Daily Environment Report™

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Water Pollution

Jackson Says EPA Needs Legislation To Clarify Jurisdiction over U.S. Waters

The work of the Environmental Protection Agency would benefit from a better legal definition of the agency's jurisdiction over water, EPA Administrator Lisa Jackson said April 8.

Without expressing support for any particular proposal, Jackson said, "I do believe we need a legislative fix to clarify the jurisdictional issue."

The problem has come from the reference to "navigable waters" in the Clean Water Act, and a series of U.S. Supreme Court decisions that have tended to narrow EPA regulatory authority because of that phrase.

People approach a wetland or stream and ask, "Do I need a permit?" Jackson said, blaming that uncertainty on the "navigable waters" phrase.

Broader Approach

"We need to know what our jurisdictions are, and I believe that the country benefits from something broader rather than narrower," Jackson said. In defense of a broader approach, she mentioned as an example the benefits of wetland buffer zones for stream quality.

Jackson addressed the jurisdictional issue while speaking at a briefing on an upcoming PBS Frontline television documentary on water pollution. She said EPA staff spends a large amount of time simply discussing jurisdictional questions before addressing problems.

The Supreme Court addressed the issue most recently in 2006 in *Rapanos v. United States* (126 S. Ct. 2208, 62 ERC 1481 (2006)), although a majority of the justices in that decision failed to agree on the extent of federal jurisdiction over wetlands under the Clean Water Act.

In Congress, Sen. Russ Feingold (D-Wis.) and 23 co-sponsors April 2 introduced the Clean Water Restoration Act (S. 787), which would replace the phrase "navigable waters" with "waters of the United States" in determining EPA jurisdiction (62 DEN A-19, 4/3/09).

Policy Questions on Farms

Jackson also spoke of the challenge of addressing pollution from agriculture and the question of regulating nonpoint sources, which are diffuse pollution sources such as pesticide runoff from farms. Animal feeding operations, which produce large amounts of manure in piles and ponds, can be classified as point sources, but not always.

"One of the policy questions is, are they a point source or a nonpoint source?" Jackson said, referring to the animal feeding operations. "And should they be regulated? And if they are regulated as one or the other, how do we assure they are regulated appropriately?"

There remains "tremendous work out there" to be done with respect to animal feeding operations and nonpoint sources, she said.

Doubts on Land-Use Regulations

Asked about the possibility of regulations for development on land near streams, Jackson expressed reluctance to see EPA get involved in such regulation in the way that states and localities do. "I have not been convinced that EPA can regulate land-use decisions," she said.

Jackson has been head of the New Jersey Department of Environmental Protection and chief of staff to New Jersey Gov. Jon S. Corzine (D). In those jobs, she saw how hard it was for a state government to avoid trouble over land-use regulation, despite being closer to the property owners than the federal government is, she said.

"At the state level it's very difficult, because municipalities chafe at state-level control," Jackson said. "I'm not sure that the federal level of control will do anything to advance the cause. We'd probably get caught in the fight."

By Alan Kovski

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