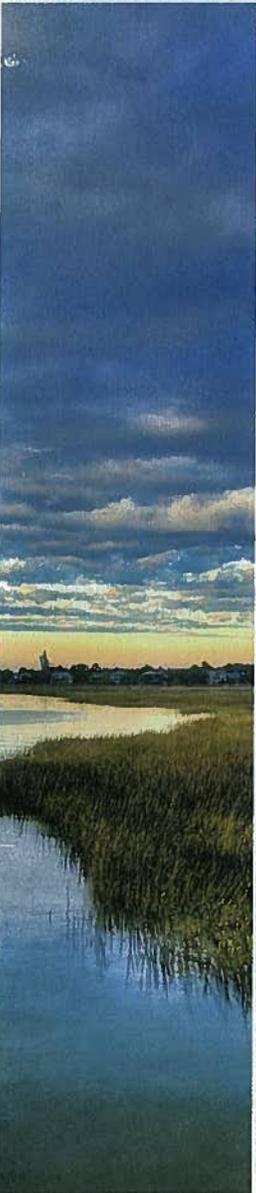




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New USEPA Report on Connectivity of Streams and Wetlands May Affect CWA Jurisdiction

In an effort to better define the scope of regulatory jurisdiction over non-navigable upstream waters and wetlands, the US Environmental Protection Agency's (USEPA's) Scientific Advisory Board (SAB) has released a draft report titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. The draft report is focused on small or temporary nontidal streams, wetlands, and open waters, and "will inform an upcoming joint EPA/U.S. Army Corps of Engineers [USACE] rulemaking to enhance protection of the chemical, physical and biological integrity of our nation's waters by clarifying Clean Water Act [CWA] jurisdiction," according to USEPA's Sept. 25, 2013, notice announcing release of the draft report.

The focus of the draft report is on surface and shallow subsurface connections from small or temporary nontidal streams, wetlands, and other open waters, and the mechanisms by which these waters may affect the functions or conditions of downstream waters. The net effect of the draft report could be a complete reevaluation of how CWA jurisdiction is determined. The USEPA draft report is based on a review of more than 1,000 publications in the peer-reviewed scientific literature and reaches the following initial conclusions:

- Streams, regardless of their size or how frequently they flow, are connected to and have important effects on downstream waters.
- Wetlands and open waters in floodplains of streams and rivers and in riparian areas (transition areas between terrestrial and aquatic ecosystems) are integrated with streams and rivers.
- There is insufficient information to generalize about wetlands and open waters located outside of riparian areas and floodplains and their connectivity to downstream waters.

PROPOSED RULE ON CWA JURISDICTION

Along with the release of the draft report, USEPA and USACE have sent to the Office of Management and Budget (OMB) a draft rule on CWA jurisdiction for interagency review. As of this writing (January 2014), the draft rule has not been released to the public, but USEPA's Sept. 25, 2013, notice states that the draft report when finalized will provide the scientific basis needed to clarify CWA jurisdiction, including a description of the factors that influence connectivity and the mechanisms by which connected waters affect downstream waters. Along with the proposal of the new rule, USEPA has withdrawn from OMB review its 2012 proposed guidance on CWA jurisdiction.

The USEPA notice explains that the purpose of the proposed rule is to clarify uncertainty

concerning the jurisdiction of the CWA that has arisen as an outgrowth of recent Supreme Court decisions. The USEPA notice goes on to state that the recent decisions underscored the need for USEPA and the public to better understand the connectivity or isolation of streams and wetlands relative to larger water bodies such as rivers, lakes, estuaries, and oceans, and to use that understanding to underpin regulatory actions and increase certainty among various CWA stakeholders. USEPA has clarified that the rule will not change existing regulatory exemptions or exclusions for agricultural operations.

TWO SIGNIFICANT COURT CASES

To better understand USEPA's intent, it is helpful to consider recent Supreme Court cases that appear to be of concern to the agency. In June 2006, the Supreme Court decided two cases, *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*, both of which significantly revised the federal wetland regulatory program under the CWA. *Rapanos* was a complicated decision with five separate opinions concerning how federal wetland jurisdiction should be determined. Despite the divergent opinions coming from the Supreme Court, ranging from Justice Antonin Scalia's very narrow application of the USACE's jurisdiction to Justice John Paul Stevens' endorsement of how the USACE and USEPA applied their jurisdiction at the time, the opinion that has had the most staying power was Justice Anthony Kennedy's concurring opinion, which took a middle-of-the-road approach. Kennedy recognized the importance of protecting water quality while emphasizing that there must be a "significant nexus" between non-navigable waters and/or isolated wetlands and navigable-in-fact waters before the USACE could assert jurisdiction over the non-navigable waters. The varying interpretations of the case and its effect on wetland jurisdictional issues have continued to be a source of discussion, challenges, and various attempts at guidance from the USEPA and the USACE. Specifically the concept of what entails the required "significant nexus" to confirm federal jurisdiction over non-navigable waters has been the greatest source of contention.

In 2007 the USEPA and the USACE issued joint regulatory guidance to clarify how they would determine jurisdiction under the CWA post-*Rapanos*. A fairly complicated form was prepared to guide the regulated public on whether they had jurisdictional wetlands on their property that needed permitting before impact. However, much of the regulated community felt that the guidance did not follow the *Rapanos* case but in fact validated what was already the agencies' standard for wetland jurisdiction at the time, with only a limited reduction in the scope of federal jurisdiction over isolated wetlands. Some concern was raised that the agencies had done this by way of guidance instead of pursuant to rulemaking with opportunity for comment and challenge by the public. Then, in 2012 the agencies again submitted proposed

guidance on CWA jurisdiction for interagency review; as previously noted, this proposed guidance has been withdrawn in favor of proposed new regulations, which likely will follow completion of the draft report.

CONCLUSION AND RECOMMENDATION

Some are opining that the draft report and proposed CWA jurisdiction rule will result in a significant broadening of the definition of "waters of the United States" and federal regulatory authority. However, without a rule to review, it is difficult to make such broad assumptions. It seems more likely that USEPA and USACE are finally putting into rule language their practice and prior guidance that they have been following for the past seven years. It is appropriate that the agencies would want to have in place the scientific backing and formal regulatory authority for their permitting decisions.

AWWA members should follow and participate in both the commentary on the draft report and the proposed rulemaking, as the definition of "waters of the United States" may affect the siting, construction, expansion, and potentially continued operations of water and wastewater treatment facilities across the country. Public comments on the draft USEPA report were solicited by the USEPA for consideration at the USEPA's SAB December 2013 meeting. As of Jan. 30, 2014, results of that meeting had not been made public. We understand from USEPA that the SAB's review of the report will be complete this summer.

At the time this article went to press an unofficial draft of the proposed USEPA/USACE rule was discovered on the website of the Congressional Committee on Science, Space, and Technology at <http://science.house.gov/epa-draft-water-rule>. Unfortunately it is not clear what the date of the draft document is. However, it provides an interesting read while we await the official release of the rule for public comment.

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