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To: AO SAB EVERYONE
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SAB Launches Review Of 'Connectivity' Study To Back Rule On CWA's Reach

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EPA's Science Advisory Board (SAB) is seeking nominations for a formal peer review to assess a long-awaited draft agency study on the science of water “connectivity” -- which, when completed, is expected to inform the Obama administration's upcoming rulemaking on the reach of the Clean Water Act (CWA).

According to a March 8 notice in the *Federal Register*, the board is accepting nominations for peer reviewers through March 29, although it does not say when the peer-review session is expected to take place nor when SAB will release a draft of the agency's study.

The study faces heightened scientific scrutiny after EPA classified it as a highly influential scientific assessment (HISA) in response to requests from House Republicans. But despite the additional scrutiny, an industry source says regulated entities doubt the review will prevent the study from supporting EPA efforts to expand CWA jurisdiction.

“Everything that EPA seems to be doing seems to be going in the same direction – the belief that additional waters need to be protected under the Clean Water Act,” the source says.

Launch of the SAB review comes as EPA and the Army Corps of Engineers are preparing to launch a formal rulemaking to define “waters of the U.S.”

The connectivity study is expected to aid that effort by providing a scientific justification for the administration's interpretation of the Supreme Court's 4-4-1 opinion in *Rapanos, et al. v. United States*. In that case, Justice Anthony Kennedy held that waters sharing a "significant nexus" with jurisdictional waters can also be subject to CWA regulation, while Justice Antonin Scalia, in a concurring opinion, wrote that only waters with a “continuous surface connection” to jurisdictional waters can be regulated.

The study was developed by EPA's research and water offices, with one author from the U.S. Department of Agriculture. EPA said in 2012 that the final report will provide a summary of the current "mainstream scientific information on the relationship of small streams, wetlands and other water bodies to larger downstream waters -- the connectivity of waters."

Though EPA characterizes the report as a "science document" which "does not make any legal conclusions regarding jurisdiction or applicability of the *Rapanos* tests," it is expected to underpin the upcoming rule on the reach of the water act, which is widely anticipated to advance a broad interpretation of Kennedy's opinion in *Rapanos*.

"To ensure the agencies implement the CWA in a manner fully consistent with *Rapanos*, the

EPA believes it is important to understand what peer-reviewed, public scientific literature has examined and concluded regarding connectivity among water," acting EPA water chief Nancy Stoner said in a June 27 letter to GOP lawmakers addressing the study.

Draft Report

According to the letter, EPA floated an internal draft of the report in February 2011 for peer review by agency staff, and interagency consultation, then released a revised internal draft last July for review by Office of Water and regional offices. The letter said EPA planned to release the draft document for public comment ahead of SAB review, but a spokesman for the board said that as of press time no draft has been made public.

The regulation was originally planned as a guidance -- which has been stuck in interagency review since February 2012 -- but Jo-Ellen Darcy, assistant secretary of the Army for civil works, recently announced the administration plans to pursue a binding rulemaking, though it may finalize the guide before crafting a rule.

Republicans and industry have fought the guidance, claiming it is a *de facto* rulemaking that would advance Kennedy's opinion, giving the agency new authority over isolated wetlands, ephemeral and intermittent streams and other marginal waters. Critics have repeatedly urged the agency to scrap the guidance and develop a formal rulemaking, while environmentalists are pushing the agency to finalize the guide as an interim step before it completes a rule.

The industry source says officials are concerned that a clause in EPA's March 8 *Register* notice requiring reviewers to have both “absence of financial conflicts of interest” and “absence of an appearance of a lack of impartiality” would exclude most researchers who have worked in the private sector.

“If they've got opinions that go against EPA's, they aren't going to get onto the panel,” the source says. -- *David LaRoss* (dlaross@iwpnews.com)

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