

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

June 24, 2014

Ditches

Initial comments from EPA –

- the provisions on ditches are two separate exemptions, so either is sufficient for a ditch to be exempted.
- Streams can be excavated down and then called a ditch, but it would still be considered a stream under the Clean Water Act.

1) How does the rule provide coverage for rain-dependent streams but also exclude certain ephemeral and intermittent ditches? I.e., are these two waterbody types always clearly distinguishable?

Ditches can be distinguished by looking at their physical characteristics that indicate that they are man-made – shape (e.g., 2:1 side-slopes), sinuosity (i.e., they are usually straightened, so faster flow), their relationship to other ditches and landscape features. Also, they wouldn't have normal vegetation. The Corp has a regulatory guidance letter on maintenance of ditches that may be helpful.

2) Are perennial flow determinations really expected to be straightforward? How will conflicting information sources be resolved?

Perennial flow (year round flow) is a very established scientific concept. Historical evidence can be used, such as photographs, prior delineations, historical knowledge. Other primary sources of information are site characteristics, topographic maps, and flow models.

3) Since definitions of uplands vary widely, how would one determine an upland setting for purposes of determining jurisdiction? (Hydric soils vs. non-hydric soils? Or the Corps' 3-part test for determining an upland, which involves a review of hydrology, soil, and plant types?)

This is a good comment that has been received from many sources, and so it is encouraged to request via formal comment that the final rule include a definition for uplands. There is a definition in the Connectivity Study's glossary, and also, if a waterbody is not a water of the U.S. (including the three-attribute definition of a wetland), then it is in upland.

4) Previous guidance stated that ditches (including roadside ditches) excavated wholly in and draining only uplands and that *do not carry a relatively permanent flow of water* are not jurisdictional, while the proposed rule states those that *have less than perennial flow* are not jurisdictional. Is there sufficient evidence that intermittent flow in upland ditches is of less consequence to downstream systems compared to intermittent flow in non-ditch channels? Or of less consequence than upland ditches with perennial flow?

The agencies' intent is to provide clarity, and they believe that the proposed exemptions provide this. After looking at available scientific data, they put forth as a policy decision that perennial flow is more predictive and straightforward. However, comment on this is requested.

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- 5) **When it comes to ditches with perennial flow due to an upstream discharge, if the artificial ditch is now considered jurisdictional due to its perennial flow, would the cessation of the discharge violate the Clean Water Act as the ditch would dry up, thus impacting the chemical, physical or biological integrity of the jurisdictional ditch?**

Formal comment on this would be helpful. However, what they expect would be looked at is what is the new normal circumstance of this water. If only ephemeral or intermittent, then it would now be exempted as a ditch.

Comment from state – this is an issue, as different amounts of water lead to different kinds of aquatic life and states have to designate uses and criteria for their waters. As for what a state would do now in such a situation (question asked by EPA) – guidance on effluent dependent waters has been needed and EPA has not provided, so not sure what they would do.

- 6) **Regarding ditches with less than perennial flow having the potential to be considered point sources, since the ditch or other feature is being considered the point source, and not the actual discharge or traditional outfall that discharges to the ditch, could this not lead to every non-jurisdictional ditch, subject only to nonpoint source contributions (for example, roadside ditches), being considered a point source and therefore required to obtain a NPDES permit?**

The rule doesn't change current practice. The Clean Water Act includes ditches in the definition of point sources, so this is not new. One point source can also discharge through another point source, and in such a case the original discharger would need a permit. Similarly, unless a stormwater conveyance carries unregulated/exempted stormwater (e.g., agricultural stormwater, irrigation return flow), designated storm water dischargers need a permit.

- 7) **If the water in an upland ditch travels through a series of ditches or streams that are a(5) (tributary) waters and eventually into an a(1) traditional navigable water, is the upland ditch, under any circumstances, a water of the U.S.?**

This is easier to explain in terms of what is *not* a water of the U.S. If a ditch does not meet paragraph b(3) or b(4), it's not exempt. If an upstream part of a ditch only drains uplands, but further downstream, it drains to a navigable water, the upstream and downstream portions would be parsed out (i.e., it would be exempt upstream but not downstream.)

Question from state regarding Q7 – has agency created a tree or chart to help guide people through this decision making process? Such a tool would be very helpful for purposed of education and outreach.

Answer – the suggestion is appreciated. They have been looking at ways (e.g., graphics) to simplify the rule for people, and a decision tree is a good idea.

Question from state – Is there a temporal space in time that will be looked back at to make determinations. E.g., in the case of agricultural ditches that are no longer used for agriculture but was originally excavated in a wetland.

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Answer – You would just look at what historical evidence exists, and so no exact timeframe is set. You would also need to consider if it is in upland and would be exempted under this rule, or if the ditch was replacing part of the natural tributary system. Or is it roadside, was it meant to just drain uplands, or was it created to drain wetlands? Also look at flow type, and if it is connected to a navigable water (per 2nd ditch exemption at paragraph b(4)).

State – The confusion is whether to look at the present day context or the (200 years ago) natural condition.

Corps – when doing jurisdictional determinations, they generally look at the current situation, but they still may need to look at when it was created.

Additional Technical Guidance Suggestions

1) Suggestion - Develop national and/or regional manuals on determining ordinary high water mark, particularly for ephemeral streams.

The Corps does have OHWM manuals for the arid west and are in process of expanding it out through the other regions.

2) Suggestion – Develop regional interpretive guidance on what constitutes a riparian area and floodplain under the proposed rule.

This is an area where comment is requested (that is, on how large is a floodplain in terms of areal extent?) Once they get answers, they can look at what guidance is needed. Also, once they get closer to what the final rule will look like, they can determine indicators of riparian areas. Regarding this, a fixed number is not proposed, but instead use of BPJ. This was a tough decision, which is why they are specifically seeking comment on it. Questions to think about – should there be a national uniform number or should it be left to BPJ? Or should there be different numbers in different areas of the country?

Question from state – if a ditch only has to meet one of the two exclusions to be exempted, if an excluded upland ditch does eventually meet a water of the U.S., it can't be pulled back in as jurisdictional?

Answer - Correct. For example, roadside ditches that drain to a water of the U.S. would be broken down to where it changes from intermittent to perennial.

Question from state – instead of regional guidance to deal with unique water features, would an alternative be to have a national rule for the uniform aspects of waters, but then when it comes to hydrological features with lots of variability, leave to state jurisdiction to address.

Answer – that is a very interesting comment and they encourage submission of this comment to the docket.