

*****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 #2 on Waters of the U.S.

June 12, 2014

Significant Nexus

- 1) Who has the burden of proving whether an “other water” is jurisdictional? EPA/Corp, the state agency, the petitioner?**

Effectuated parties, consultants, and agencies can do analyses and provide them to EPA and the Corps to inform the decision, but EPA/Corps makes the decision.

- 2) It has been reported that EPA and the Corps plan to develop a method for determining whether a water has a significant nexus to downstream TNWs. Can anything be shared about this plan? Will this method use a gradient approach to look at degrees of connectivity?**

There may be field guidance down the road, but currently there is nothing in the works to develop an official method. The Science Advisory Board has opined upon the gradient approach and this info will be considered by EPA and would provide a basis for any technical analyses done at the field level.

- 3) Will Districts have the option of developing regional guidance on what “other waters” would be jurisdictional?**

Regions have manuals like this in place, but nothing in the works at this time. Local regional guidance is difficult due to goal of national consistency. But the problem with one size fits all is acknowledged and so EPA and the Corps just want to ensure that any regional guidance is coordinated through HQs. They will also encourage districts and regions to develop process agreements so that any regional guidance does not interfere with national consistency.

- 4) What scale of mapping will be used to determine jurisdiction? (It is important that jurisdiction is determined using commonly available map/GIS products that are of similar scale across the US (i.e., 1:24000 or finer.))**

Maps don't determine jurisdiction, but instead what's on the ground does. Maps can inform though. The most refined data is the best and better reflects what's on the ground.

- 5) Suggestion – Provide a clear test for how to determine whether a water body has a “significant nexus” to a downstream jurisdictional waterbody.**

This would be better articulated in field manual rather than national rule. Due to the different types of waterbodies across US, regional tests would be more useful, and field manuals come from off the ground. There may be regional indicators that in the future the Corps could consider addressing/developing. The nature of significant nexus won't change from Region to Region but individual indicators that feed into determinations might be regionalized. The suggestion is appreciated and noted.

- 6) Suggestion - Map all jurisdictional waters that fit the definition of (a)(1)-(3) – Traditional navigable waters, interstate waters, and territorial seas - for the purposes of (a)(7) – identifying “other” upstream waters on a case-specific base.**

*****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.*****

Appreciate the suggestion and note it. Such a task would require a bit of thinking through, especially since jurisdiction is sometimes determined in court cases, so lists of jurisdictional waters change. The Corps does maintain lists, which do change from time to time. Also, not being on a list doesn't mean it's not navigable. Also need to determine the scale of interstate waters. E.g., are waters which just start briefly in one state and then flow into another state interstate waters?

Question from state – The Science Advisory Board has stressed biological factors. To what extent will those factors play into significant nexus determinations? Also, what is “significant”?

Answer - The significant nexus concept is from Justice Kennedy and so is “more than speculative or insubstantial.” The proposal discusses this as well as the draft Connectivity Study. Comments are requested on examples of biological connections. (E.g., – waters that serve as refuge for amphibians.)

Question from state - Re: mapping (in question #6 above under Significant Nexus) - how will compliance among land users be facilitated? Under the Endangered Species Act, mapping facilitates compliance. Wouldn't this kind of mapping (of traditional navigable waters, interstate waters, and territorial seas) be in line with this? It's not good to diverge within an agency.

Answer - It is good to not diverge, and they will consider doing the mapping, but how court cases change things needs to be addressed. And determining what are interstate waters, and what are traditional navigable waters would need to happen before then. EPA can work with Corps about what is easiest to capture.

Question from state – Will case-by-case determinations add to resource limitations?

Answer - It is possible, and EPA and the Corps will need to address with managers as the rule goes forward.

