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EPA Open to Revising Economic Analysis Of Proposed Jurisdiction Rule, Adviser Says

by Amena H. Saiyid

The Environmental Protection Agency remains open to revising the cost-benefit analysis of the proposed rule that would clarify the extent of Clean Water Act jurisdiction over the nation's waters, an agency adviser said May 22.

“Like all aspects of the rule, the costs and benefits analysis is subject to comment, and it is also subject to revision,” Ken Kopocis, senior adviser to the EPA Office of Water, said at an Environmental Law Institute seminar on the proposed waters of the U.S. rule.

The economic analysis of the waters of the U.S. rule, proposed jointly by the U.S. Army Corps of Engineers and the EPA, has come under intense criticism from more than 200 House Republican lawmakers and the Waters Advocacy Coalition—a national coalition representing the construction, manufacturing, housing, real estate, mining, agricultural sector and energy sector.

The coalition hired its own economist who said the agencies' analysis was based on outdated studies, incomplete data and flawed methodology (86 DER A-36, 5/5/14).

Kopocis said that the EPA and the corps—as they always do with proposed rulemaking—would be “revisiting the cost and benefits analysis as part of the development of the final rule.”

No Direct Costs Seen

As part of the joint proposed rule, the agencies found that the rule would impose no direct costs on the regulated community. Rather, the joint economic analysis of the proposed rule calculated indirect benefits and costs that would accrue as a result of clarifying the confusion surrounding which waters are federally protected.

The analysis showed the benefits of implementing the proposed rule would range from \$300.7 million to \$397.6 million annually, while the indirect costs would be between \$133.7 million and \$200 million.

The greatest costs would be incurred by developers, mining companies, landowners and other permit applicants. They could be required to mitigate losses of wetlands and streams and to obtain Section 404 dredge-and-fill permits and Section 402 National Pollutant Discharge Elimination System stormwater runoff permits under the proposed rule.

EPA Won't Comment on Final Rule

However, the EPA's senior adviser stopped short of commenting on the shape of the final rule, saying “that would be disingenuous to the entire notice and comment period.”

Moreover, Kopocis maintained that the joint rule, which was proposed April 21, represented the agencies' best thinking at that moment in time. “It would be short sighted and mistaken if people accepted that we already have made up our minds that the final rule will be what the proposed rule is,” he said (77 DER A-13, 4/22/14).

Deidre Duncan, a Hunton & Williams attorney who represents the Waters Advocacy Coalition, told the seminar the proposed rule, contrary to the administration's claims, creates more confusion and does broaden the reach of the Clean Water Act jurisdiction over the nation's waters.

Definition of Tributaries

Duncan said the new definition of tributaries was bringing in more waters and categories of waters that weren't previously covered. Moreover, she said, the proposed waters of the U.S. definition would apply to all Clean Water Act programs, including pollution discharges and prevention of oil spills.

During the question-and-answer session, Larry Liebesman, an attorney with the Washington, D.C.-based office of Holland & Knight LLP, asked Kopocis to clarify how the agencies planned to distinguish between groundwater and subsurface shallow water.

Liebesman noted that Kopocis said groundwater is clearly exempted from Clean Water Act regulation. At the same time, Liebesman said the proposed rule also allows subsurface shallow water connection to establish jurisdiction between waters and wetlands that are “adjacent” or “neighbor” to traditionally navigable waters.

Kopocis responded that the proposed rule made it clear that the subsurface shallow water flows don't fall under Clean Water Act jurisdiction by virtue of establishing jurisdiction between two disparate bodies of waters and wetlands.

House Committee to Hold Hearing

Meanwhile, the House Small Business Committee plans to hold a May 29 hearing on the proposed rulemaking, saying the committee's analysis has revealed the proposed rule could be “extremely harmful” to businesses, committee spokesman Darrell Jordan told Bloomberg BNA.

According to Jordan, Committee Chairman Sam Graves (R-Mo.) decided to hold a hearing after he announced in early May that he was adding the rule, which would clarify the scope of Clean Water Act jurisdiction over the nation's waters and wetlands, to the list of rules the small business committee has deemed burdensome (79 DER A-25, 4/24/14).

Witnesses representing the National Cattlemen's Beef Association, National Stone and Gravel Association and National Home Builders Association are expected to testify on whether the proposed rule will “drown small businesses.” Also expected to testify is William Buzbee, director of the Emory Environmental and Natural Resources Law Program at Atlanta-based Emory University Law School.

Reach of Rule

The jointly proposed rule would bring under federal jurisdiction all tributaries of streams, lakes, ponds and impoundments, as well as wetlands that affect the chemical, physical and biological integrity of larger, navigable downstream waters. The agencies plan to accept comment on the rule until July 21 (79 Fed. Reg. 2,218; (77 DER A-13, 4/22/14).

For More Information

More information about the House Small Business Committee hearing is available at <http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=373099>.