

Trench Warfare



As 2014 draws to a close and a new year looms, all eyes will be on Congress as the lame ducks prepare to exit and new representatives begin their terms. There are

a number of policy changes expected as the balance of partisan power shifts, and one point of contention that will affect storm water professionals is the proposed Waters of the U.S. rule under the Clean Water Act (CWA).

Proposed by the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers, the draft rule aims to define the scope of the CWA in the aftermath of Supreme Court decisions in 2001 and 2006. According to EPA, these decisions narrowed legal protections and confused the understanding of what waters are covered under the law, especially smaller streams and wetlands that may flow only intermittently or after heavy rain—many of which are upstream of navigable waters and feed into drinking water sources.

EPA stated that the rule does not add protection to any new water bodies that have not historically been covered by the CWA or limit current regulatory exemptions and exclusions: “Simply put ... If you didn’t need a permit for a type of activity before, you won’t need one now.”

Despite EPA’s attempt at clarification, and although supporters say the new rule will protect surface water quality, reduce flooding and recharge groundwater, the effort to draft a rule has been vigorously opposed by industry, including the American Farm Bureau Federation and the National Assn. of Home Builders,

which argue that the definitions would create a regulatory overreach—even allowing EPA to regulate “ditches,” stock ponds and farmland, although EPA has denied that would be the case—and create poor business conditions.

These arguments reflect a divide between policies and the complicated hydrology of the real world; for example, there is some debate on whether “ditches,” “tributaries” and “floodplains” are defined in the proposed rule according to how these features exist in nature, and if the rule’s definitions of the terms are consistent with those in other water regulations.

Regulators want easy-to-follow policies for deciding when to issue permits, but the natural environment does not always cooperate. Wetlands and small ponds can vary greatly in their biology and hydrology, so how does one determine which are significant enough to merit protection? Small water bodies may have little effect on downstream waters individually, but combined can demonstrate significant impact.

If the intended rule does in fact improve surface water quality in the U.S., save money and reduce the red tape of the permitting process, then everyone should be in agreement that it is a good thing—but there still seems to be more confusion than understanding on what will and will not be regulated. In 2015, EPA will continue its uphill battle to prove that the rule will have a net-positive effect, and to clarify several definitions within its proposed rule—because, based on all the conflicting information that is circulating, this attempt at clarification has only further muddied the waters. **SWS**

Mary Beth Nevulis, managing editor
mnevilis@sfgmail.com



Scranton Gillette Communications, Inc.
3030 W. Salt Creek Ln. #201, Arlington Heights, IL 60005
tel: 847.391.1000 fax: 847.390.0408

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