

PolicyPennings by Daryll E. Ray & Harwood D. Schaffer

Waters of the U.S. rule: The back story and waters that are explicitly excluded

The proposed rule, “Definition of ‘Waters of the United States’ Under the Clean Water Act” (<http://tinyurl.com/mk5a7nb>), published by the US Army Corps of Engineers, (COE) and the Environmental Protection Agency (EPA) in the April 21 issue of the Federal Register is designed to achieve two goals: 1) “to ensure protection of our nation’s aquatic resources” and 2) “make the process of identifying ‘waters of the United States’ less complicated and more efficient.”

The issuance of the rule was triggered by two recent rulings of the US Supreme Court based on an earlier 1985 decision. As the two agencies write, “Congress enacted the...Clean Water Act or CWA... ‘to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.’”

In the 1985 ruling, “The U.S. Supreme Court first addressed the scope of ‘waters of the United States’ protected by the CWA in *United States v. Riverside Bayview Homes*...which involved wetlands adjacent to a traditional navigable water in Michigan. In a unanimous opinion, the Court deferred to the Corps’ ecological judgment that adjacent wetlands are ‘inseparably bound up’ with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of ‘waters of the United States’.... The Court observed that the broad objective of the CWA to restore and maintain the integrity of the Nation’s waters ‘incorporated a broad, systemic view of the goal of maintaining and improving water quality.... Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for “water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.” In keeping with these views, Congress chose to define the waters covered by the Act broadly.’”

In a 2001 ruling, “the Court (in a 5-4 opinion) held that the use of ‘isolated’ nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the CWA. The...Court noted that in *Riverside* it had ‘found that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands “inseparably bound up” with the “waters of the United States” and that ‘it was the significant nexus [an important concept in the proposed rule] between the wetlands and “navigable waters” that informed our reading of the CWA’ in that case.”

Again in 2006, the Court addressed the term “waters of the United States.” In a key part of that ruling Justice Kennedy “concluded that ‘to constitute

“navigable waters” under the Act, a water or wetland must possess a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made’.... He concluded that wetlands possess the requisite significant nexus if the wetlands ‘either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable”’.... Justice Kennedy’s opinion notes that such a relationship with navigable waters must be more than ‘speculative or insubstantial.’”

The purpose of the proposed rule is to clarify that “significant nexus” or connection between the navigable waters of the United States and the wetlands the EPA and COE seek to regulate. In light of this need the EPA commissioned a study, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (<http://tinyurl.com/ldn73to>).

With regard to this study, the agencies write, “The Report is under review by EPA’s Science Advisory Board, and the rule will not be finalized until that review and the final Report are complete. This proposal is also supported by a body of peer-reviewed scientific literature on the connectivity of tributaries, wetlands, adjacent open waters, and other open waters to downstream waters and the important effects of these connections on the chemical, physical, and biological integrity of those downstream waters.”

The agencies also expect that “additional data and information likely will become available during the rulemaking process, including that provided during the public comment process, and by additional research, studies, and investigations that take place before the rulemaking process is concluded. The agencies are specifically requesting information that would inform the decision on how best to address ‘other waters.’ At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record and determine at that time what, if any, adjustments are appropriate for the final rule.”

In light of the Supreme Court’s ruling that the agencies need to show a “significant nexus” between a water body that falls under the aegis of the EPA and the COE, the importance of the review of the scientific literature cannot be underestimated. It does not matter whether either the EPA and COE or a property owner think particular ditch or wetland should or should not be covered by the CWA. What matters is whether the scientific literature shows a “significant nexus” be-

Cont. on p. 2

Waters of the U.S. rule: The back story and waters that are explicitly excluded

Cont. from p. 1

tween a particular type of ditch or wetland and waters that all agree come under the purview of the CWA.

At the same time, the proposed rule “excludes specified waters and features from the definition of ‘waters of the United States.’ Waters and features that are determined to be excluded under section (b) of the proposed rule will not be jurisdictional under any of the categories in the proposed rule under section (a), *even if they would otherwise satisfy the regulatory definition* (emphasis added). Those waters and features that would not be ‘waters of the United States’ are:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.
- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water.

- The following features:
 - Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease; artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
 - artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
 - small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
 - water-filled depressions created incidental to construction activity;
 - groundwater, including groundwater drained through subsurface drainage systems; and
 - gullies and rills and non-wetland swales.”

Daryll E. Ray holds the Blasingame Chair of Excellence in Agricultural Policy, Institute of Agriculture, University of Tennessee, and is the Director of UT’s Agricultural Policy Analysis Center (APAC). Harwood D. Schaffer is a Research Assistant Professor at APAC. (865) 974-7407; Fax: (865) 974-7298; dray@utk.edu and hdschaffer@utk.edu; <http://www.agpolicy.org>.