

EPA Poised To Drastically Expand Water Jurisdiction

By **Sean McLernon**

Law360, New York (September 19, 2013, 5:06 PM ET) -- New scientific findings released by the U.S. Environmental Protection Agency this week emphasize that most waters across the country are inextricably linked, which experts say lays the groundwork for aggressive new Clean Water Act rules expanding federal jurisdiction over wetlands, streams and other bodies.

A proposal addressing federal authority under the Clean Water Act has been expected for seven years, since the U.S. Supreme Court scaled back the government's power under the law and called for the EPA and fellow permitting agency the U.S. Army Corps of Engineers to issue rules reflecting the court's finding that in order for the government to have authority over a body of water, there must be a "significant nexus" between the water area and another.

By publishing the "Connectivity of Streams and Wetlands to Downstream Waters" draft report from its Office of Research and Development and simultaneously submitting a joint draft rule to the federal Office of Management and Budget for interagency review, the EPA and the Corps have begun that process, looking eager to seize greater control over the country's waters.

"The writing is on the wall," Hunton & Williams LLP partner Deidre G. Duncan said. "The report essentially supports the point that all waters generally connect to each other, and even if they don't connect, those waters are probably important, too."

A lack of clarity has plagued the Clean Water Act permitting process for years, and the U.S. Supreme Court did little to fix the problem with its 2006 decision in *Rapanos v. U.S.*, in which a Michigan landowner was targeted by the government for failing to acquire a permit before developing wetlands that the government said qualified as "waters of the United States."

Casting the deciding vote for a deadlocked court in favor of *Rapanos*, Justice Anthony Kennedy set the "significant nexus" standard of determining the government's authority over a body of water. Figuring out what qualifies as significant under Kennedy's test, however, has proved to be a difficult task for property owners and permitting authorities alike.

Now the government seems to be making its own case for what a significant nexus looks like through the Office of Research and Development draft report, according to White & Case LLP partner Neal McAliley.

“It's almost like it is responding directly to the points that Kennedy made,” McAliley said. “It represents the dialogue between the agencies and the Supreme Court that a lot of people expected would have come out a long time ago.”

The report, which covers more than 1,000 peer-reviewed pieces of scientific literature about how small and isolated water bodies are connected to larger streams and rivers, concludes that all tributary streams are “physically, chemically and biologically connected” to downstream rivers. That includes perennial, intermittent and ephemeral streams.

“That sentence on its face is saying there is a nexus between all streams and downstream navigable waters, and it is implicitly saying that there is a significant nexus,” McAliley said.

The Office of Research and Development makes a similar conclusion for wetlands and open waters in riparian areas and floodplains.

As for wetlands in landscape settings set apart from other bodies of water, such as prairie potholes, vernal pools and playa lakes, the report says it's hard to generalize about their effects on downstream waters from the available literature. But the report still stresses that landscape water bodies provide numerous functions “that can benefit downstream water quality and integrity.”

“I think it's clear from the report and from what we have seen in previous guidance documents that the agencies want to maximize jurisdiction over as many wet areas as they can,” Duncan said.

The draft rule won't be made public until after the interagency review is completed, leaving plenty of questions about how far the EPA will actually go, but Pillsbury Winthrop Shaw Pittman LLP partner Wayne M. Whitlock said there was plenty in the report to suggest that the government would significantly increase its authority under the Clean Water Act.

“The draft report seems to be making the case that there is more extensive connectivity, which in turn would be used to expand jurisdiction,” Whitlock said.

Whether that expanded jurisdiction survives litigation is a different matter. Scientific findings like those found in the report may not be enough to meet the standards set by the courts, Mayer Brown LLP partner Kevin Desharnais said.

“Ultimately, looking at ecological connectivity should be a factor, but it doesn't necessarily answer the question of whether or not it is satisfying the legal standard,” Desharnais said.

Duncan also said the EPA could run into trouble with the Supreme Court's findings in *Rapanos*.

“It doesn't seem consistent with what Justice Kennedy intended when he adopted the significant-nexus standard,” Duncan said. “Kennedy rejected the government's theory of any hydrological connection, finding it overbroad, but this report focuses on establishing that any connections or lack of connections are important.”

Still, reports like this one put federal agencies in a stronger position in court by creating a foundation for rule-making that could convince judges to give them more leeway.

“Conceptually, it's a smart move by the agencies to issue a report like this because it provides a technical basis for revisions to the regulation,” McAliley said. “When agencies make technical judgments, they tend to get a lot of deference from the courts.”

Plus, the courts have already recognized the need for the agencies to take some action. Kirkland & Ellis LLP partner Granta Y. Nakayama, who spent four years as an assistant administrator in the EPA's Office of Enforcement and Compliance Assurance, said the current situation leaves property owners unclear and makes it difficult for agencies to enforce the rule.

"'Significant nexus' is a scary term," Nakayama said. "It's impossible to apply without clear directions."

For the EPA, it provides an opportunity to bolster its permitting authority.

"I think it's clear that the EPA would like to clarify Clean Water Act jurisdiction, and the agency believes there is a scientific basis for an expansive view," Nakayama. "That's nothing new. It's been the view of the agency for a long time."

--Editing by Elizabeth Bowen and Philip Shea.

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