

Waters of the U.S.: EPA's Connectivity Report and CWA Regulation

Overview - EPA's report implies that, because nearly all water is in some way connected, EPA's authority under the Clean Water Act is virtually limitless. The report thus disguises what is nothing more than a *policy* preference as a claim that is justified by science and the law. Such a position is contrary to law and utterly unfounded. The impact of this interpretation, if rolled into federal regulation as we anticipate, is more permits, more permit requirements, government and environmental group scrutiny of more of the things we do in agriculture.

Background - According to law and decisions by the U.S. Supreme Court, the CWA regulates navigable waters and certain other waters with a “significant nexus” to navigable waters. All other waters are left to the states to regulate. Any rule defining the reach of the CWA must include limits on federal jurisdiction, and cannot include waters that are not navigable or that do not have a “significant nexus” to navigable waters.

Summary of EPA's Connectivity Report

- Concludes that nearly all wetlands, open waters, and streams (channels/ditches), regardless of size or how frequently they flow, are connected and implies that such connections are enough to justify federal jurisdiction.

Problems with EPA's Connectivity Report

- Fails to establish any scientific basis for determining the existence of a “significant nexus,” and thus fails to provide a scientific basis for any rule defining federal jurisdiction. Identifies only the presence of connections, without considering the *significance* of those connections.
- Ignores Supreme Court ruling that rejected- the idea that a “significant nexus” is established by any hydrological connection.
- Does not identify how the existing connectivity literature will guide agencies as they attempt to determine and scientifically defend the concept of “significant nexus” and thus the scope of the CWA.