

## Q&As on Clean Water Rule – 17 August 2015

### Implementation – Grandfathering

#### **Q: Are preliminary jurisdictional determinations affected by the new rule?**

**A:** Preliminary jurisdictional determinations (PJDs) from the Corps for Clean Water Act Section 404 purposes are not affected by the new rule. A PJD is a non-binding “. . . written indication that there may be waters of the United States, including wetlands, on a parcel” and may be used to voluntarily waive or set aside questions regarding jurisdiction over a particular site, usually in the interest of allowing the landowner or other “affected party” to move ahead expeditiously to obtain a Corps permit. Landowners may rely on existing PJDs regarding a specific authorization/verification even after the new rule is in effect. Landowners may continue to request a PJD in lieu of an approved jurisdictional determination under the new rule. In addition, landowners with an existing PJD may request an approved jurisdictional determination under the new rule if they choose, which would be finalized after the effective date of the new rule.

#### **Q: What is the status of an approved jurisdictional determination associated with a pending complete nationwide permit pre-construction notification (PCN)?**

**A:** For an approved jurisdictional determination associated with a complete Section 404 pre-construction notification (per Nationwide Permit General Condition #31 and any related Corps district-specific regional conditions) pending on or before publication date of the new rule (i.e., June 29, 2015), the approved jurisdictional determination will be finalized consistent with the former rule, regardless of the date of the NWP verification decision. However, the applicant has discretion to request that the Corps apply the new rule, in which case the Corps would finalize the approved jurisdictional determination after the effective date under the new rule. Pending PCNs must not be withdrawn and resubmitted for the old rules to apply.

### Characteristics of Tributaries and Erosional Features

#### **Q: What is the difference between tributaries under the Clean Water Rule and erosional features which are not considered “waters of the U.S.” under the Rule?**

**A:** For the purposes of the Rule, a tributary is a water that contributes flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas that exhibits physical indicators of flow through a bed and banks and an ordinary high water mark (OHWM). Ephemeral erosional features, such as gullies, rills, and non-wetland swales, do not have the physical features of tributaries and are specifically excluded from the definition of waters of the U.S. Concentrated surface runoff may occur within an erosional feature, but without creating the physical characteristics associated with bed and banks and an ordinary high water mark, the feature will not be jurisdictional.

It should be noted that some ephemeral streams are colloquially called “gullies” or the like even where they exhibit a bed and banks and an ordinary high water mark; regardless of the name they are given locally, waters that meet the definition of tributary are not excluded erosional features.

#### **Q: What is a “bed and banks”?**

**A:** The bed and banks is the substrate (the bottom) and sides of a channel between which flow is confined. The banks constitute a break in slope between the edge of the bed and the surrounding

terrain. This break in slope may vary from gradual to steep, depending on the landscape position of the channel. The bed may be devoid of vegetation or may be fully vegetated depending on precipitation levels, volume, frequency, and duration of flow.

**Q: What is an “ordinary high water mark” (OHWM) and what are its indicators?**

**A:** The OHWM is that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. The OHWMs can take on a variety of appearances and have a wide range of indicators depending on location, recent flow conditions, and other factors. These factors and other relevant indicators are discussed in detail in applicable Corps guidance documents and manuals on OHWM identification. The OHWM manuals can be found at: <http://www.erdc.usace.army.mil/OHWM/>.

**Q: Where do erosional features occur?**

**A:** Erosional features occur where there is enough concentrated surface runoff to form a channel, but that channel has insufficient volume, frequency, and duration of flow to exhibit the physical characteristics of a bed and banks and/or OHWM. In some circumstances a tributary may demonstrate breaks in the presence of bed and banks and/or OHWM along the connection to the downstream traditional navigable water, interstate water, or territorial sea while hydrologic connectivity remains. Such breaks in bed, banks and or OHWM may include an erosional feature. Flow through a non-jurisdictional erosional feature does not preclude the water from remaining a tributary so long as the bed and banks and an OHWM are present upstream of the break.

**Q: How can I determine the difference between a tributary and an erosional feature in the field?**

**A:** If the feature is a tributary you will generally be able to identify bed and banks and another indicator of an OHWM unless disturbed conditions exist, such as during or shortly after extreme flow events or due to man-made alterations. As explained above, erosional features lack a bed and banks and/or an OHWM.

**Adjacent and Case-Specific Waters**

**Q: What waters may be covered under the adjacent category of waters?**

**A:** The Rule includes all waters adjacent to a water identified in paragraphs (a)(1) through (a)(5) – the traditional navigable waters interstate waters, territorial seas, impoundments, and tributaries. These adjacent waters may include wetlands, ponds, lakes, oxbows, impoundments, and similar waters. Adjacent waters do not include waters that are subject to established normal farming, silviculture, and ranching activities as those terms are used in Section 404(f) of the CWA. However, such waters may be subject to a case-specific significant nexus analysis under paragraph (a)(7) or (a)(8).

**Q: What waters may be covered under the site-specific significant nexus categories of waters under paragraph (a)(8)?**

A water that is determined not to be adjacent under the Rule but that is within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea is jurisdictional where it has a significant nexus to a traditional navigable water, interstate water, or territorial sea either alone or in combination with similarly situated waters.

A water that is determined not to be adjacent under the Rule but is within 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary is jurisdictional where it has a significant nexus to a traditional navigable water, interstate water, or territorial sea either alone or in combination with similarly situated waters.

All significant nexus findings must be effectively documented with relevant site-specific factors that support the jurisdictional finding.

**Q: What are considered wetland waters under the Rule?**

**A: The definition of “wetland” does not change under the Rule:** “The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” Wetlands are delineated using the 1987 Corps Wetland Delineation Manual including its Regional Supplements.

**Q: What types of non-wetland waters are included as adjacent waters or as site-specific significant nexus waters?**

**A:** Ponds, lakes, oxbows, impoundments, and similar waters are considered non-wetland waters that can be found to be jurisdictional as either adjacent or as site-specific significant nexus waters.