Waters of the United States
National Conference of State Legislatures
August 20, 2014
Virginia S. Albrecht
The New Definition

1. Traditional navigable waters
2. Interstate waters
3. Territorial seas
4. Impoundments of 1-3, 5
5. All tributaries of 1-4
6. Adjacent “waters”
7. Other waters that have a significant nexus to 1-3
Affects All CWA Programs

- The Proposed Rule replaces the definition of “navigable waters” and “waters of the United States” in the regulations for all CWA programs, and in particular sections 311, 401, 402, and 404:
  - 33 C.F.R. § 328.3: Section 404
  - 40 C.F.R. § 110.1: Oil Discharge Rule
  - 40 C.F.R. § 112.2: Spill Prevention, Control and Countermeasure Plan
  - 40 C.F.R. § 116.3: Designation of hazardous substances
  - 40 C.F.R. § 117.1(i): Notification of discharge of hazardous substances required
  - 40 C.F.R. § 122.2: NPDES permitting and Storm Water
  - 40 C.F.R. § 230.3(s) and (t): Section 404
  - 40 C.F.R. § 232.2: Section 404 exemptions
  - 40 C.F.R. § 300.5: National Contingency Plan for oil discharges
  - 40 C.F.R. § 300, Appendix E to Part 300, 1.5: Structure of plans to respond to oil discharges
  - 40 C.F.R. § 302.3: Petroleum exclusion
  - 40 C.F.R. § 401.11: Effluent limitations
The Term “Navigable Waters” Is Pervasive in the CWA
(Used 87 Times)

- National goal to eliminate discharges into navigable waters
- Partnership of state and local governments to prevent, reduce, eliminate pollution of navigable waters
- Monitor water quality of navigable waters
- Control and permit discharges into navigable waters
- Effluent limits for discharges into navigable waters
- Designate beneficial uses for navigable waters
- Water quality standards established for navigable waters
- Total Maximum Daily Loads (TMDL) for navigable waters
- List all impaired navigable waters and develop a strategy for each segment of navigable waters that fails to meet water quality standards
- EPA must consider listing as impaired any navigable water for which a person submits a petition
- Inventory all point source discharges into navigable waters
- Identify non-point sources contributing to failure of a water quality standard in navigable water
New Definition: Tributary

- Water body physically characterized by a bed and bank and ordinary high water mark which contributes flow directly or indirectly to waters in 1-4
  - Regardless of size, volume, frequency, or duration of flow
  - Regardless of distance from 1-4
- But a wetland, pond, or lake that lacks an OHWM or bed and bank can be a tributary if it “contributes flow”
Ordinary High Water Mark

- Field indicators often occur in upland areas
  - E.g., debris, sand deposits
New Definition: Tributary

- A tributary can be natural, man-altered, or man-made and includes rivers, streams, lakes, impoundments, canals, and ditches (unless excluded).
- Ditches excluded if they meet three-part test:
  1. Excavated *wholly* in uplands, and
  2. Drain *only* uplands, and
  3. Have less than perennial flow
Tributaries?
Currently Designated WOTUS in Kansas
Additional WOTUS in Kansas

- If ephemeral streams are included as WOTUS, Kansas Department of Health and Environment estimates an increase from 32,000 miles of streams to 134,000 miles of streams
Storm Water Systems (MS4s)

- Already have NPDES permits
- Under proposed rule, will be tributaries (contribute flow) and required to meet water quality standards
Pinellas Park Ditch #5 (Bonn Creek) Pinellas County, Florida

- Managed as part of the Pinellas Park Water Management District
- Not now considered to be WOTUS, but would be per the proposed rule
Fiscal Impact

- Pinellas County calculates the cost to bring Ditch #5 to current water quality standards would be $31,351,460.

