

House Oversight and Govt Reform
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APPENDIX B

USACE Implementation Challenges

CWA "Waters of the U.S." Implementation Concerns
HQUSACE
24 April

Overarching Concerns:

1. Rule text contains non-equivalent requirements for significant nexus determinations
2. Arbitrary limits for case-specific significant nexus determinations not rooted in science
3. Arbitrary limits within definition of "neighboring" not rooted in science and beyond reasonable reach of defining adjacency by rule
4. Lack of definitions for multitude of terms used within rule text (e.g. similarly situated, "a water", prairie pothole, western vernal pool, Delmarva & Carolina Bay, pocosin, Texas coastal prairie wetland, ditch, roadside ditch, etc.)
5. Grandfathering provisions lacking granularity and clarity
6. Preamble does not reflect Corps technical experience and expertise, nor does it accurately reflect the Corps understanding of the substantive public comments

Specifics:

- Need implementation clarification on when a watershed meets more than one category which category to use in the determination? Does one go down the list in order (TNW, then interstate waters, then territorial seas, etc.) until the first category that applies? With exclusions applied first overall.
- (a)(1) – Traditional Navigable Waters (TNW)
 - Districts may be challenged to identify whether there is an "upper limit" to the TNW, and if so, where.
 - These analyses take at least several months, similar to a Section 10 designation
 - Districts currently do not have a list of TNWs, as they do with the Section 10 waters:
 - Drawing single point of entry (SPOE) watersheds to the TNW may be a challenge without such lists and limits identified.
 - Need implementation clarifications on how to identify and make determinations for TNW designation. Rapanos guidance included an Appendix for TNWs.
- (a)(5) – Tributaries
 - Need a definition or further discussion on "bed and banks" to implement in the field and identify a tributary. Some areas, especially in the arid west, may have very wide tributaries with shallow "banks" or very gradually sloped "banks." Do these still constitute "bed and banks" as to the intent in the rule? The preamble only discusses that the slope may vary. Needs further clarification to implement.

- The specific indicators used in the OHWM manual and the term "active channel" need to be related back to the OHWM definition in the rule.
- Need implementation clarification and/or definitions to distinguish between excluded erosional features and ephemeral tributaries.
- What constitutes a "break" in a tributary? Is there need to distinguish a tributary upstream of a break but not downstream of a break? The Corps OHWM manuals state that you need to find the tributary both up and downstream of the break.
- How does a regulator or the public know if the two sections of a tributary are part of the same tributary when there is a break separating sections? How does a regulator or the public know they are connected? How far can a break go; any distance limitation? Ephemeral tributaries out west may hit an alluvial plain and fan out; are these considered "breaks" or do these result in isolation of the streams?
- (a)(6) – All waters, including wetlands, ponds, lakes, oxbows, impoundments, and similar water features, adjacent to a water identified in subparagraphs (a)(1) through (5) of this section.
 - Need a definition of "water." It may be hard to distinguish what constitutes a non-wetland adjacent water without a definition of "water." A low depressional area on a farm field that ponds water after a rainstorm for ten days; would that be considered a non-wetland adjacent water? A puddle? Received many comments on this topic. Should there be a requirement for wetland parameters, hydrology, permanence of water, duration? A "delineation manual" for non-wetland waters?
 - New definition of adjacency includes a provision that waters subject to established normal farming, silviculture, and ranching activities are not adjacent.
 - This could result in large workload increases for those districts in agricultural areas as wetlands subject to such activities which are currently adjacent to a rule would now require a case-specific significant nexus determination. For example, a wetland abutting a perennial tributary which was subject to ranching activities currently would be considered adjacent without additional analysis; however, such wetland under the draft final rule could not be adjacent and instead would require a case-specific significant nexus determination.
 - Specific state example: Minnesota has 10.6 million acres of wetlands; ~50% of Minnesota's 54 million acres are farmland and an additional ~7% are forested wetland of which a large portion is managed in silviculture. The proposed definition may exclude a large amount of those 10.6 million acres of wetlands as adjacent, and would instead require a case-specific significant nexus determination.
 - Neighboring:
 - The indirect reference to the FEMA floodplain can lead to challenges in the field. Is the "list" of floodplains to use in the preamble considered a "hard preference" or a "soft preference" list? In any order? Landowners may want a different version to be used; need implementation clarification on which floodplain and which order to use in adjacency determinations.

- FEMA redraws their floodplains often; which version do we use? Levee Improvement Districts apply for floodplain modifications frequently; almost monthly in some districts.
- Other options for the 100-year floodplain do not match the FEMA floodplain; they serve different purposes. The NRCS soil maps suggested for use do not match the risk assessment that is used by FEMA. HEC-RAS is based on hydrology not flood risk.
- Can vertical and elevation changes be used in determining distance? Deeply incised tributaries with waters on a bluff; would these be considered adjacent?
- How is the distance measured? Remotely via aerial photography? Can't do the distance measurement in the field as it would take into account the elevation profile. Need implementation tools/resources on how to determine distance.
- (a)(7) and (a)(8) – Case-Specific Significant Nexus Determinations
 - How do we identify a prairie pothole, western vernal pool, Texas coastal prairie wetland, Carolina/Delmarva bays, or pocosins? Need delineation manuals for these waters or at least a definition of these waters, vegetation characteristics, etc.
 - Single point of entry watershed (SPOE) is a challenge to delineate. There are no readily available maps or tools. The tools used by EPA (NHD, HUC) do NOT delineate SPOE. It needs to be drawn manually which can be especially challenging in the arid west with very large SPOEs and in areas of flat topography. Can introduce inconsistency.
 - Need a mapping tool for districts to outline SPOEs and to potentially use in future determinations. However, SPOEs may change over time with development, climate, etc. Would need to be periodically reviewed if trying to use the same SPOE as used in a previous ID.
 - Need guidance on how to identify “similarly situated” waters. How close do they need to be to each other? How many and which type of functions do they need to similarly provide?
 - Need guidance on how to identify all of the “similarly situated” waters in a SPOE in order to do a significant nexus determination. This may be challenging to do remotely.
 - Must identify all waters similarly situated in a SPOE using remote tools, aerial photos, NWI maps. This may not be accurate as to the actual waters and of the same type to be used in significant nexus determination. May be a source for legal or appeal challenges.
 - Distance limit used in (a)(8) may modify state assumed waters in Michigan and New Jersey. Applicable Districts will need to work this out with the states.
 - Need guidance on appropriate procedural steps for (a)(7) and (a)(8) waters, as the procedures differ between them.
 - In (a)(7) the “similarly situated” waters are already identified then the SPOE is identified then the significant nexus determination is completed.
 - In (a)(8) the SPOE is drawn first, then “similarly situated” waters are identified and then the significant nexus determination is completed.

