

Building industry worries water rule could affect projects

By **Daniel Walmer**, June 19, 2015 at 3:00 AM

Developers already must navigate several potential roadblocks when considering a construction project, according to Josh George, president of the York Builders Association — slopes, sinkholes, wet soils and traffic problems, among others.

Now, George is afraid new regulatory oversight — in the form of a rule that may expand the U.S. Environmental Protection Agency's jurisdiction to smaller and more transient waterways — could impair the financial viability of some projects.

“Because development is a business like any other, there needs to be a return on investment,” he said. “Expanding and adding regulatory oversight ... may render these properties undevelopable or too expensive to develop affordably.”

RELATED: Waters of the U.S.: Could an EPA rule actually hurt business development?

Supporters and opponents of the rule differ on the extent to which it will actually increase the EPA's jurisdiction, but business leaders say that uncertainty itself may be the biggest cause for concern.

Expanded jurisdiction?

The final rule, announced May 27, is designed to clarify the EPA's jurisdiction over certain non-navigable waters, such as tributaries and wetlands, and supporters say the move is supported by science. Thomas Au, conservation chairman for the Sierra Club Pennsylvania Chapter, said pollutants in surface waters drain into waters used for drinking, so it is critical to filter out pollutants from smaller waterways before they enter sources of drinking water.

“The **Army Corp of Engineers** and the EPA ... have worked together to gather the best science to support the rule,” he said.

The EPA also rejects claims that the rule is a major regulatory expansion, stating on its website that the rule does not cover any new types of water or new ditches; instead, it states for the first time that certain dry ditches are exempt from the rule.

However, Dan Bosch, senior manager of regulatory policy at the National Federation of Independent Business, called the EPA's claims about reducing regulation of ditches “at best a half-truth” that is based on comparisons with the EPA's 1986 rule, which was scaled back by court decisions. He said the rule would not apply to every ditch and puddle but would capture stream beds and other features that most people would not consider water.

Alexandra Chiaruttini, an environmental law attorney at York-based **Stock and Leader LLP**, sees the rule as a

mixed bag for developers: It clarifies the EPA's jurisdiction in some cases — but sometimes expands the EPA's jurisdiction in doing so — while leaving some portions of the rule ambiguous, she said.

Au believes businesses in Pennsylvania especially need not worry because the state's broad Clean Streams Law already provides for state regulation of projects that would be covered under the rule. Chiaruttini agreed that it is “remarkably unlikely” that a project that did not already need a permit is now going to be subject to the EPA rule. In most cases, the developer will likely be dealing with the same permit writers and other staff at the state Department of Environmental Protection for both permits, though the federal permitting process may trigger other federal laws, such as the Endangered Species Act.

Long wait

Still, the law does require another permit to be completed before beginning construction. Projects that need a determination of EPA jurisdiction from the U.S. Army Corps of Engineers can wait as long as a year for that determination, before the permitting process even begins, Chiaruttini said.

Because the process is so long, most developers decide it's not worth fighting a determination that the EPA has jurisdiction.

RELATED: U.S. House passes bill blocking EPA 'Waters of the US' rule

“The practical reality is money is time for developers,” she said.

But due to the rule's complexity, it can be difficult for a business to determine EPA jurisdiction without seeking a determination from the U.S. Army Corps of Engineers, Bosch said.

George called the rule “broad and open to interpretation.” For instance, it is unclear if vegetated drainage swales that convey and treat stormwater runoff will be considered a regulated feature, he said.

Chiaruttini recommended that businesses looking to develop ask their consultants what permits will be needed.

Impact on construction

While construction spending has generally been on the rise in recent years following struggles during the recession, 2014 saw uneven results for commercial construction bidding in Central Pennsylvania, according to information from Chicago-based project data firm BidClerk. Projects bid in the York-Hanover region increased from 161 in 2013 to 200 in 2014, but projects in the Harrisburg-Carlisle region declined from 458 projects in 2013 to 343 in 2014, and the Lancaster and Lebanon regions also saw declines, the firm reported.

Chiaruttini does not expect the rule to discourage development, but said it could do so in certain case-specific instances where there might be a federal law that could result in a significant barrier to the completion of a project if the federal government has jurisdiction. Bosch said the rule could complicate matters for projects with slim profit margins.

“The reality is that any business that owns property and may seek to develop or alter it now has to consider whether or not they have a 'water of the U.S.,' and if they do, whether or not they want to move forward with the plans to do so,” he said.

An additional concern, he said, is that a property containing “Waters of the U.S.” could become more difficult to sell to another developer if the current owner decides not to develop it.

Will new 'Waters of the U.S.' rule be enforced?

- The rule will likely not be blocked by legal challenges, said Alexandra Chiaruttini, environmental law attorney at Stock and Leader LLP. However, portions of the rule will likely be subject to several lawsuits that could wind their way for years before finally being decided by the U.S. Supreme Court, she said.
- Dan Bosch, senior manager of regulatory policy at the National Federation of Independent Business, did not say whether NFIB would take legal action but said the group contends that the current rule goes beyond the legal limitations set by the U.S. Supreme Court on an earlier rule in 1986.
- Federal legislators are also mulling possible action. The **U.S. House passed a bill** in May to compel a rewrite of the rule, and the Senate Committee on Environment and Public Works advanced a similar bill June 10.

What are ‘waters of the U.S.’?

Facts about the Environmental Protection Agency’s new ‘Waters of the U.S.’ rule:

- It further defines the EPA’s jurisdiction to regulate actions that impact waterways.
- Four categories of EPA jurisdiction are generally unchanged by the new rule: traditional navigable waters, interstate waters, territorial seas and impoundments of jurisdictional waters.
- A fifth category, tributaries, was further defined and specifically excluded dry ditches that flow only after precipitation. It further defines the waters in a sixth category — “adjacent waters” — based on their proximity to another waterway and whether they are included within a 100-year flood plain.
- It extensively discusses the EPA’s jurisdiction over case-specific waters with a “significant nexus” to other waterways but does not clarify every circumstance.
- Environmental law attorney Alexandra Chiaruttini recommended engaging an environmental professional for clarification of the rule as applied to a specific waterway because the analysis can be very fact-specific and technical in nature.
- View the full rule on the EPA’s **webpage about the Clean Water Rule**.

Sources: Alexandra Chiaruttini, environmental law attorney at Stock and Leader LLP; EPA.

Daniel Walmer

Daniel Walmer covers York County, energy, environment and agribusiness. Have a tip or question



for him? Email him at **danielw@cpbj.com**. Follow him on Twitter, **[@danielwCPBJ](https://twitter.com/danielwCPBJ)**.

+ Leave a Comment

0 Comments
