Written by **William F. Jasper** on December 13, 2013

EPA Water Police Coming to Your Farm, Business — and Back Yard

The rollout fiasco of ObamaCare and the ongoing uproar over its hidden traps and broken promises has obscured another domestic agenda item of the Obama administration that may prove nearly as pervasive and invasive as his nationalized healthcare initiative.

The clock is ticking on the federal Environmental Protection Agency's draft proposal to grab regulatory authority over virtually all surface water and groundwater throughout the United States. If not stopped by Congress, the agency could assert jurisdiction over even intermittent seasonal streams, isolated wetlands, ditches, trickles, puddles, and ponds. In September, the EPA issued a draft scientific study purporting to find that virtually all wetlands and streams are "physically, chemically, and biologically connected" to downstream waters over which the EPA already claims authority. Moreover, says the EPA study, even many "ephemeral streams" and "prairie potholes, vernal pools and playa lakes" that are dry most of the year can be found to have some connectivity to downstream waters.

At the same time that it released its science report, the EPA and the Army Corps of Engineers sent a draft regulation to the White House Office of Management and Budget (OMB) for interagency review. The White House is supposed to release the proposed regulation to the public by mid-December, but preoccupation with ObamaCare and other matters could delay that release.

Predictably, the EPA's expansive claim to regulatory power is being cheered by "environmental" NGOs that applaud every move to expand, concentrate, and centralize the power and reach of government. And just as predictably, the EPA proposal is generating vigorous opposition from property owners, farmers, ranchers, and industry, as well as state and local governments, who will be directly affected by any new EPA rulemaking on these matters.

The EPA's new study, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, is generating controversy for its claims and methodology, as well as for the political nature of its release before being subjected to scientific peer review. Since passage of the federal Clean Water Act (CWA) in 1972, the EPA has been torturing the law's text to claim

practically unlimited jurisdiction over all waters. However, the act does not regulate *all* waters; it regulates "navigable waters," defined as "waters of the United States" (33 U.S.C. §§ 1344, 1362(7). To a reasonable layman, the term "navigable waters" would obviously not apply to puddles, vernal pools, ditches, and seasonal streams. But to EPA bureaucrats bent on limitless authority, the CWA wording was no obstacle; it has continued to assert its power despite being slapped down in court decisions.

The U.S. Supreme Court has ruled against the EPA's ludicrous stretching of "navigable waters" in two of its three decisions concerning this issue. In *United States v. Riverside Bayview Homes, Inc*. (1985), the court upheld the EPA's claim to jurisdiction over wetlands adjacent to navigable waters because it found that the adjacent wetlands were "inseparably bound up" with the navigable waters.

In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* (2001), the Supreme Court rejected the EPA's claimed regulatory authority over isolated ponds because they were a "far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."

Following their SWANCC defeat, the EPA and Army Corps of Engineers adopted the scheme of claiming that isolated waters were not outside their jurisdiction if, somehow, those waters could be arguably "connected" to navigable waters. This "any connection" theory of water regulation was challenged in *Rapanos v. United States* (2006).

The Supreme Court, in its *Rapanos* decision, found that the Army Corps of Engineers had gone "beyond parody" in claiming that land — whether wet or dry — somehow falls within the definition of "waters" under the CWA. The court referred to *Webster's New International Dictionary* (2nd edition, 1954) to inject some common sense into the agency's absurd interpretation. The court ridiculed the corps' "land is waters" interpretation, stating:

> The definition refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features." All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely "streams," connotes a continuous flow of water in a permanent channel — especially when used in company with other terms such as "rivers," "lakes," and "oceans." None of these terms encompasses transitory puddles or ephemeral flows of water.
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> The restriction of "the waters of the United States" to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction.

The court also revisited again the navigable waters issue, noting that a reasonable interpretation requires "at bare minimum, the ordinary presence of water." Further, the court stated:

> In addition, the Act's use of the traditional phrase "navigable waters" (the defined term) further confirms that it confers jurisdiction only over relatively permanent bodies of water.... Plainly, because such "waters" had to be navigable in fact or susceptible of being rendered so, the term did not include ephemeral flows.

