

Client Alert: Wetlands and Isolated Surface Waters News

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Update on Clean Water Act “Jurisdictional Waters” Guidance and Science Advisory Board Review of USEPA’s Water Body Connectivity Scientific Literature Search

In the spring of 2011, USEPA and the U.S. Army Corps of Engineers issued a draft revised Clean Water Act (CWA) guidance document to assist in determining when surface waters fall within the CWA’s jurisdiction that would subject the waters to regulation under wetlands or other permitting programs (76 Fed. Reg. 24479; May 2, 2011). The draft revised guidance expanded the jurisdictional reach from a previous December 2008 CWA guidance document, which was issued to help guide the agencies in following U.S. Supreme Court cases addressing the scope of the CWA and definition of “Waters of the United States.”

The 2011 Joint Agency draft revised guidance was controversial, and thousands of public comments were submitted. An issue that received considerable attention, was the sufficiency of any physical, chemical or biological nexus between small or temporary isolated water bodies with larger permanent or relatively permanent water bodies, that would bring the small or isolated water body within the CWA’s jurisdiction. The 2011 draft revised jurisdictional guidance has not been finalized.

USEPA Water Body Connectivity Report - Review of Scientific Research

USEPA has finalized its literature search on water body connectivity and recently issued a draft report, “Connectivity of Streams and Wetlands to Downstream Waters: A Review of and Synthesis of the Scientific Evidence” (September 2013 External Review Draft, EPA/600/R11/09B). The Water Body Connectivity Report reviews and summarizes currently available peer-reviewed scientific literature (published through August 2012) on the connectivity or isolation of streams and wetlands relative to larger water bodies, and the factors that influence

or affect the function of downstream waters. Previous drafts of the Report were prepared and reviewed by USEPA and the Corps in 2011. Additional comments were received from outside scientists in a limited public review and from an independent peer review panel conducted in January 2012. The Water Body Connectivity Report can be found [here](#).

USEPA makes several conclusions/findings in the September 2013 Water Body Connectivity Report based on their review and understanding of the scientific literature:

(1) streams exert strong influence on the character and functioning of downstream waters, and all tributaries (including head waters), whether perennial, intermittent or ephemeral, are physically, chemically and biologically connected to downstream rivers.

(2) Wetlands and open waters that have *bidirectional hydrologic exchanges* with streams (e.g., wetlands and open waters in riparian areas and floodplains) are physically, chemically and biologically connected to downstream rivers.

(3) Wetlands that lack *bidirectional hydrologic exchanges* with downstream waters (i.e., are *unidirectional*) such as many prairie potholes, vernal pools, and playa lakes, provide numerous functions that can benefit downstream water quality and integrity, if there is a surface or shallow subsurface water connection to the river network.

(4) For *unidirectional* wetlands that do not have a surface or shallow water connection to the river network, the literature is not sufficient to evaluate or generalize about the degree of connectivity. Such wetlands occur on a gradient or degree of connectivity, and vary geographically and over time. An evaluation of this kind of wetlands can be complicated as certain functions are beneficial just by virtue of the water being isolated (e.g., prevention of sediment and water from flowing downstream), and if such water is altered, negative consequences can occur on the downstream watershed network. USEPA indicated that these conclusions also apply to ponds and lakes that lack surface water inlets, as the same principles govern hydrologic connectivity between these water bodies and downstream waters, although their review did not specifically address ponds or lakes without an inlet. USEPA further mentions that evaluations of these types of individual wetlands and open waters or groups of these wetlands, could be possible through a case-by-case analysis, and while technically challenging, there are new advancements in the fields of mapping, assessment, and landscape classifications, that are promising for detecting and monitoring ecologically relevant connections.

The Water Body Connectivity Report can and most likely will, form the basis for further USEPA regulatory and policy actions related to the regulation and permitting of wetlands and isolated waters. In that regard, USEPA has requested the review of the Science Advisory Board (SAB).

Science Advisory Board Review of Water Body Connectivity Report/Public Meeting

The SAB was created in 1978 by Congress to provide independent scientific advice to USEPA on the technical basis for USEPA's positions and regulations. At the request of USEPA, the SAB has formed a 27 member panel of PhD scientists from around the United States to perform a review of the Water Body Connectivity Report. The names and bios of the panel members for this effort are posted [here](#). In general,

the SAB panel's "technical charge" is to determine the accuracy of the Report, and whether USEPA's conclusions and findings are supported by the available science.

On September 17, 2013, the SAB announced that the full panel reviewing the Water Body Connectivity Report will meet for 2 1/2 days in a public meeting to be held December 16-18, 2013 at the Washington Plaza Hotel, 10 Thomas Circle NW, Washington DC, where they will listen to and accept public comments.

Public Input Opportunity

USEPA has established a docket to capture all written, email and oral statements in connection with SAB's review of the Water Body Connectivity Report (Docket ID No. EPA-HQ-OA-2013-0582). The public comment procedure for submitting written/email comments and making oral statements at the public meeting, will be explained in an upcoming Federal Register Notice (a pre-publication Federal Register Notice is now available [here](#)). According to the pre-publication version, members of the public wishing to make oral statements at the December 16-18, 2013 meeting will need to contact the Designated Federal Officer directly (by phone or email and the contact information is provided in the notice) by December 9, 2013 to be placed on the list of public speakers. Written statements are to be submitted by November 6, 2013 if you want the comment to be viewed by the panel before the December 16-18, 2013 public meeting. Written comments submitted after November 6, 2013 will be marked "late" and may not be provided to SAB for their consideration before the December 2013 meeting, but the comments will be part of the docket and available for the panel's review and consideration.

It is our understanding that the panel will hold one or more meetings (most likely via teleconference) after the December 2013 meeting to discuss and complete its draft review, and there will be additional opportunities to submit comments for the panel's review. After the panel completes its report, the Chartered SAB will hold a public quality review teleconference to review the panel's report. Public comments for SAB's consideration will also be accepted prior to the quality review teleconference. These meetings and teleconferences will be noticed in the Federal Register.

These meetings and related comment periods, will be important opportunities for the public to provide input to the reviewing panel and the Chartered SAB on the Water Body Connectivity Report, and USEPA's conclusions drawn from their review of the scientific literature. A link to SAB's Technical Charge (and the Water Body Connectivity Report) can be found [here](#).

If you need further information or assistance on this subject, contact Ted Boggs in the Vorys Columbus Office at taboggs@vorys.com or 614.464.8319.