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Experts: Karst watersheds unprotected under WOTUS rule

By CAROLINE EGGERS ceggers@bgdailynews.com Nov 1, 2019

A raindrop hits the pavement Wednesday, October 30, 2019, in a Bowling Green parking lot.

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The Environmental Protection Agency and the Army Corps of Engineers recently repealed the 2015 rule that defined waters of the U.S. under the Clean Water Act and intends to enact its heavily contested replacement next month.

For people living in karst terrains, this replacement will not sufficiently protect their drinking water source, according to Jason Polk, an associate professor of geoscience at Western Kentucky University and director of the HydroAnalytical Lab.

“We don’t have regulations that protect water at the underground level,” Polk said. “We’re omitting a massive part of groundwater, a major source of drinking water.”

In 1972, Congress passed the Clean Water Act to establish a basic structure for regulating pollutant discharges into the waters of the U.S., give the EPA the authority to implement pollution control, set water quality standards for contaminants in surface waters and make it unlawful for any person to discharge any pollutant from a point source into a navigable water without a permit.

The definition of navigable waters has remained muddy and triggered countless court cases over the years.

“It’s one of the most volatile and emotional issues of any of the issues that I’ve handled in the past 40 years,” said LaJuana Wilcher, a local environmental attorney and the EPA’s former senior regulatory official for water programs. “There are few federal environmental rules that affect everyone. ... The reach of this statute gets into people’s backyards.”

Historically, the courts have interpreted “waters of the U.S.” – WOTUS – broadly, which basically boiled down to whether water concerns affected interstate commerce as defined by the Constitution, according to Wilcher.

“There is not a simple answer to what is a jurisdictional water,” Wilcher said. “Contrary to popular belief, the Clean Water Act does not cover every drop of water in the U.S.”

The EPA’s stated intention with the repeal and replacement is to establish a consistent framework of regulations across all jurisdictions. Following the 2015 rule, which sought to establish protections for

ephemeral streams and wetlands, more than half of the states, including Kentucky, stayed the rule and reverted to pre-2015 regulations.

The U.S. Geological Survey's National Hydrography Dataset reports that 18 percent of the nation's streams are ephemeral, meaning they flow only during or after rain. But the conservation nonprofit Trout Unlimited reported this year that 18 percent is a conservative estimate, and some states have a significant amount of ephemeral streams. About 74 percent of Arizona's 432,728 mapped stream miles are ephemeral, according to Trout Unlimited's analysis.

Neither the former rule nor its proposed replacement directly addresses karst, which covers about 12 percent of the planet's ice-free land surface and supplies about 20 to 25 percent of the global population with drinking water – including about half of Kentucky's water, according to Polk.

“When that regulation was first written, we were in the infancy of understanding karst underwater systems,” Polk said. “In 2019, there are thousands of case studies. In spite of having an abundance of science that shows the connection between surface and groundwater in karst, we still seem to see most regulations moving in the opposite direction.

“Whether it's an underground river or an above-ground river, it's a river that's an ecosystem and a food and water resource.”

All of Bowling Green sits atop an underground world, so our groundwater is vulnerable to contamination, especially from spills or chemical releases, according to Polk.

Earlier this year, there was a gasoline release in Bowling Green that impacted Lost River Cave and its nearby community. Local and state officials proved that surface water travels underground and again resurfaces, which allowed them to also pursue the investigation federally, according to Matt Powell, the city of Bowling Green's environmental manager.

"All of our water is groundwater. Having that excluded as a WOTUS is a huge concern," said Powell, who expects implementation of the replacement could prove to be a "fundamental change" to the Clean Water Act.

This new rule is expected to be tied up in court battles for the near future. The likelihood of states successfully staying the rule remains uncertain at this time.

"Generally the effectiveness of a rule will be stayed if the people seeking to overturn that rule can demonstrate to the court that they will succeed on the merits of the case," Wilcher said. "Courts don't just stay rules every time there is a challenge to them."

In the meantime, the pre-2015 rule is in effect across the nation. So the silver lining is that there is a single system of governance, according to Powell.

But since the replacement rule will be likely litigated indefinitely, “we may not know what WOTUS means for another 10 or 15 years,” Powell said.

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