The court also noted that the corps, like the EPA, had continued to assert its expansive regulatory claims despite the court's SWANCC decision. According to the court:

> Even after SWANCC, the lower courts have continued to uphold the Corpsí sweeping assertions of jurisdiction over ephemeral channels and drains as "tributaries." For example, courts have held that jurisdictional "tributaries" include … a "roadside ditch" whose water took "a winding, thirty-two-mile path to the Chesapeake Bay," … and (most implausibly of all) the "washes and arroyos" of an "arid development site," located in the middle of the desert.

Not to be deterred, the federal bureaucrats have, since SWANCC and *Rapanos*, focused on developing their "connectivity" theory, in order to meet the "significant nexus" standard that Justice Kennedy set down in his concurring *Rapanos* opinion.

The text of the EPA's *Connectivity of Streams and Wetlands* study (also known as *The Synthesis Report*), together with the alarming trend of the agency's abuse of power — especially under the current administration — gives every reason to believe that the agency intends to run roughshod over private homeowners, farmers, ranchers, loggers, miners, manufacturers, energy producers, developers, and local and state governments. All under the pretext, of course, of protecting the purity of water from evil polluters. And — with the blessing of "science."

The EPA and Army Corps of Engineers have fashioned their connectivity standards to trump the "navigable waters" limitations and appear to meet the "significant nexus" requirements of the Supreme Court. *The Synthesis Report* states:

> All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.

Further, it signals that more wetlands battles are in the works, even though the "wetlands" may be "prairie potholes" unconnected to the "waters of the United States." According to the EPA's report:

> Wetlands in landscape settings that lack bidirectional hydrologic exchanges with downstream waters (e.g., many prairie potholes, vernal pools, and playa lakes) provide numerous functions that can benefit downstream water quality and integrity….
>
> In unidirectional wetlands that are not connected to the river network through surface or shallow subsurface water, the type and degree of connectivity varies geographically within a watershed and over time.

It continues:

> Further, while our review did not specifically address other unidirectional water bodies, our conclusions apply to these water bodies (e.g., ponds and lakes that lack surface water inlets) as well, since the same principles govern hydrologic connectivity between these water bodies and downstream waters.

The Synthesis Report reconfirms agency plans to target "ephemeral or intermittent" water flows, stating:

> Even infrequent flows through ephemeral or intermittent channels influence fundamental biogeochemical processes by connecting the channel and shallow groundwater with other landscape elements.

The report's glossary also provides cause for concern, giving, for example, this definition for "connectivity": "The degree to which components of a river system are joined, or connected, by various transport mechanisms; connectivity is determined by the characteristics of both the physical landscape and the biota of the specific system."

Considering past abuses of the EPA and other federal regulatory agencies, it does not require great imagination to realize this definition alone supplies enormous opportunities for tyrannical overreach. Will the EPA determine that your "prairie pothole" with a few inches of seasonal water — be it 5, 10, 20, or 32 miles from the nearest "navigable waters" — is "connected," nonetheless, because "landscape" criteria developed by the agency's "scientists" say so?

And if that doesn't work, there's always the "biota" criterion. "What the heck is 'biota,'" you ask? The *Oxford Dictionary* defines it as "the animal and plant life of a particular region, habitat, or geological period: the biota of the river." Other reference sources say it refers to any "organisms" — animal or plant — in a region or habitat. It is far from wild speculation to imagine that the EPA (perhaps with the assisting prod of a lawsuit by enviro-activists) may use its new connectivity weapon to find a bug, frog, fungus, weed, bird, bush, rodent — any organism — to claim a connection between one's property and far off "waters of the United States," no matter how absurd and "beyond parody" the contention may be.

The EPA's connectivity theory and its proposed new regulations to implement it have been subjected to many critical legal reviews by many groups, including the Missouri-based Property Rights Coalition and the Waters Advocacy Coalition, which is composed of organizations such as the American Farm Bureau Federation, American Forest & Paper Association, Irrigation Association, National Association of Home Builders, National Association of Manufacturers, National Association of Realtors, National Association of State Departments of Agriculture, National Cattlemen's Beef Association, National Mining Association, and National Council of Farmer Cooperatives.

