion over a particular water’s status.

In 2007, she said, the EPA was unable to pursue an enforcement action and demand a cleanup of an oil spill into Edwards Creek, an intermittently flowing stream in Texas, because the agency found it too complex to prove that the creek was protected under the Clean Water Act.

“Consequently, no cleanup was required under the Clean Water Act and the perpetrator of this spill went unpunished,” Stoner said.

Stoner also gave the example of the San Pedro River in Arizona, which flows only part of the year and supports habitat for wildlife, but which has been polluted by stormwater runoff. “EPA had to discontinue its enforcement cases in this area because it was so time-consuming and costly to prove that the Clean Water Act protects these rivers,” she said.

During the webinar, Stoner emphasized that the one thing everyone has agreed on is that it has been very confusing since the U.S. Supreme Court rulings in 2001 and 2006 to figure out what’s covered under the Clean Water Act.

The purpose of the proposed rule, she said, is to identify what is clearly protected by the Clean Water Act and what is not, “and to make sure those things that are protected are clearly identified and that it’s a system that makes sense.”

**Protecting Headwaters ‘Essential.’**

Stoner also said the proposed rule is particularly focused on stream protections.

“Protecting headwaters of streams is essential to being able to protect the rivers, the lakes, the coastal waters because every water has headwaters. And if you don’t protect the headwaters, you really have not protected those downstream waters either,” she said.

Joining Stoner on the webinar was Donna Downing, an attorney and jurisdiction team leader in the EPA wetlands division, who elaborated on the various aspects of the rulemaking.

In particular, Downing clarified that tributaries of traditional navigable waters, interstate waters and territorial seas would be considered jurisdictional under the Clean Water Act regardless of whether they flow year round or seasonally.

"Based on peer-reviewed scientific literature, the agencies have concluded that tributaries categorically have a significant nexus, making a case-specific analysis unnecessary, provided the water under consideration meets the proposal definition of tributary," Downing said.

An EPA draft study, "Connectivity of Streams and Wetlands to Downstream Waters" that contains a literature review of more than 1,000 peer-reviewed articles was sent by the agency to the Science Advisory Board to see if the conclusions held up to scientific rigor.

#### **Flow Not Criteria for Jurisdiction**

She further clarified that science suggests that waters falling into this definition of a tributary have a significant nexus to those traditional navigable waters, interstate waters and territorial sea "regardless of flow."

The proposed rule defines a tributary as including waters with a bed and banks and an ordinary high water mark and that contribute to flow, to traditional navigable waters, interstate waters, or territorial sea either directly, or indirectly. The proposed rule also considers wetlands to be tributaries even if they lack a bed and bank and ordinary high water mark if they contribute flow to such waters.

"If it falls under the definition of tributary in the rule, it is considered to be tributary and the water of the U.S. categorically," Downing said.

The lack of emphasis on flow was noted by Brian Glass, of Bryn Mawr, Pa.-based Warren Glass LLP in a March 27 Bloomberg BNA webinar on the proposed rulemaking. He said the agencies' proposed definition for tributaries "was pretty far-reaching" because it allows tributaries with flow that is perennial, ephemeral or intermittent.

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#### **For More Information**

More information about the proposed "waters of the United States" rule is available at <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

The joint EPA, U.S. Army Corps of Engineers proposed "waters of the U.S." rule is available at [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_proposed\\_rule\\_20140325\\_prepublication.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_20140325_prepublication.pdf).

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