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EPA Plans Method For Determining Whether Waters' Nexus Is 'Significant'

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Faced with concerns from industry, lawmakers and its science advisors, Deputy EPA Administrator Bob Perciasepe says federal officials will have to come up with a way to determine whether smaller waters have a "significant" nexus to larger navigable waters, a key test for determining whether they are jurisdictional under the Clean Water Act (CWA).

Speaking to the Association of Metropolitan Water Agencies during their April 7 annual policy conference, Perciasepe said EPA, the Army Corps of Engineers and in some cases, the Department of Agriculture, will have to come up with a way to determine when smaller, non-navigable waters have a "significant" nexus to larger, navigable waters and can be regulated under the water law.

While "nexus is a scientific determination" on whether or not a connection is present, "The question really is, when does it become significant?" he said.

Perciasepe's comments come in response to widespread concerns that the administration's recently proposed rule clarifying the reach of the water law over smaller waters does not adequately define when smaller waters have a "significant" nexus and can be regulated.

EPA's proposed rule, issued jointly with the Corps, is intended to clarify the reach of the water law in the wake of a 2009 high court ruling that created uncertainty about when smaller waters are subject to regulation. In *Rapanos v. United States*, Justice Antonin Scalia ruled in the court's plurality decision that only "relatively permanent waters" that hold a "continuous surface connection" to a traditionally navigable water of the United States can be considered jurisdictional.

By contrast, Justice Anthony Kennedy ruled in a concurring opinion that waters that share a "significant nexus" to navigable waters can be regulated under the water law.

The administration's proposed rule, as well as an accompanying EPA study on waters' connectivity, generally seeks to follow Kennedy's approach. The proposed rule, for example, says that all streams, as well as all waters and wetlands located in floodplains and riparian corridors share a connection or "nexus" to downstream, traditionally regulated waters – and are therefore subject to default regulation.

The agency is proposing to define "significant nexus" as one that "significantly affects the chemical, physical, or biological integrity of" a downstream river, territorial sea or other jurisdictional water.

Administration officials have argued that the proposed rule seeks to provide legal certainty about which waters are subject to regulation, an issue that until now has largely been governed by informal policy measures, such as guidance documents and wetlands delineation manuals, and a patchwork of court precedents.

But in the days since the proposed rule was unveiled, the measure has drawn strong criticism from lawmakers and industry officials who say the proposed rule would expand the agency's regulatory reach in part because officials have not adequately defined when waters have a "significant" nexus that allows them to be considered jurisdictional.

The critics say that EPA's proposal does not clearly address how regulators plan on distinguishing all nexuses or connections from "significant" ones. An early draft of the proposed rule "fails to address the central jurisdictional issue, i.e., when is the connection between waters significant enough to provide a basis for trumping state jurisdiction with an assertion of federal jurisdiction," the Waters Advocacy Coalition, an industry coalition, said in a recent memo.

Science Advisors

The concerns are coming not just from EPA's political opponents but also from its science advisors. In just-released comments on EPA's draft connectivity study, which is expected to provide the scientific basis for the final version of the rule, the advisors urged EPA to shift its approach in its draft study to better quantify the degree, or magnitude, of such connections.

The agency's approach in its draft study "often treats connectivity as a binary property, either present or absent, rather than as a gradient," according to draft recommendations crafted by a panel of EPA's Science Advisory Board (SAB) charged with reviewing the draft connectivity study.

The panel's March 25 draft report, quietly released last week, urges EPA to instead revise its interpretation of connectivity from a "dichotomous, categorical distinction (connected versus not connected) to a gradient approach that recognizes variation in the strength, duration and magnitude and effect of those connections."

In the draft report, the SAB panel acknowledges the agency's plans to use the connectivity study in support of its rulemaking, saying that bringing more "clarity to the interpretation of connectivity, especially with respect to quantification of the degree, magnitude, or consequences" of connections would be helpful to policymakers.

The panel is also recommending that EPA more explicitly address the cumulative effects of streams and wetlands on downstream waters – particularly how proximity and time play a role – which may provide a broader justification for showing connectivity.

Additionally, the draft report calls on EPA to make major changes to its draft conclusion that there is a lack of data to support a blanket finding that "unidirectional" waters, or isolated waters and wetlands outside of riparian and flood zones share a connection to downstream waters. The draft study leaves open a door to case-by-case determinations if scientific evidence could demonstrate a connection, and in the proposed rule, the agency is taking comment on whether some "unidirectional" waters should be subcatgeorized into classes that would be covered under a default jurisdictional finding.

The panel says "To the contrary, the SAB finds that the scientific literature does provide information to support a more definitive statement (i.e., numerous functions of unidirectional wetlands have been shown to benefit downstream water quality)," urging the agency to focus on features where a connection is "clearly supported" by the literature and highlight areas where there may be data gaps.

Moreover, EPA should in its revisions recognize connectivity "as a gradient rather than a dichotomous categorical variable and highlight the fact that there are multiple mechanisms resulting in connectivity that occur over gradients of space and time."

The draft report suggests language to clarify that "Over sufficiently long time scales all aquatic habitats are connected to downstream waters through the transfer of water, chemicals or biota, though the magnitude and effects of these connections vary widely among wetlands."

Additionally, the panel, which is scheduled to discuss its draft recommendations during April 28 and May 2 meetings, also suggest that EPA expand its review to include a more thorough examination of how passage of time and water temperature affect connectivity, and the role of connectivity on contaminant transport and transformation. -- *Bridget DiCosmo* (bdicosmo@iwpnews.com) *& Lee Logan* (llogan@iwpnews.com)

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