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Industry Fears EPA Connectivity Study Could Aid CWA Jurisdictional Findings

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Industry groups are urging EPA to include experts with regulatory and policy backgrounds on its Science Advisory Board (SAB) panel that will review the agency's long-awaited study on water "connectivity," saying the agency has indicated it plans to rely on the study in making field determinations on Clean Water Act (CWA) jurisdiction even before it revises its policies for determining the law's reach.

The industry groups, and some state regulators, argue in comments obtained by *Inside EPA* through a Freedom of Information Act request that it is imperative that at least some panelists have familiarity with the legal implications of CWA jurisdiction and the water law's section 404 permitting program -- given that jurisdictional determinations often trigger requirements that landowners obtain 404 permits for dredge-and-fill activities.

"Indeed, EPA has indicated that it will rely on the Draft Report, once finalized, in the field," the Waters Advocacy Coalition (WAC), a group that represents a wide swath of companies in the construction, housing, mining, energy and agriculture sectors, says in June 7 comments.

EPA solicited nominations on the SAB panel that will review its "Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Waters" through March 29, and released a list of potential candidates for public comment on May 17. The comment period on nominations ended June 7.

EPA says in a March 8 *Federal Register* notice that the draft report is aimed at "synthesizing" the peer-review science on "biological, chemical and hydrological connectivity of waters, and the effects that small streams, wetlands, and open waters have on larger downstream waters such as rivers, lakes estuaries, and oceans."

The study has long been expected to inform the Obama administration's pending policies for determining when isolated wetlands and other marginal waters are subject to the law's requirements in light of Supreme Court rulings that created uncertainty about what tests regulators use to make their determinations.

The study is expected to provide scientific justification for the administration's interpretation of one of the high court's rulings, its split decision in *Rapanos. v. United States*. There, Justice Anthony Kennedy held that waters sharing a "significant nexus" with jurisdictional waters can be covered under the CWA while Justice Antonin Scalia wrote that only waters with a "continuous surface connection" to jurisdictional waters are subject to regulation.

The administration has proposed guidance detailing how regulators should determine

jurisdiction in light of the ruling. They have also decided to codify any policy in a rule though they have not yet decided whether to finalize the pending guidance -- which has been under review at the White House Office of Management and Budget since 2012 -- as an interim step that environmentalists are seeking before a rulemaking is completed.

While Republicans and industry groups support codifying any new policy in a rule, they oppose any rulemaking unless EPA pledges to abandon the terms of the draft guidance that they say would expand the law's reach in part because it allows regulators to use either of the two Supreme Court tests for determining whether waters are jurisdictional.

In an effort to block advancement of the administration's approach, House appropriators included language in a pending bill funding the Army Corps of Engineers in fiscal year 2014 that blocks the Corps from implementing or developing any rule or guidance to revise the policies regulators use to determine the reach of the CWA -- the most expansive attempt yet to block the pending joint effort by EPA and the Corps to refine their jurisdictional tests.

Connectivity Study

While EPA has yet to release the draft study, industry groups say in their comments that the agency has indicated it plans to use the final connectivity study in field analysis even before it issues guidance or launches a rulemaking.

Deidre Duncan, an attorney with the D.C. firm, Hunton & Williams, which represents the WAC, writes that the draft report could have significant influence on EPA's and the Corps' policies for identifying waters of the United States. Further, WAC's comments point out, while EPA's draft guidance on the reach of the CWA -- which has been stuck in regulatory review at the White House Office of Management & Budget since February 2012 -- does not directly address connectivity, it does discuss "possible connections a non-jurisdictional water" can have to jurisdictional waters, indicating the study could be used in implementing the guidance.

WAC urges EPA to select panelists with significant field experience, to better position them to review not only the scientific basis of the study but also "any conclusions that may be drawn from those analyses," suggesting several candidates with regulatory experience, including Arizona Department of Water Resources' chief hydrologist Frank Corkhill, Wetland Training Institute's Robert Pierce, and Ben Parkhurst, of the consulting firm HAF, Inc and others.

Those nominations were also endorsed in June 7 comments filed by the Agricultural Retailers Association, and in June 6 comments filed by the National Stone, Sand & Gravel Association, which also note that EPA has announced it will use the final report in the field.

In June 7 comments filed by the Association of State Wetland Managers, state regulators stress that the panel should include members with "significant experience" in applied science on freshwater wetlands and headwater streams so the panel can evaluate the practical applicability of science-based criteria for use by wetland managers. The group also urges that the panelists have some knowledge of section 404 of the water law and its related regulations, saying "an understanding of the legal context of the review" is necessary, as is the ability to identify the findings most applicable to and useful for development of national policy.

Meanwhile, in resolutions filed by a handful of county commissions in Minnesota, including Roseau, Lake of the Woods, Mahnomen, Marshall, Koochiching, Clearwater, Aitkin and

Beltrami Counties, commissioners cite fears that the study could "result in broader regulation of earthwork projects related to road construction and farmland drainage" and urge EPA to consider Larry Kramka, of Minnesota-based firm Houston Engineering for the panel.

The counties' concerns stem from issues first raised in 2009 by Sen. Amy Klobuchar (D-MN) that led to a compromise amendment to narrow the reach of failed legislation aimed at clarifying the scope of the CWA.

Klobuchar said in a June 2009 interview with *Inside EPA* that the legislation must be narrowed in a way that ensured it limited the federal oversight of less harmful activities that should not be regulated. "We want to make sure our counties that have salt go into a ditch alongside the road don't have to get a permit," she said. -- *Bridget DiCosmo* (bdicosmo@iwpnews.com)

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