Federal Wetlands Jurisdictional Determination Perspective on the Rule for Waters of the US

Presented by:
Dylan Larson, PWS, CEP
Miller Legg
Outline

- What does it mean? – Bottom line
- Is it jurisdictional or not?
- Consideration of significant nexus / adjacency in South Florida urban areas
- Documentation and forms and why
- Remember other jurisdictions
What does it mean? **Bottom line?**

- Rule to provide certainty and predictability
  - Waters of the US – defined by law
  - No additional analysis required
    - Terms defined: Significant nexus, adjacent waters, neighboring, tributaries
    - Within 100’, 1,500’, 4,000’

- But still case specific analysis required for other situations

- Similar or slight increase jurisdiction to recent practice
  - The pendulum effect of court rulings
Waters of the US - Defined

- Traditional navigable waters
- Interstate waters
- Territorial seas
- Impoundments of jurisdictional waters
- Covered tributaries
- Covered adjacent waters...

- All waters located within the 100 year floodplain of a traditional navigable water
Not Jurisdictional

Rule now states clearly following would not be waters of the United States

– Waste Treatment Systems
– Prior converted cropland
– OLD DEFINITION OF DITCHES
  • Ditches wholly excavated in uplands, drain only uplands, and have less than perennial flow
  • Ditches that do not contribute flow (direct or indirect) to TNW, interstate water, territorial sea, or jurisdictional impoundment
– NEW DEFINITION OF 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, excavated in a tributary, or drain wetlands
  • Ditches that do not flow, either directly or through another water, into a water...
Tributary- Defined

- Includes natural, undisturbed waters and constructed waters.
- Channelized or straightened rivers or streams for flood or erosion control (not a ditch)
- Stream with stabilized banks through use of concrete or rip-rap (not a ditch)
  - LA River is quoted example
Rule now states clearly following would not be waters of the United States

- Waste Treatment Systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act

- Stormwater?
Significant Nexus / Adjacency

Water management and waterworks operations in Florida

- Florida has significant water management and waterworks operations
- Some engineered waterways historically natural or wetlands, others not
  - Kissimmee River
  - C-11 Canal
  - Five water management districts cover the state
Significant Nexus / Adjacency

- Highly urbanized area
- Complex and extensive canal network
  - Managed by state for larger conveyance
  - Tied into by multiple local drainage districts
Jurisdictional? – NO?

Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
Significant Nexus / Adjacency

SFWMD

– To live in south Florida runoff pretty much connects to a ditch that goes to a canal that goes to a larger canal that ties to a pump somewhere that ultimately gets to the intracoastal waterway?

– If you can prove it doesn’t, then does the agency look at subsurface connection as a significant nexus?
  • Actual subsurface not regulated – but not excluded from forming the significant nexus

– Likelihood that the water will be jurisdictional
Two major efforts?

- Data Sheets for the jurisdictional determination
  - However may not be needed if it has water and has significant nexus to traditional navigable water, interstate water or territorial sea
- Supporting information for connectivity
No change to wetland definition

- Inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, ... a prevalence of vegetation typically adapted for life in saturated soil conditions.

Data Sheets (1987 manual)

- Hydrology
- Vegetation
- Soils
Documentation and Forms - Connectivity

Previous information for connectivity highlighted in the guidance
- Maps / Aerials
- Drainage studies / reports
- Topographic surveys
- Pipe and culvert locates
- Watershed studies
- Drainage district criteria
- Field observations / photographs

Not evident or emphasized in rule
However may still be needed to prove adjacency, significant nexus – but definitely to disprove connection
New forms or documentation not defined
Still can’t escape

- State of FL still has their own jurisdictional delineation criteria

- FL criteria has nothing to do with connection to other water systems like the federal jurisdiction

- Based on broader allowance than USACOE:
  - Vegetation
  - Hydrology
  - Soils
Final Thoughts

- More wetlands or waters will be jurisdictional.
  - That may be the certainty for the regulated public.
- Less paperwork may be needed to be claimed jurisdictional. More paperwork will be needed to prove that it is not jurisdictional.
- Comment on the proposed rulemaking and monitor final issuance.