Waters of the U.S.—Potential Questions to Ask

Ditches

A ditch is jurisdictional if it had a bed, bank and ordinary high water mark (OHWM). All public safety ditches –roadside, flood control channels, drainage systems, stormwater—have these characteristics.

- A ditch is jurisdictional if it connected directly, or indirectly, to jurisdictional water. ***How will connection be determined?*** i.e. through the physical ditch structure which directly (or indirectly) connects to a "water of the U.S."

- **Is there a limit to connectivity?** Can a ditch that is physically connected to another ditch (via pipe, other infrastructure, or convergence for example) that leads to a "water of the U.S." be considered jurisdictional even if it is hundreds of miles away and doesn't have a relatively permanent flow of water?

- If ditches run across state lines, the ditch falls under the federal regulation regime. However, many of our counties maintain roads and other infrastructure over Native American tribal lands. Some of our counties have multiple tribes within a county, the roads and other infrastructure mishmash in an out of these lands. **Since the tribes are sovereign, will these roadside ditches (and other relevant infrastructure) be considered interstate and thus, federally regulated under the Section 404 permit program?**

- Currently, in the field, OHWMs are determined by a line on the shore established by the fluctuation of water. Many of county maintained ditches were hand dug and not created by OHWMs, for example, roadside ditches will not have a typical OHWM because the flow is too low or irregular. *But, in recent years, some Corps districts have said these types of ditches have OHWM by definition so they are jurisdictional.* **Will OHWM be defined differently in this regulation?**

Ditch Exemption Language

Two types of ditches are exempt from regulation: 1). Those excavated only in uplands and drain only in uplands and have less than perennial flow and 2). Ditches that do not contribute to flow, either directly or through another water, to a jurisdictional water.

- **How will uplands be defined?** County ditch systems are complex creatures, rather than being one interconnected ditch, there could be series of different connections that ultimately flow to a "water of the U.S." For example, in some parts of the country, ditches are dug in "uplands," run through a transitional area, and eventually join a "water of the U.S."

- **Will the ditch system be evaluated as a whole, even though parts of the system are in uplands, because the ditch system connected directly to a jurisdictional water or will jurisdiction be determined on the characteristics of the particular section of the ditch (even though the ditch is directly connected to a WOTUS).**

- **Could the agencies give an example of a ditch that drains only in an uplands?** Most, if not all county-maintained ditches, connect directly (or indirectly) to a "waters of the U.S."

- In parts of the mid-west, counties are rebuilding roads that have both uplands and lowland areas. The road ditches were excavated many years ago when the road was first built but may need to be redone or extended to meet those requirements. **If part of the existing road has wetlands on both sides of it, would the ditch be jurisdictional?**

- **How will "do not contribute to flow" in the exemption be determined?** Especially since the proposed rule states that perennial, intermittent and ephemeral streams may be jurisdictional. **What types of flow types are left? How would this be proven (i.e. what tests would be used?). Who would have the onerous to prove the ditch does not contribute to flow—the agencies or the permitee?**

- **Will ditches that hold water year round in low lying coastal areas with high groundwater tables be considered jurisdictional?**

- **Will ditches, where tidal waters back up through the stormwater system and inundate the upland cut ditch, be jurisdictional?**

<u>Ditch Maintenance Exemptions Under Current Regulation</u>

The agencies state the exemption of maintenance of drainage ditches will continue. The agencies have indicated this exemption is automatic and that counties do not have to apply for this exclusion.

However, under the current regulatory climate, a number of our counties have found the ditch maintenance exemption very difficult to obtain. For example, in some Corps districts, counties must apply for the exemption. As part of the exemption application process, the county must provide surveying data that shows the maintenance activities are exempt.

Counties, in other Corps, districts have stated the conditions governing the types maintenance activities that are considered exempt, are very narrow.

Other counties have received "Cease and Desist" letters for doing maintenance activities in ditches they believed were exempt.

Other Corps districts have stated counties need to provide the original specifications for the ditch showing original scope, measurements, etc. Since many of these ditches may have been hand-dug decades ago, this historical documentation does not exist.

