

Defining the Reach of the Clean Water Act

John R. Weinberger, June 1, 2015.

The battle over the reach of the Clean Water Act continues. Last week, amid cries by Republican members of Congress that the Obama administration is expanding government power over private property, the U.S. EPA published its final rule defining which bodies of water are actually protected by federal anti-pollution laws. Everyone agrees that rivers and lakes are subject to national clean water laws. But what about smaller streams and wetlands that feed into rivers? What about irrigation ditches that cross farm fields or drainage ditches that cut through suburban housing developments? Where does the Clean Water Act stop? The rule defining “Waters of the United States” covered by the Clean Water Act is meant to bring clarity to an area of environmental law that has been muddied by conflicting Supreme Court decisions, but opposition has been fierce. In the agricultural community, fear that the EPA and Corps of Engineers will regulate puddles, ponds and ditches, borders on paranoia. In fact the new rule leaves farmers virtually untouched by the Clean Water Act. Nonetheless, Republican leaders have fanned the flames of opposition. A “raw and tyrannical power grab that will crush jobs,” announced Speaker John Boehner upon release of the new rule.

Despite the rhetoric, the rule actually represents a strong scientific consensus on which streams and wetlands have the greatest impact on the water quality of downstream lakes and rivers. At the heart of the controversy are “ephemeral” streams – streams that don’t flow constantly but appear and disappear seasonally based on rain or snowmelt. Although individually, each ephemeral stream seems insignificant to the nation’s waters, taken together, these streams are an important component of our river systems. Roughly 60% of U.S. streams are seasonal and temporary and those small streams have a serious impact on water quality downstream. According to a leading restoration ecologist, Margaret Palmer, executive director of the National Socio-Environmental Synthesis Center, these ephemeral streams carry nutrients and contaminants and therefore, “Damage to or pollution of these waters directly affect larger, downstream waters.”ⁱ

The rule to define the scope of the Clean Water Act is intended to provide property owners with clarity about whether any streams, ponds or wetlands on or adjacent to their property are subject to federal permit requirements for filling or draining wetlands or discharging waste. Up until now, any stream might be considered a tributary which could be regulated by the Federal government under the Clean Water Act on a case-by-case basis. The new EPA rule for the first time, gives a concrete definition of a tributary as having a bed, banks, an ordinary high water mark and down stream flow. A stream that meets all four of those criteria, whether ephemeral or not, is now covered by the Clean Water Act. With regard to ponds and wetlands, if they are within 1500 feet of a river, lake or tributary covered by the Clean Water Act, they are “adjacent” to jurisdictional water and they are therefore also covered by the Clean Water Act.

What about wetlands and ponds that are not adjacent to a river or lake? With respect to “isolated” wetlands and ponds, the new EPA rule represents a compromise between environmental protection and private property rights. It draws a geographic cutoff point to determine which waters are in and which

waters are out of federal protection. Wetlands and ponds that have a “significant nexus” (affecting the chemical, physical or biological integrity) of a waterway covered by the Clean Water Act – are covered by the law if they are within a 100-year floodplain or within 4000 feet of a river channel. Wetlands and ponds outside of a 100-year flood plain or beyond 4000 feet of a river are, for the first time, excluded from Clean Water Act protection regardless of whether they have a significant physical, chemical or biological relationship with protected waters. This is a major concession by the Obama Administration which has not wanted a *per se* exclusion of waters from the Clean Water Act based on distance without determining on a case-by-case basis whether those water have a significant nexus with jurisdictional waters.

In order to accommodate farmers, the new rule maintains an existing exemption for farm operations – so farmers should never have to apply for an EPA permit or Corps of Engineers permit for normal farming activities regardless of whether it has a water pollution impact. Irrigation ditches are explicitly exempted by the rule. Farmers have nothing to complain about in this rule.

Although the rule represents a compromise, opposition to the rule, led by the American Farm Bureau Federation, has hardened and is not likely to dissipate. The House of Representatives passed a bill in September to block the rule. In the Senate, a bill sponsored by John Barrasso (R-WY) which aims to shrink the jurisdiction of the Clean Water Act, is pending in the Senate Environment and Public Works committee.

A Senate subcommittee held a hearing on the Barrasso bill on May 19 – a week before the final rule was released. Patrick Parenteau of the Vermont Law School Environmental and Natural Resources Law Clinic testified against the bill and in favor of EPA’s effort to develop a scientifically sound rule. His written statement to the subcommittee is as concise and well-reasoned defense of EPA’s jurisdiction over streams and tributaries as I have seen over the course of this controversy. Among the points Parenteau makes is that Justice Kennedy, writing for a plurality in the 2006 *Rapanos* case, demands that EPA regulate tributary waters that have a “significant nexus” to jurisdictional waters. “Significant nexus” requires a scientific understanding of the hydrological and ecological relationship of ephemeral streams and other small headwaters with downstream rivers. In order to meet the demands of the Supreme Court, EPA consulted its Science Advisory Board which produced a report entitled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.” That report was based on more than 12,000 published peer-reviewed scientific papers. As Parenteau states, “The science unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence water quality and ecological integrity of navigable waters.”ⁱⁱ Therefore, EPA’s approach in crafting the new rule is based firmly in science and is consistent with Supreme Court interpretation of the Clean Water Act.

The final rule defining which bodies of water are encompassed by national clean water laws is fully justified by Justice Kennedy’s call for EPA to determine a scientifically based “significant nexus” to downstream rivers. The EPA could have gone much further in incorporating wetlands and ponds. In order to address the concerns of farmers and other critics, EPA chose to set a bright-line geographic limit, beyond which wetlands and ponds will remain unregulated, regardless of whether they have a

significant chemical or biological connection with a tributary, river or lake. This is a major concession to critics of the rule may not mollify opponents. Opposition to the rule seems to have developed into a symbolic cause – representing frustration with the Obama administration’s environmental agenda – separate from the specific Clean Water Act issues. It will be interesting to see whether opponents of the rule, after having had time to study the final document, will recognize that it does represent a compromise, and many of their concerns have been met.

ⁱ Christian Science Monitor, “Why the EPA Wants to Amend the Clean Water Act,” Henry Gass, May 28, 2015.

ⁱⁱ Statement of Patrick Parenteau, Legislative Hearing on S. 1140, Subcommittee on Fisheries, Water and Wildlife, Committee on Environment and Public Works, U.S. Senate, May 19, 2015.