

ISSUE BRIEF

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EPA and the Corps Ignoring Sound Science on Critical Clean Water Act Regulations

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The Environmental Protection Agency (EPA) and the Army Corps of Engineers have drafted regulations that would clarify what kinds of bodies of water are covered under the Clean Water Act (CWA).¹ This new definition would serve as the foundation of the CWA, determining the reach of the federal government’s jurisdiction under this law.

The EPA is developing a scientific study that is supposed to answer many of the questions that need to be addressed in formulating policy for these regulations. However, instead of waiting until its scientific report is completed, the agency has sent its proposed rules to the Office of Management and Budget (OMB) for its review while the report is still in draft form.² This premature action will undermine the scientific study and any final rules that are eventually developed.

The Importance of the Rules. There has been long-standing controversy over what the phrase “waters of the U.S.” means under the CWA. The EPA and the Corps have consistently taken very broad interpretations of this term. The United States Supreme Court in two recent cases rejected the broad overreach taken by both the EPA and the

Corps.³ The new rules will try again to clarify the scope of federal agency power to regulate water bodies.

The Scientific Study. In July 2013, the EPA assembled a Scientific Advisory Board to peer review a study the agency compiled called the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*.⁴ The report is supposed to help develop any final rules. According to the EPA, “This report, when finalized, will provide the scientific basis needed to clarify CWA jurisdiction, including a description of the factors that influence connectivity [of streams] and the mechanisms by which connected waters affect downstream waters.”⁵

Yet the EPA sent its proposed rules clarifying CWA jurisdiction to OMB on September 17, 2013, and released its draft scientific assessment for public comment on the same day.⁶ In fact, the scientific advisory panel did not meet for the first time until December 16, 2013—months after the proposed rule was sent to OMB.⁷ As a result, the proposed rules have been drafted well before the report is even finalized.

The EPA claims, “When final, EPA’s science report on connectivity will provide the science foundation for agency decisions concerning the implementation of the Clean Water Act. The final rule will provide clarification for how that science is translated to policy.”⁸

The problem, though, is that the science report should first provide the foundation for the *proposed* rules. The EPA and the Corps are effectively jumping ahead to the final rule. This undermines both the scientific assessment and the rulemaking process:

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- **Undermining the scientific assessment.** The EPA has a strong incentive to avoid making major changes to the draft scientific report even if the scientific panel or the public have feedback that would necessitate such changes. If these changes were made, the agency would be admitting that the proposed rules are not based on sound science.
- **Undermining the rulemaking process.** The public is supposed to have a meaningful voice in the notice and comment process. This starts with having notice of proposed rules and the opportunity to provide comments to the agency regarding these proposed rules. This exchange of information does not just serve those providing comments and affected parties; it also helps agencies in making informed regulatory decisions.

By not waiting until its final science report is completed before drafting proposed rules, the EPA is giving the impression that its policy decisions are a foregone conclusion. There is also the opposite problem of the agency developing proposed rules that are not under genuine consideration. Since the science report could have a significant impact on the final rules, the proposed rules could be mere placeholders, not a reflection of actual policy proposals.

- **Introducing logical outgrowth doctrine questions.** When there is a significant difference between proposed and final rules, courts may decide that agencies must start the process all over again by drafting new proposed rules. According to the D.C. Circuit Court of Appeals, “Given the strictures of notice-and-comment rulemaking, an agency’s proposed rule and its final rule may differ only insofar as the latter is a ‘logical outgrowth’ of the former.”⁹ The EPA and the Corps’s jumping the gun and issuing proposed regulations that could significantly differ from the final rules could be a costly waste of time.

The Integrity of the Process. The proposed rules should not be drafted until after the scientific report is finalized and based on sound science. OMB should send back the proposed rules to the EPA and the Corps until the scientific assessment has been finalized and the credibility of the report is established.

Even if this process is followed, this in no way means that the rules would reflect sound policy or even be grounded in sound science; however, at least the EPA would be letting its final science report inform the proposed rules. If this does not happen, legislation on this critical issue would be warranted.

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1. Nancy Stoner and Lek Kadeli, “EPA Science: Supporting the Waters of the U.S.,” EPA Connect, September 17, 2013, <http://blog.epa.gov/epaconnect/2013/09/watersoftheus/> (accessed December 27, 2013).
 2. Office of Management and Budget, *The Clean Water Protection Rule*, <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=2040-AF30> (accessed December 27, 2013).
 3. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). See also *Rapanos v. U.S.*, 547 U.S. 715 (2006).
 4. U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft)*, September 24, 2013, <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345> (accessed December 27, 2013).
 5. *Ibid.*
 6. Stoner and Kadeli, “EPA Science.”
 7. EPA Scientific Advisory Board, “Meeting: Panel for the Review of the EPA Water Body Connectivity Report 12/16/2013 to 12/18/2013,” <http://yosemite.epa.gov/sab/sabproduct.nsf/MeetingCal/A243CB99328D3BF085257BBE0074E4E2?OpenDocument> (accessed December 27, 2013). See also Russell Riggs, “Scientists Meet on EPA Water Rule,” National Association of Realtors, December 20, 2013, <http://www.realtor.org/articles/scientists-meet-on-epa-water-rule> (accessed January 3, 2014).
 8. Stoner and Kadeli, “EPA Science.”
 9. *Environmental Integrity Project v. U.S. Environmental Protection Agency*, 425 F.3d 992 (D.C. Cir. 2005).