Tributary: New Definition

• Water body physically characterized by the “presence of physical indicators of a bed and bank and ordinary high water mark which contributes flow directly or indirectly to traditional navigable waters, interstate waters, and/or territorial seas”
  - Regardless of size, volume, frequency, or duration of flow
  - Regardless of distance from the downslope water
  - Includes all ephemeral, intermittent, and perennial streams
A tributary can be natural, man-altered, or man-made and includes rivers, streams, lakes, impoundments, canals, and ditches unless excluded.

The final rule excludes the following ditches:

- Ditches with **ephemeral flow** that are not a relocated tributary or excavated in a tributary.
- Ditches with **intermittent flow** that are not a relocated tributary or excavated tributary and do not drain wetlands.
- Ditches that **do not flow**, either directly or indirectly, into a TNW, interstate water, or territorial sea.
Tributaries: Bed, Banks, OHWM

- Definition relies on bed, banks, and OHWM
  - Can be seen even in features without ordinary flow
- Allows jurisdiction over areas where there are historical indicators of prior existence of bed, banks, and OHWM
  - E.g., stream gauge data, elevation data
Tributaries: Bed, Banks, OHWM

- Drainage with bed, banks, and OHWM created by sheet flow (along former logging road)
Tributaries?

- Drainage with bed, banks, and OHWM that contributes flow to other covered waters can be a tributary.
Final WOTUS rule covers all “adjacent waters”

“Waters” mean:
- “Natural or man-made aquatic systems” (e.g., streams, lakes, wetlands, ponds, ditches)
- Which can be identified based on the fact that they “contain water” or have chemical, physical, or biological indicators

“Adjacent” means:
- All waters located within 100 feet of the OHWM of an (a)(1)-(5) water
- All waters located within the 100-year floodplain of and within 1,500 feet of an (a)(1)-(5) water
- All waters located within 1,500 feet of the high tide line of an (a)(1)-(5) water
Case-Specific WOTUS Determinations

• Even if a water is outside the scope of these “adjacent waters” distance thresholds, it can still be jurisdictional through a case-by-case significant nexus analysis.

• Under the (a)(8) category, waters in the 100-year floodplain or within 4,000 feet of a water of the U.S. with a significant nexus are jurisdictional.

• Again, if any portion of the feature is within the 100-year floodplain or within 4,000 feet, the entire feature is jurisdictional.
Case-Specific WOTUS Determinations: 100 Year Floodplain

2013 jurisdictional determination

Same area overlaid with 100-year floodplain
Exclusions from WOTUS Definition

- Waste treatment systems
- Certain artificial water features:
  - Artificially irrigated areas that would revert to dry land should application of water to the area cease
  - Artificial, constructed lakes and ponds created in dry land
  - Artificial reflecting pools or swimming pools created in dry land
- Small ornamental waters created in dry land
- Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand or gravel that fill with water
- Erosional features that do not meet the definition of tributary
- Groundwater
- Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land
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
• **Section 402**
  - NPDES permits are required for point source discharges from pesticide applications “to, over, or near WOTUS”
  - Many routine fertilizer and pesticide applications may be deemed to result in a “discharge of a pollutant” to new WOTUS
  - Activities that result in a “discharge” cannot legally go forward without a required permit
  - Failure to obtain a permit can result in civil and criminal penalties under the CWA
Pesticide General Permit (PGP)

- Authorizes discharges “to, over, or near WOTUS” from application of:
  - Biological pesticides
  - Chemical pesticides that leave a residue for the following pesticide use patterns:
    1. Mosquito and other flying insect pest control
    2. Aquatic weed and algae control
    3. Aquatic nuisance animal control
    4. Forest canopy pest control
- Does **not** authorize discharges from:
  - Fertilizer applications
  - Terrestrial applications to control pests on agricultural crops or forest floors
- Must obtain individual permit for pesticide applications not covered in PGP (or corresponding state permit)
• 2011 PGP will expire on Oct. 31, 2016
• EPA published draft reissuance on Jan. 26, 2016 (81 Fed. Reg. 4289)
  − Will take comment through March 11, 2016
• EPA seeking comment on all aspects of PGP, including:
  − Adequacy of information required in NOI
  − Value and utility of required annual reports
  − Whether new/additional BMPs and/or permit conditions should be added
States are required to establish water quality standards (WQSs) for all waters of the United States, including:

- Designating uses
- Identifying impaired waters
- Developing total maximum daily loads (TMDLs) and waste load allocations
Increased Obligations to Set and Meet Water Quality Standards

- Kansas estimates an increase from 32,000 miles of streams to 134,000 miles of streams subject to water quality standards
- Kansas must now expend resources establishing WQSs for those waters and owners and operators of activities in those waters will be required to obtain NPDES permits and/or Corps 404 permits.
Increased Obligations and Uncertainty Management of stormwater and the Clean Water Act
• Portions of many MS4s will meet the “tributary” definition
• Does exclusion apply?
  – Was the ditch constructed in dry land?
  – How can you tell?
• As a practical matter, many MS4 conveyances are channelized or piped streams or other water features
  – Therefore the exclusion wouldn’t apply
• Ditch in Florida would be considered WOTUS under the rule
• Cost to bring this ditch to current water quality standards would be $31,351,460

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<th>Cost for Reduction</th>
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<td>Total</td>
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Green Infrastructure
Green Infrastructure and CWA Permits

- The WOTUS rule may create disincentives to the use of green infrastructure (GI)
  - Maintenance of the GI could require a CWA section 404 permit
  - If a WOTUS, the discharge of stormwater into the GI itself could require an NPDES permit, even though the GI is designed to receive and treat stormwater
Risk of Third Party Litigation

• Confusion and uncertainty over what is WOTUS put governments and industry at risk for third party litigation
  – Despite an agreement with EPA, Missouri was sued by a third party because it failed to designate uses and set water quality criteria for certain waters.
  – County of Monterey, CA, was found liable for not maintaining a failed levee, even though its CWA permit was not approved on time by the Corps
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