

Environmental Protection Agency Science Advisory Board  
Panel for the review of  
*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the  
Scientific Evidence*  
Public Meeting, December 16-18, 2013  
Washington Plaza Hotel  
10 Thomas Circle, NW  
Washington, DC 20005  
Prepared Testimony of Tony Francois  
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Pacific Legal Foundation is pleased to take this opportunity to testify on *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, prepared by the Office of Research and Development of the Environmental Protection Agency. PLF is the nation's oldest public interest legal foundation that litigates in state and federal courts throughout the country for the principles of private property rights, individual liberty, and a balanced approach to environmental protection. PLF has been very active in litigation concerning the Clean Water Act; for example, PLF attorneys were counsel of record in *Rapanos v. United States*, the United States Supreme Court's most recent decision addressing the scope of the Clean Water Act. PLF provided written comments on the Connectivity Report on October 11, 2013.

Various Supreme Court justices have observed that Clean Water Act jurisdiction is complex, and clarification - either from Congress or the agencies - is necessary. EPA acknowledges that the Connectivity Report is the first step in promulgating new regulations. Unfortunately, the present draft suggests that any new regulations based thereon will worsen, rather than improve, the law of Clean Water Act jurisdiction. To avoid this result, PLF urges the Science Advisory Board to adopt the recommendations set forth in our October 11, 2013 letter. These recommendations will help ensure that the new rule-making will conform to existing constraints from the Act and case law, as well as provide meaningful guidance to the regulated public "feeling their way" through this difficult area of law.

I will highlight just a few points made in our October 11 comment letter:

A. Defining Wetlands

The report defines "wetland" to mean any area meeting one of the Cowardin criteria. The law, however, mandates that the agencies use the Corps' Wetlands Delineation Manual of January 1987. The 1987 Manual generally requires that all three Cowardin criteria be present. There is no legitimate reason to use a less rigorous standard. There is even less reason for the report to discard, as it does, any wetlands distinction when discussing riparian areas and floodplains.

PLF therefore recommends that the definition of wetlands be made consistent with

existing law, and that the report's wetlands analysis be redone in light of this change.

## B. Classifying Wetlands

The report divides wetlands into classes of "riparian," "flood plain," "geographically isolated," "bidirectional," and "unidirectional," yet none of these technical categories easily maps to the existing legal categories of adjacent and non-adjacent/isolated wetlands. In *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court upheld part of the agencies' "adjacent wetlands" jurisdiction based on the "reasonableness" of the purported ecological connection between navigable waters and their adjacent wetlands. As the *Rapanos* plurality explained, *Riverside Bayview's* analysis was based on a scenario where the wetlands physically abut another water, i.e., one cannot distinguish the end of land from the beginning of water. One might presume (as the report appears to do) that wetlands within a river's flood plain could have such a degree of connectedness. But it does not follow, as the report also appears to suppose, that such flood plain wetlands necessarily will have such a connection.

PLF therefore recommends that the report explain how its technical wetlands vocabulary maps to existing legal terminology.

## C. Cumulative Effects

The report repeatedly asserts that every wetland or stream, considered singly or in the aggregate, substantially affects the physical, chemical, or biological integrity of downstream waters. That every surface-water input to an aquatic system is significant in the aggregate is a fact that even a lay observer can recognize. Justice Kennedy's *Rapanos* concurrence nevertheless strongly implies that the Act could only encompass regulation of certain classes of "major tributaries" or "specific tributaries," not every tributary. Justice Kennedy was aware as well that "isolation" is a matter of degree, yet nevertheless concluded that certain classes of wetlands and other features must be held to be legally "isolated" notwithstanding a minor connection.

The report, however, seems oblivious to this important built-in limitation to the scope of the Clean Water Act. For example, the report states at page 3-41: "although an individual low-order stream can have less connectivity than a high-order stream, a river network has many more low-order streams, which can represent a large portion of the watershed, thus, the magnitude of the cumulative effect of these low-order streams can be significant." This observation entirely misses Justice Kennedy's point that the agencies' existing regulations are infirm precisely because they cover such low-order streams carrying only "low volumes of water." Although Justice Kennedy's concurrence does anticipate the aggregation of wetlands, it does not for tributaries.

PLF therefore recommends that the report's discussion of cumulative effects be limited to wetlands, and that the report's discussion of tributaries be refocused on identifying characteristics of "major tributaries" based on their volume of flow, proximity to navigable waters, or other relevant considerations.