Rep. Lamar Smith (R-Texas), chairman of the House Committee on Science, Space, and Technology, is among the members of Congress who have denounced the EPA's new water regulatory plans as "a massive power grab of private property across the U.S."

In a November 12, 2013 press statement, Rep. Smith declared:

> The EPA's draft water rule is a massive power grab of private property across the U.S. This could be the largest expansion of EPA regulatory authority ever. If the draft rule is approved, it would allow the EPA to regulate virtually every body of water in the United States, including private and public lakes, ponds and streams.

"The Obama administration's latest power play to regulate America's waterways is an unprecedented effort to control the use of private property," Smith said.

A week prior, on November 6, Rep. Smith and Environment Subcommittee Chairman Chris Stewart (R-Utah) sent a letter to the White House Office of Management and Budget (OMB) outlining concerns about the "rush" process by which the EPA is attempting to expand its jurisdiction under the Clean Water Act.

"Rather than allowing time for a review of their proposed regulations, the EPA is rushing forward regardless of whether the science actually supports the rule," the chairmen wrote. "The proposed rule could give the EPA unprecedented power over private property in the U.S. Racing through the approval process without proper peer review and transparency amounts to an EPA power play to regulate

America's waterways. Such unrestrained federal intrusion poses a serious threat to private property rights, state sovereignty and economic growth."

As we have reported previously (see here and here), last year the U.S. Supreme Court handed down another slap to what it called the EPA's "high-handedness" in the agency's abuse of "wetlands" regulations to stop the Sackett family of Priest Lake, Idaho, from building their dream home on a residential lot. In spite of having gotten all the necessary local permits, the Sacketts were prevented from building their home for five years and threatened with outrageous fines of $75,000 per day.

Nevertheless, it doesn't seem to matter how many times the Supreme Court or other courts may rebuke and rebuff the regulatory overreach of the EPA, Army Corps of Engineers, U.S. Forest Service, or any of the other myriad federal alphabet soup agencies; the bureaucrats unrepentantly and relentlessly return to their grasping agenda with nary (or barely) a pause.

The Sacketts were fortunate to have been represented by capable counsel provided pro bono by the Pacific Legal Foundation; many thousands of other American homeowners, farmers, and business owners have been bankrupted by similar federal regulatory attacks, or have simply given up, caved in to the demands of federal agencies, and paid exorbitant fines. Who, besides the likes of Bill Gates or George Soros have the financial wherewithal (not to mention the time and energy — which could involve many years of litigation) to take on the federal government?

Should American citizens be forced to undergo such extortion, humiliation, and abuse at the hands of our "public servants"? Unfortunately most members of Congress — even those who claim to oppose the notorious "overreach" of the EPA and other agencies Congress has created, funded, and is charged with overseeing — do little more than plead with the agencies to stop abusing powers they are not authorized under our Constitution to exercise in the first place. On November 13, Senate Western Caucus Chairman John Barrasso (R-Wy.) and Congressional Western Caucus co-chairs Stevan Pearce (R-N.M.) and Cynthia Lummis (R-Wy.) joined 27 other Caucus Members in sending a letter to EPA Administrator Gina McCarthy in a futile effort to convince the agency head to "change course."

"We urge you to change course and to commit to operating under the limits established by Congress, even if those limits are impermissibly overlooked in the so-called Connectivity Report," the 30 senators and congressmen implored. "We ask that you work with Congress to address these issues keeping in mind the need to provide clean water for our environment and communities, while also acknowledging the important role states play as a partner in achieving these goals."

Any members of Congress that seriously expect Administrator McCarthy to take their plea to heart probably also believe the Easter Bunny delivers the eggs to the White House for its annual Easter egg hunt. Or, more likely, they believe that by this practically empty gesture they can engage in a defiant pose that will (they hope) satisfy their constituents that they are doing their jobs and defending their constituents rights and interests.

Sen. Rand Paul (R-Ky.) has gone a different route, proposing genuine, substantive remediation, in the form of the Defense of Environment and Property Act of 2013 (S. 890). The legislation, which he introduced in May — five months before the EPA unleashed its new proposed power grab — would thwart the connectivity gambit of the EPA and Army Corps of Engineers by, among other things, strictly defining "navigable waters" and "waters of the United States," as well as requiring any federal agency that issues a regulation that "diminishes the fair market value or economic viability of a property" to pay "the affected property owner an amount equal to twice the value of the loss."