Other Questions

- 1) The preamble indicates that traditional navigable waters include waters being used for commercial waterborne recreation, such as boat rentals and "guided fishing trips." Would this only include guided fishing trips that utilize a boat for access? If so, can that be clarified?**
The concept of traditional navigable waters is a legal one, and the approach to such waters generally indicates that the activity needs to involve some waterborne navigation. So the answer is yes, and states are encouraged to indicate in comments where ambiguity arises and the agencies will try to address.
- 2) Can the EPA/Corp clarify that raw water ponds (i.e., waters withdrawn for use until use and treatment have been completed) are not waters of the US?**

*****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.*****

It depends. If the pond is doing waste treatment – then it's exempt. If not (e.g., it only serves to store the raw water), then if it is excavated in uplands, it's not jurisdictional; if it is impounded, then it is jurisdictional.

3) Do the EPA/Corp expect that the number of small, non-navigable lakes that are currently jurisdictional will decrease under the proposed rule?

This depends on whether such a lake falls into a brightline jurisdictional category. I.e., if it is an adjacent water, it is jurisdictional; if it is on a farm, it's not. There is not enough information right now to answer this question, but the agencies hope to be able to answer after comments (examples) are submitted. Also, if a landowner wants a previously jurisdictional lake to be non-jurisdictional, he/she would send an application to the Corps.

4) Based on the comments they have received thus far, do the EPA/Corp expect the final rule will reduce the number of Jurisdictional Determination requests?

The economic analysis goes into this more. The Corps could possibly process more permit requests, with any associated JD requests. A drive for certainty on the part of proponents may also increase requests. But overall, the response to JD requests should be more efficient/shorter. So there may be greater volume, but less individual time per review due to clarity in the rule.

5) Is EPA's Connectivity Study/Report still on track to be finalized in early July? We believe commenters on the rule should have access to the final, Science Advisory Board (SAB)-informed product so they have the same information EPA will have, as EPA previously said that the final rule will be informed by the results of the SAB review. Commenters may be able to provide valuable insight to EPA to help guide on this subject and it would promote transparency in the important process of determining the limits of EPA and Corps authority under the Clean Water Act.

The SAB has a public teleconference scheduled for June 19. See their website for more information. After that, they intend to wrap up comments, but have provided no specific date for finalization. So that will certainly be after the end of June. By extending comment period, and based on information from SAB, EPA believes they will have completed all of their work before the end of the comment period and so the public should be able to consider the final Study. The Connectivity Study is based on over 1000 peer-reviewed studies, and makes conclusions based on these studies. Commenters can suggest different conclusions. The SAB will be doing the same, that is, commenting on conclusions. Instead of waiting, people can look at the underlying science and see if they agree with the conclusions.

Suggestion/question from state – unique hydrological features are specific to states and regions – you said they lend themselves best to regional guidance. And so it may also be the best to leave those waters to the states to protect. And especially given the uncertainty regarding what waters are jurisdictional (e.g., mapping is so difficult), how can you even do an economic impact analysis?

Answer - This comment should be submitted to the docket. With that said, all economic analyses have imperfections due to assumptions that have to be made, leading to bracketing and estimating. All

******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.******

tributaries to traditional navigable waters are also jurisdictional under the previous rule, but the rule didn't define tributary. Today, under the new rule, tributary is defined and this provides clarity. You can go to the water and look for a bed and bank and ordinary high water mark. A map doesn't give you any of that information. You need to be on the ground to do the jurisdictional determination. And so for an economic analysis, you have to estimate with some bounds and do sensitivity analyses.

Question from state – will there have to be after-the-fact permits due to changes in existing jurisdictional determinations?

Answer - Jurisdictional determinations are valid for 5 years under current regulations. The agencies haven't figured out grandfathering, but they don't intend to do anything retroactively to anyone who has been issued permits.

Question from state – “Similarly situated” seems a stretch. Does the Corps intend to go out into the field and analyze them? And was the cost of this considered in the cost analysis?

Answer - “Similarly situated” is from Kennedy. It doesn't mean automatically jurisdictional, but if it sounds like that in the proposal, then bring it up in comments. The question EPA and the Corps are focused on is in what circumstances is it appropriate to consider similarly situated waters.