- If (a)(6) waters cannot be aggregated with (a)(7) or (a)(8) waters when doing a sig nexus determination, it is logical that first all the (a)(6) waters in the SPOE must be identified in order to “subtract” them out.
 - How can these be identified and upon what technical or scientific basis can these waters be “ignored” when conducting the sig nexus analysis? By what process that is repeatable?
- Significant Nexus –
 - Need specific guidance on significant nexus determination.
 - Must clarify that those functions need to be tied to the (a)(1) through (a)(3) waters.
 - Only one of those functions? Needs to be clear that needs to be more than speculative or unsubstantial.
 - Exclusive list; what if other functions are performed, cannot use in significant nexus determination?
 - Courts have made clear that qualitative evidence supporting a significant nexus determination is all that is required. The legal term of significant nexus is not a scientific one and as such should not be made into a metric.
- Exclusions –
 - Do we need to map the excluded waters/features for a determination? In the determination do we need to “officially” exclude those waters/are they part of the approved JD? We do so with “isolated” determination currently, but would we need to do so for all of these excluded waters? For example, would we need to include in the determination documentation or map the feature, such as a gully or swale?
 - Only approved JDs can be used to make jurisdictional determinations. There may be an increase in approved JD requests if landowners understand that these features are excluded for the first time in rule, especially related to ditches and stormwater management features.
 - May be a challenge to distinguish between a ditch and a tributary. Need a definition or clarification on ditch.
 - What is a roadside ditch? How close to the road does it need to be? Does it need to be parallel to the road?
 - May be a challenge to identify a ditch that is a relocated tributary or excavated in a tributary. How far back in history does a regulator need to go? If it can't be determined definitively, who bears the burden of proof? The landowner or the agency? Need to provide a set of tools/resources that the field can use to make the determination of the history of a ditch.
 - Need to distinguish between perennial, intermittent, and ephemeral flow regimes for ditches.
 - Need guidance on what perennial “flow” is; does it mean water is perennially present or that the water is flowing perennially? What about ditches that temporarily “pond” or “pool”?
 - Does the ditch exclusion extend to the banks of the ditch or does it extend only to the OHWM? What about wetlands that may be adjacent or within the ditch? Are these excluded with the ditches or if they meet the terms of adjacency (to a

- tributary for example) could they could be jurisdictional? Need guidance on wetlands within and adjacent to excluded ditches.
- May be challenging to determine whether some depressions were incidental to construction or mining in the past. Without the “abandonment” provision, these are excluded in perpetuity, and it may be a challenge for the PM to determine the historical use or creation.
 - What if the depressions develop wetland characteristics or there are fringe wetlands? Are these included in the “water-filled depressions” or are wetlands separate? Could they be considered an adjacent water if they meet the definition or are they excluded along with the open water depression?
 - “Lawfully constructed” for grassed waterways may be challenging to implement; does this mean they need a CWA permit or can it be funded by NRCS? Needs clarification.
 - If we have a definition of “water” a puddle may not be necessary in the excluded list. If we do not have a definition of “water” it may be difficult to distinguish a “puddle” from some non-wetland waters. We received many comments on this. Need guidance on how short of a timeframe water must be held for it to be considered a non-jurisdictional puddle or a depression feature. No hydric soils? Other characteristics?
 - Is tiling included in the “drained through subsurface drainage systems”? Need guidance and clarification on the tiling; what forms of tiling are excluded under this exclusion? Tiling in the bottom of a stream or on the sides of the channel?
 - May be challenging in determining whether storm water control features were constructed in WoUS in some areas with limited historical data and if not permitted or part of an approved plan.
 - Does the exclusion include any stormwater management features or do they need to be part of an approved local county/state plan? Or simply designed to meet the requirements of the CWA like the waste treatment system exclusion? May be difficult to challenge an applicant’s statement that it is constructed for the purpose of stormwater management. Technically all waters/wetlands may serve that purpose.
- Documentation -
 - New JD form.
 - No coordination required between agencies.
 - There are many points in the JD process that will require additional documentation and could be sources of appeal and legal challenges -
 - For adjacent waters: identifying for the first time adjacent non-wetland waters, identifying floodplain, identifying distance, etc.
 - For case-specific waters: identifying SPOE, identifying ‘subcategory’ of water, identifying similarly situated waters, identifying significant nexus, etc.
 - Grandfathering –
 - How is the field going to transition into the new rule from current practice? Many considerations regarding existing permits, existing JDs, JD requests received during 60-day period between publication and effective date, enforcement actions, modifications to permits, etc.