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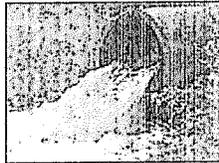
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Water Quality

Attorneys Say Sediment Ponds, Swales Might Be Classified as Federally Protected Waters



By Amena H. Saiyid

March 31 — In its proposed rule on Clean Water Act jurisdiction, the Environmental Protection Agency may inadvertently be categorizing sediment-trapping ponds and stormwater-capturing grassy swales as waters of the United States, according to attorneys.

Speaking at a webinar, Thomas Ward, vice president for litigation at the National Association of Home Builders, expressed concern that such ponds and swales could become jurisdictional because of loopholes in the way the proposed rule is written.

Sponsored by Bloomberg BNA, the webinar was held March 27, two days after the EPA and the U.S. Army Corps of Engineers released the proposed rule to clarify which waters and wetlands would be subject to Clean Water Act jurisdiction (2014 WLPM, 3/26/14).

Under the proposal, federally protected waters would require clean water permits if there is any discharge of pollutants, oil, chemicals or dredge and fill material.

The EPA and the Corps emphasized that they would retain existing exemptions for waste treatment systems, such as lagoons and ponds used to filter pollutants and treat wastewater in compliance with Clean Water Act requirements. The proposed rule would also retain exemptions for prior converted cropland. In addition, the agencies proposed to exclude non-wetland swales and man-made swales, such as those used to capture stormwater in cities, from federal jurisdiction.

Ward explained that the language in the proposed rule states that only waste treatment systems “designed to meet the requirements of the Clean Water Act” would be excluded from the revised definition of the waters of the United States.

He said builders put in all sorts of ponds and basins that could be considered waters of the United States. More importantly, he said, these might be put in to meet state requirements or be put in as green infrastructure, but not to meet Clean Water Act requirements.

In adding the qualifier, “to meet the requirements of the Clean Water Act,” Ward said the agencies would be categorizing sediment trapping ponds, put in place as green infrastructure, as federally protected waters.

Grassy Swales Federally Protected?

Moreover, Ward cautioned, nonwetland natural and man-made swales, which the agencies are now proposing to exclude from federal jurisdiction, could fall under the rule if certain plants grow on them. The corps identifies wetlands on the basis of vegetation and the function it performs. If the vegetation on these swales is on the Corps list, would the exclusion apply, Ward asked.

Following Ward, Brian Glass of Warren Glass LLP presented his views on what the proposed “waters of the United States” rule would entail for existing and potential Clean Water Act permit holders, particularly those whose activities involve dredging and filling, such as mining, road and home building.

Glass said the agencies’ proposed definition for tributaries “was pretty far reaching” because the definition identifies tributaries as having a bed, bank and ordinary high mark, and contributing flow “directly or indirectly” to downstream navigable waters, interstate waters or territorial seas, all categories that already are under federal protection.

Glass noted that the list of waters that make up tributaries is nonexclusive. It includes streams, lakes, ponds and impoundments, even if man-made breaks such as bridges, pipes or dams interrupt the flow. The list also includes ditches but excludes ditches that are excavated in uplands and have less than perennial flow, irrigation ditches used for agriculture, or ditches that do not directly or indirectly contribute flow to traditional navigable waters, interstate waters, and territorial seas.

Clarifying Sentence Needed

On hearing Ward’s concerns, Nathan Gardner-Andrews, general counsel for the National Association of Clean Water Agencies, told Bloomberg BNA that the agencies can easily add a clarifying sentence on the role of green infrastructure techniques in the final rule. He said NACWA, which represents more than 300 municipal owned wastewater treatment utilities, will most probably provide comment on this issue.

Jon Devine, senior water attorney with the Natural Resources Defense Council, dismissed Ward's concerns about green infrastructure. He said the industry will bring up any argument to "muddy the waters" and create confusion.

Jan Goldman-Carter, senior manager at the National Wildlife Centers's Wetlands and Water Resources division, told Bloomberg BNA that any new discharge should be permitted under Clean Water Act regulations. If a pond or basin constructed to capture stormwater is adjacent to federally protected wetland then yes, the pond should be permitted for discharges, she said.

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