Regulators Look for Clarification on Clean Water Act Standards

By Jennifer Ginn
Thursday, February 28, 2013 at 02:56 PM

When Congress passed the Clean Water Act in 1972, it was fairly vague about which bodies of water would be protected by the new legislation. Supreme Court rulings over the past 12 years have done little to add much clarity to the issue.

“In 1972, Congress enacted the Clean Water Act and indicated that all its programs were designed to protect the navigable waters,” said Donna Downing, an attorney in the U.S. Environmental Protection Agency’s Office of Water. She was one of the featured speakers in “The Clean Water Act and Waters of the U.S.,” a recent CSG webinar. “Then in the act they defined navigable waters as meaning waters of the United States, including the territorial seas. That’s all the statute says about what waters are protected and subject to all those different Clean Water Act programs.”

Stacey Jensen, a regulatory program manager at the U.S. Army Corps of Engineers headquarters, said in order to be considered a “waters of the U.S.” under the Clean Water Act, it must:

1. Be traditionally navigable;
2. Be interstate;
3. Could affect interstate commerce if used, degraded or destroyed;
4. Involve impoundment structures like dams in jurisdictional waters;
5. Be tributaries of jurisdictional waters;
6. Be territorial seas; and
7. Be wetlands adjacent to jurisdictional waters.

“Those terms also can be ambiguous,” Jensen said. “There’s a lot of different terms you see out in the scientific community, you don’t see them on this list.”

Downing said as is typical in these vague situations, the court system often decides definitions and limitations. A few cases decided by the U.S. Supreme Court have had a significant impact on the Clean Water Act and its scope of authority.

In the 1985 Riverside Bayview Homes case, the Supreme Court decided that wetlands adjacent to traditional navigable waters would fall under the auspices of federal oversight even if they do not appear to be navigable in the traditional sense of the word. This decision helped spur the issuance of the 1986 Migratory Bird Rule by the U.S. Army Corps of Engineers, giving it permitting jurisdiction over waters used to irrigate crops sold in interstate commerce and waters that are or could be used...
as a habitat by migratory birds or endangered species.

The Supreme Court in a 5-4 vote ultimately struck down the Migratory Bird Rule in the 2001 case, Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers. Downing said the justices told the corps and EPA they could not claim jurisdiction just because of the presence of migratory birds. Federal regulation under the Clean Water Act had to have a connection to the navigability of isolated wetlands.

But again, more questions remained.

“What does isolated mean,” Downing said. “Is it distance, hydrology? The Supreme Court didn’t say.”

In split decisions over two cases in 2006—Rapanos v. United States and Carabell v. United States—the Supreme Court essentially set up two guidance standards for federal regulators. A plurality opinion issued by Justice Antonin Scalia said federal jurisdiction only covers wetlands connected to permanent bodies of water like streams, rivers and lakes by a continuous surface connection.

Justice Anthony Kennedy issued his own opinion, saying there was federal jurisdiction over waters of the U.S. when there was more than a speculative effect on the chemical, physical or biological integrity of the water—in essence, a substantial “nexus” between a wetland and a traditional navigable water. The practical implication, however, involved using an ambiguous ecological test.

“The Supreme Court … didn’t invalidate the regulatory definition the agencies developed for terms such as ‘waters of the United States’, but it did affect how those regulations are implemented,” Downing said. “We now need to look for examples for inland waters if there’s a presence of a significant nexus or is it relatively permanent, terms that just don’t appear in the regulation.”

This left federal regulators with a perplexing scenario because there are no statutory terms for tributary or significant nexus. Jensen said current federal guidance would exclude more than 15,000 bodies of water from federal jurisdiction.

In May 2011, the Obama administration proposed new draft guidance to clarify the scope of the waters of the U.S. and to address concerns about inconsistencies and to improve predictability for states, industries and other stakeholders. New regulations could have a substantial impact on millions of businesses, farms and private property owners, in addition to potentially extending federal oversight on water resources historically managed by states.

More than 230,000 public comments were received on the proposed guidance, showing the large interest from the regulated community and environmental protection organizations involved. In December 2012, that set of final draft guidance was sent to the Office of Management and Budget, where it is still under interagency review.

Brydon Ross, CSG’s director of energy and environmental policy, contributed to this article.

**CSG Resources**


**Other Resources**

- **Governing** [4]: “It’s a Critical Time for the Clean Water Act” [4]
- **Natural Resources Defense Council**: Supreme Court Case Could Threaten Scope of Clean Water Act
Also in This Issue:

- States Will Feel the Pinch of Sequestration, but a Bigger Budget Bite is Coming [7]
- In the Firearms Debate, Are We All Losing? [8]
- Listen, Engage to Craft Solutions to Problems [9]

Tags:
E-Newsletter [10]