<table>
<thead>
<tr>
<th></th>
<th>% Reduction Needed</th>
<th>Lbs Reduction Needed</th>
<th>Cost per Lb</th>
<th>Cost for Reduction</th>
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<tbody>
<tr>
<td>Total Nitrogen</td>
<td>27%</td>
<td>3,795 lbs</td>
<td>$3,500/lb</td>
<td>$13,282,500</td>
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<tr>
<td>Total Phosphorus</td>
<td>64%</td>
<td>1,547 lbs</td>
<td>$11,680/lb</td>
<td>$18,068,960</td>
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<tr>
<td>Total</td>
<td></td>
<td></td>
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<td>$31,351,460</td>
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Numerous State and Local Government Groups Have Expressed Concerns about the Proposed WOTUS Rule
U.S. Conference of Mayors’ Resolution July 2014

- Rule must be revised to clarify that “priority concerns for local governments” are not WOTUS:
  - MS4 conveyances
  - Green infrastructure
  - Water delivery systems
  - Ditches and other drainage features that are part of public infrastructure
  - Wastewater treatment systems
Water Delivery Systems

California Aqueduct bypassing Lancaster, CA

Central Arizona Project, Picacho pumping plant
Green Infrastructure

• Now infrastructure designed to clean water before discharge to WOTUS will have to meet water quality standards
New Category: Adjacent “Waters” (In Addition to Wetlands)

- **Adjacent:** Bordering, contiguous, or neighboring waters separated from other WOTUS by barriers
- **Neighboring:** Waters located within a riparian area or floodplain or waters with a shallow subsurface connection
  - **Riparian area:** Transitional areas between water and land where surface or subsurface hydrology influences the ecological process and plant community of the area …
  - **Floodplain:** An area bordering inland or coastal areas that … is inundated during periods of moderate to high water flows (to be determined by best professional judgment)
Central Florida Floodplain
Phoenix, Arizona, Floodplain
Callaway County, MO

- Blue dots = 100-year floodplain
- Black dots = 500-year floodplain
What is an “Adjacent Water”? 

“The agencies use the term “water” and “waters” in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas and other types of natural or man-made aquatic systems. The term does not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biologic features.”

– Proposed Rule, Footnote 3.
Adjacent Waters?
Water Reuse Systems

Sun City Regional Water Reclamation Facility recharge ponds

Alessandro Reclamation Facility recharge pond abuts San Jacinto River.
Industrial Ponds Along Arkansas River Floodplain
Agricultural Implications

• “Interpretive Rule” regarding 404(f) exemptions for normal farming, silviculture, or ranching activities

• Narrows scope of 404(f) exemptions:
  – Must now comply with NRCS standards to be exempt
  – Suggests that activities other than those 56 listed in the rule are no longer exempt

• Exemptions have limited application:
  – Only apply to section 404
  – Must be part of established (i.e., ongoing) farming operation
  – Do not apply where there is change in use
<table>
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<tr>
<th>EPA Says Proposed Rule:</th>
<th>But, In Fact:</th>
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<tbody>
<tr>
<td>Does NOT protect any new types of waters</td>
<td>Ephemeral waters, adjacent waters are now WOTUS</td>
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<td>Does NOT broaden historical coverage of the Clean Water Act</td>
<td>Historical coverage has twice been determined to be overbroad</td>
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<td>Does NOT regulate groundwater</td>
<td>It confusingly relies on “subsurface hydrological connection” to define “adjacency”</td>
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<tr>
<td>Does NOT expand regulation of ditches</td>
<td>Ditches have not been regulated as WOTUS under non-404 CWA programs</td>
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<tr>
<td>Provides exemptions for most ditches</td>
<td>The exemptions are very narrow: Must meet <strong>three part</strong> test: Excavated in uplands; drain only uplands; less than perennial flow</td>
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<td><strong>Will create clarity</strong></td>
<td><strong>Will it?</strong></td>
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What are Uplands?

• “Ditches that are wholly excavated in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water).”

• Watershed Protection Glossary:
  – “Upland: An area of the terrestrial environment that does not have direct interaction with surface waters.”
Additional Ambiguities

- Constructed wholly in uplands? Are hydric soils uplands? Is a floodplain an upland?
- Drains only uplands? What if wetlands nearby?
- OHWM?
- What is a “water” in the term adjacent waters? See note 3.
- Riparian areas?
- Floodplains?
- Grandfathering?
- What is “single landscape unit” for purposes of significant nexus?
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