Sen. Paul's bill has six cosponsors: Mike Lee (R-Utah), Mitch McConnell (R-Ky.), Marco Rubio (R-Fla.), David Vitter (R-La.), Saxby Chambliss (R-Ga.), and Orrin Hatch (R-Utah). The federal legislation-monitoring website govtrack.us gives S. 890 only a "5% chance of getting past committee" and an even slimmer "2% chance of being enacted." That dismal prognosis is based upon a legislative history, the website notes, in which "only 11% of bills made it past committee and only about 3% were enacted in 2011–2013."

An identical House version of the bill, H.R. 3377, sponsored by Rep. Mac Thornberry (R-Texas) and cosponsored by Mark Amodei (R-Nev.) and Tom McClintock (R-Calif.) is given a slightly better (but still bleak) chance of passage by govtrack.us: 9% chance of getting past committee; 3% chance of being enacted.

However, there are many current dynamics that could change those gloomy forecasts. Widespread anger over the broken promises of ObamaCare and the hidden mandates, fines, and taxes that are coming to light could betoken a significant shift in public opinion against more fedgov regulatory intrusion. The NSA spying and warrantless search scandals are stirring bipartisan outrage across the political spectrum. The administration's continuing assault on our crumbling economy is causing widespread defections across all of Obama's key demographic support bases. Then there is the current Supreme Court case of *Bond v. United States*, another astonishing example of fedgov officials reaching "beyond parody" to the realm of the absurd. In this case, currently being heard by the court, defendant Carol Anne Bond is being prosecuted by the federal government under legislation to implement the United Nations Chemical Weapons Convention. What did Bond do? She caused minor burns to the fingers of her husband's paramour (whom he had impregnated) by putting a homemade caustic chemical on the door handles of the woman's home, car, as well as on her mailbox. For that minor act of soap opera revenge federal prosecutors leapfrogged state jurisdiction and made it a federal case based on a UN treaty! With this kind of outrageous overreach being the rule of the day for the Obama administration, many people will have no difficulty at all in recognizing the frightening potential for horrendous abuse imbedded in the EPA's inventive "connectivity" doctrine.

Opposition to the administration's ever growing cascade of executive orders, regulations, abuses, and usurpations could hit a critical mass that coincides with incumbent jitters about voter retaliation in the fast-approaching 2014 elections. Significant input from agitated citizens could propel Sen. Paul's S. 890 and Rep. Thornberry's H.R. 3377 to passage.

However, it may begin to dawn on a great many people that even these bills are far too little too late; even if enacted, they deal only with one facet of the EPA's vast abuses and usurpations, leaving intact its many other unconstitutional arrogations of power.

In an essay earlier this year, entitled "Is It Time to Get Rid of the EPA?," Henry I. Miller, M.D. answered that question in the affirmative. Dr. Miller, a research fellow at the Hoover Institution and adjunct fellow at the Competitive Enterprise Institute, was himself for many years a federal regulator (at the Food and Drug Administration, FDA). His extensive dealings with the EPA convinced him that it is "a miasma populated by the most radical, disaffected and anti-industry discards from other agencies" with an "entrenched institutional paranoia and an oppositional worldview."

"I found EPA to be relentlessly anti-science, anti-technology and anti-industry," Miller said. "Since it was created in 1970, EPA has been a rogue agency — ideological, poorly managed and out of touch with sound science and common sense. It is past time to consider whether the nation's experiment with a free-standing environmental agency has failed, and whether its few essential functions should be

relegated to less science-challenged agencies and departments."

As many articles published by *The New American* have shown (see links below), Dr. Miller's characterization of the EPA as a "rogue agency" is far from exaggeration. Its abolition is the ultimate solution that Congress should be aiming at. Any legitimate functions it serves and police powers it exercises can be, and should be, left to the state and local governments to perform, as our nation's Founders intended, as our Constitution mandates, and as experience proves is not only more efficacious in protecting the environment, but also in encouraging prosperity and preserving liberty.

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