

Colorado Springs Utilities Analysis of the “Waters of the U.S. Rule” August 2015

Colorado Springs Utilities (CSU) has reviewed the final version of the “waters of the U.S.” rule as issued on June 29, 2015. The rule was accompanied by a large amount of supplemental material, including an extensive preamble, a lengthy Technical Support Document (400+ pages), and a Response to Comments document that was also hundreds of pages in length. Hence, all of the supporting material has not yet been fully reviewed. That said, we would note that the agencies, and in particular EPA, did make some significant modifications to the rule as initially proposed in an attempt to address documented concerns. We thank the agencies for their efforts in that regard.

The following is a summary, followed by a more detailed explanation, of the major remaining concerns of Colorado Springs Utilities. Many of these concerns are capable of resolution through the adoption of appropriate implementation guidance. However, since guidance can always be modified by the agencies, a preferable long-term approach to rectifying such concerns would be the adoption of legislation or a modified rule.

Summary of Concerns

- The definition of “tributary,” on its face, remains unclear relative to the need for a “two part” qualifying test, and the impact of a man-made or natural break in the waterway on the status of the upstream segment.
- The inability to conduct a case-by-case jurisdictional analysis for waters defined as “adjacent”.
- The absence of any provision directly addressing the status of “canals”.
- The potentially very narrow set of exclusions for western ditches.
- The failure to include an exclusion for man-made “water system” features.
- The breadth of the significant nexus test, with specific reference to the expansive list of “functions” and the process surrounding “regional” determinations.
- The need for additional clarity in the exclusion for stormwater control features, especially as they may be constructed in post-burn areas.

Detailed Explanation

1. Definition of Tributaries: It should be noted at the outset that under the final rule all tributaries are per se jurisdictional. “Tributary” is defined, in part, to mean:

“...a water that contributes flow...to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary.”

Relative to this portion of the definition, the rule, on its face, is ambiguous concerning whether the mere presence of a bed, bank and ordinary high water mark (OHWM), will lead to an

assumption that there is a contribution of water to a traditional navigable water (TNW), or if meeting the definition of “tributary” is, in fact, a “two part” test. The supporting documentation would lead one to believe that it is indeed a two part test, with the need to independently demonstrate that the water in question also contributes flow to a TNW. CSU supports this reading, as many washes, arroyos, etc. in the arid West may possess the referenced physical features, i.e., a bed, bank and OHWM, due to infrequent high storm flows, yet these flows would not have a significant effect upon a TNW. The need for the two step analysis should be made clear in the implementation guidance.

The definition goes on to state that:

“A tributary can be natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and bank and an ordinary high water mark can be identified upstream of the break....”

This portion of the definition raises further questions. For example, it is unclear whether if the break is not a water (e.g., dry land, upland grassland, desert floor or upland vegetated swale), the drainage up-gradient of such a break in a water that meets the definition of tributary is nevertheless non-jurisdictional since it does not contribute flow through a waterway. It appears that under the way the final rule as written, in order for a tributary to connect to a TNW, it must contribute flow through a jurisdictional or non-jurisdictional “water”. Thus, overland flows through dry land breaks, a not uncommon situation in the arid West, would be considered a situation where a water located upstream of the dry land break would be considered non-jurisdictional and lose its tributary status. Guidance confirming this fact should be provided.

2. Definition of Adjacent Waters: Under the final rule, all adjacent waters are per se jurisdictional. “Adjacent” is defined to mean waters “bordering, contiguous, or neighboring” a TNW. “Neighboring,” in turn, is defined so as to encompass all waters located within the 100 year floodplain and not more than 1500 feet from the OHWM. These definitions can be problematic, as they leave no room for a case-by-case determination regarding whether the “adjacent” waters would have a significant nexus to a TNW, i.e., would significantly impact the physical, chemical or biological integrity of such a water. For example, the rule would find jurisdictional an isolated intrastate pond which floods, on average, once every 100 years, with such flood flows then reaching the TNW. Many water utility and agricultural water storage and transport activities will be built, of necessity, in near proximity to a TNW and potentially disturb these “adjacent” features. However, in the absence of some individual determination that these features have a significant nexus to a TNW, it is inappropriate (costly and time consuming) to catch such activities in the regulatory web.

