

**\*\*\*These notes are for the benefit of those ACWA members who could not attend the State/EPA Coregulator Discussions. They have not been reviewed or endorsed by EPA nor do they represent ACWA's position.\*\*\***

State-EPA Coregulator Call #1 on Waters of the U.S.

June 2, 2014

### **Shallow Subsurface and Other Connections**

- 1) In certain circumstances waterbodies can be connected through groundwater with travel times of thousands or tens of thousands of years. Would this connection be sufficient to establish jurisdiction?**

EPA intends no change from the current practice in place today, and so such slow travel times and deep aquifers would not be considered characteristic of a shallow subsurface connection. Generally, sub-surface connections would only be considered if the water is shallow and retains the characteristics of the surface expression. In the case of karst systems, the flow velocity upstream should match what is coming out of karst topography downstream.

- 2) Shallow sub-surface connections to downstream waters can lead to upstream waters being jurisdictional. Could such shallow connections also result in identification of new point sources? For ex, if there is a wastewater treatment pond that is very old and has some groundwater intrusion that is later discharged to another waterbody), would an NPDES permit be required for the wastewater treatment pond?**

The same issue exists today. These kind of decisions are made on a case by case basis, with outcomes generally 50/50. Can depend on distance.

- 3) If a tributary stream flows into an urbanized area and enters surface and subsurface stormwater conveyance systems, what is the status of the water in these conveyance systems? Are there circumstances when it would be jurisdictional or would it become nonjurisdictional while moving through the surface and/or underground water conveyance systems?**

When the conveyance system is subsurface, it is not jurisdictional. If you develop on the land above, a permit would not be needed. The tributary stream flowing into the storm system, however, is jurisdictional until it goes underground. Same is true today. If flowing through a surface system, it would be jurisdictional if there is an ordinary high water mark and bed and banks. No different from current practices.

- 4) Housing developments in many parts of the country are being built on drained wetlands that have subsurface drainage systems in place. Over time these systems may fail. The land is no longer in agriculture. What is the status of these subsurface systems with respect to jurisdiction?**

Subsurface flow is exempt. But if failure leads to a return of hydrology and the area becomes more and more wetland-like, it could become jurisdictional. This also doesn't change with the proposed rule, except to the extent that the rule clarifies that groundwater is not jurisdictional.

- 5) Could a raingarden or swale that drains to a water of the U.S. be considered a point source? If so, could this disincentivize green infrastructure?**

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Yes, but that is how it is today. The proposed rule doesn't change the definition of a point source. Comments on how the rule could possibly affect the use of green infrastructure are welcome, however. The agencies don't want to do anything that affects their support of green infrastructure.

**6) Could jurisdiction increase due to the shallow subsurface connection language?**

An expansion is not expected since these connections are looked at today when making jurisdictional determinations. Significant nexus could result in some changes to jurisdiction if a connection is not very apparent.

Note – “current practice” (or “how it is today”) = as defined by the 2008 guidance.

### **Ephemeral Streams**

**1) Since the proposed rule now considers ephemeral streams as “tributaries” – are the ephemerals included in the “other” waters estimate, or are they brought into the “tributary” category and assumed to have always been a part of the existing definition? And so were they not considered in the EPA/Corps’ estimate of increased jurisdiction?**

Ephemeral streams were considered jurisdictional pre-SWANCC to a large extent. In the agencies’ cost analysis, some ephemeral streams weren’t considered jurisdictional in past, but only ~1-2%.

**Question from state** – what about the “all other waters such as streams (including intermittent streams)...” language from the current definition of Waters of the U.S? It seems to imply that ephemeral streams were not included.

**Answer** – streams was included. And many states do include specifically include ephemeral streams in their water quality standards. The “ordinary high water mark” follows the vertical extent, not longitudinal, and is included in the Corps regs. Other Corps regs also consider ephemeral streams. And so in determining jurisdiction, they use the test of whether there is enough flow to establish an ordinary high water mark. EPA is actually going a little more restrictive now, since a bed and banks are required as well.

**Question from state** - What about a gradient vs binary approach?

**Answer** – EPA ORD will be taking a look at this possibility. And so it is on the table over whether to include it in the final rule or keep to case by case.

**2) The current mandate is that all waters of the U.S. have uses of aquatic life support and recreation. Considering that ephemeral waters only flow in response to rainfall, how does EPA view application of designated use and criteria to ephemeral streams? Will there be discussion on how to apply uses and criteria to ephemeral streams if they are to be brought into the definition of a tributary? Following from that, will there be discussion on application**

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**of 303 and 402 to the designated uses and criteria for ephemeral waters? These ephemeral streams also bear many characteristics that are similar to wetlands when trying to deal with water quality standards. It has been extremely difficult to develop water quality standards for wetlands—from identifying designated uses to dealing with impairment. These waters are not “fishable/ swimmable.” (note - some ideas for uses: aquatic life consisting of macroinvertebrates that only need brief periods of flow; the providing of flow to downstream waters; temperature control for downstream waters.)**

The Act intended to protect all aquatic life (not just fish) and the regulations provide enough flexibility to consider what aquatic life you are protecting in any particular stream. 131.10(g)(2) addresses ephemeral streams that can't support fish use, but can support “ephemeral-type aquatic life.” So the proposed rule might result in more application of other aquatic life standards/uses in some places. Should consider what vehicles to use to discuss this topic. Along with water quality standards for wetlands, which is at issue now. Intermittent streams should be discussed too. Some regions have also worked through this.