- **While the agencies plan to continue the exemption, are there any plans by the agencies to address how ditch maintenance exemptions are handled by the various Corps districts—for example, clarifying guidance to state that all ditch maintenance activities are exempt and do not need prior approval?**

- **If a county is doing routine maintenance activities on a ditch that is adjacent to a wetlands areas, would that make the ditch jurisdictional?**

General

The Clean Water Act protects the chemical, physical and biological integrity of the nation's waters. Generally, the three terms have always been considered together. However, throughout the proposed rule, the terms are grouped differently—sometime they are link by an "and" and sometimes they are linked by an "or:"

Chemical, physical and biological
Chemical, physical or biological

- **How the terms are linked have a huge impact on how this regulation is enforced. Why were the changes made and where will these changes have the biggest impact?**

Stormwater

In various conference calls and meetings, the agencies have stressed that municipal separate storm sewer systems (MS4s) will not be regulated as "waters of the U.S."

But since MS4s are essentially a series of ditches, pipes, and channels—under the tributary and adjacency definition—we believe MS4s could be interpreted to be "waters of the U.S." While not the intent of the agencies to regulate, vague federal rules have been used by various outside groups to litigate for years.

- **Could the agencies explain where stormwater activities are specifically exempt in the proposed rule? Is there any leeway under the proposed rule for citizens or groups to file lawsuits against MS4s for not being regulated as a "waters of the U.S?" Will the agencies consider exempting MS4s in the final regulations?**

- **If an MS4 is determined to be a "waters of the U.S.," how will that impact the ability to utilize that facility for water quality treatment? How will water quality criteria be applied? TMDLs?**

- **Are stormwater ponds (attenuation/treatment) that directly discharge to or are directly connected to a "waters of the U.S." be considered jurisdictional?**

Green Infrastructure

Green Infrastructure is being used by local governments across the nation to address stormwater water pollution concerns. It can be used in and outside of MS4 systems. Over the years, green infrastructure (or Low Impact Development) tends to develop wetland features.

- **Will Section 404 permits be required for green infrastructure construction and long term maintenance activities?**

Significant Nexus Determination

Jurisdictional waters must have a significant nexus to navigable and/or interstate waters. As stated on page 22193, "'Significant nexus'' is not itself a scientific term. The relationship that waters can have to each other and connections downstream that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas is not an all or nothing situation." In other words, if ditch water affects biological, hydrological, habitat
of species, etc., it can be regulated under the significant nexus determination. The significant nexus determination requires case specific determinations.

- **In the significant nexus test, how will EPA determine the extent of "in combination with other similarly situated waters" in the significant nexus analysis?**

Floodplain

- **Could EPA share it's thoughts on how to further define floodplain?**

Comment: page 22208

"Both confined surface and shallow subsurface connections are forms of direct-hydrologic connections between adjacent waters and (a)(1) through (a)(5) waters. For purposes of this rule, confined surface connections consist of permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches." Our fear is that this indicates swales, gullies, rills, and ditches are jurisdiction, which would be inconsistent with other language in the rule.

Emergency Response – As counties refines their disaster preparedness plans, the counties have expressed concerns over how this proposed rule may impact their public disaster response, mitigation, and recovery process with an unforeseen additional regulatory process.

Additionally, while an emergency exemption exists for clean-up from natural disasters, it's our understanding that local governments are rarely granted it.

Pesticide/Herbicide Permit – The EPA has a pesticide/herbicide permit for all "waters of the U.S." within threshold guidelines. This means anytime a pesticide/herbicide is applied on or near "waters of the U.S." a permit is needed. This permit includes tight documentation requirements for communities of over 10,000. Those counties who have "waters of the U.S." ditches will be required to follow strict program and paperwork requirements for pesticide use.

Counties use herbicide and pesticides in a number of ways which include treatment of weeds in ditches on the side of the road and treatment of mosquitoes and other pests. *The impact of the proposed rule on the pesticides general permit program is of significant interest to counties since counties own and manage 45 percent of the roads in 43 states, many of these roads are in extremely rural counties with limited resources.*