3. Canals: It should be noted that the above definition of “tributary” mentions “canals”, a term for which no definition is provided or exemptions noted, unlike the rule’s treatment of “ditches”. It appears from the supplemental material that these two situations, i.e., canals and ditches, may be included or excluded from jurisdiction based on the same criteria, but this is unclear and should be confirmed.
4. Treatment of ditches: CSU believes that the exclusions for ditches in the final rule, though an improvement, continues to present concerns. The final rule refers to ditches with “ephemeral” or “intermittent” flow, but these two terms are not further defined. Under prior agency regulations and guidance, “intermittent” was used in the context of streams, and encompasses those “flowing during certain times of the year, when groundwater provides water for stream flow.” On the other hand, “ephemeral” refers to streams that have “flowing water only during, and for a short duration after, precipitation events in a typical year.” The rule preamble, in turn, refers to “precipitation and groundwater flow or seasonal flow” when speaking of intermittent ditches, while it describes ephemeral ditches as those which flow in response to precipitation and snowmelt. If this preamble language is intended to describe the types of flows that qualify the ditch for an exclusion, and the other supporting documents would seem to indicate that this is indeed the case, many Western municipal and agricultural ditches will be found jurisdictional. This is the case because they derive their flow from the exercise of lawful decreed diversions from rivers or streams and return a portion of that flow to the river either as a result of water court decree terms and conditions or simple lack of demand or treatment capacity at a given point in time. It must be clarified whether such ditches would, under all circumstances, be considered jurisdictional. For example, would the frequency and/ or volume of return flows be relevant?

In addition, reference is made in the preamble and supporting documentation to a ditch’s inability to qualify for an exemption if it “redirects the majority of a stream’s flow” or impacts aquatic functions in the stream. However, in the prior appropriation states of the West, it is not uncommon for a ditch or series of ditches along a reach of stream to divert, under their respective priorities, the majority of the natural flow regime. The agencies also need to clarify their position on this issue, including whether the ditch would be considered jurisdictional even though it does not return flow to a TNW.

On a similar note, clarification of what constitutes a relocated tributary is also necessary. Is a relocated tributary simply a situation where a ditch is used to physically reroute the channel of a tributary or does it also include the situation where a tributary ends in a ditch or canal and the canal conveys the water carried by the tributary? The preamble notes that a ditch that is a relocated stream is distinguishable from a ditch that withdraws water from a stream without changing its aquatic character. The latter type of ditch is apparently excluded from jurisdiction.

Exclusion for Water Systems: CSU and other Western water providers had requested an express exclusion for man-made components of water systems akin to that provided for wastewater systems. Though it is clear from the final rule that the wastewater system exclusion remains

intact, the status of portions of water systems, including recycling, recharge and reuse facilities, as well as common water system delivery structures that are a part of the treatment process, remains uncertain at best. This is due in large measure to the consistent use of the word “wastewater” in conjunction with such facilities. In reality, many of the water systems in question do not move, store or treat wastewater, but rather handle “raw water” or even treated water that is not yet ready for direct customer use. The existence of some type of water system exclusion is therefore very important, especially where looming water supply shortages necessitate the employment of creative solutions. Though the agencies indicate in the supporting documentation that they do not favor a “blanket exclusion” for all water system components, as it perhaps could lead to debates over the status of certain components such as in-stream reservoirs or natural drainage ways used as conveyance facilities, there is a need to clarify the “exempt” status of constructed water facilities that are not themselves TNWs or tributaries of TNWs.

5. Breadth of Significant Nexus Test: Under the final rule, in determining the existence of a significant nexus, waters are to be assessed by evaluating certain “aquatic functions.” If any single function or combination of functions contributes significantly to the chemical, physical or biological integrity of the nearest TNW, similarly situated waters in the region are considered jurisdictional. These functions include such things as sediment trapping, retention of flood waters, runoff storage, contribution of flow, export of food resources, and provision of aquatic habitat. Unfortunately, it is difficult to find a sound basis in the Act or the case law for such an expanded “functions” list, where many of the identified functions could be provided equally well by dry land or totally constructed artificial facilities and it is, in fact, the “absence” of any hydrological connection which meets some the identified function, e.g., storage of flows that prevents downstream flooding. Though there may exist a public policy justification for such a position, it is up to Congress, not the agencies, to expand the Act in this manner.

In addition, in the West, where water providers hold decreed water interests in basins located great distances from their irrigated lands or customer base, a dilemma arises as dredge and fill applications are filed by others with interests in the same basin, and significant nexus determinations are made for the entire “region” per the rule, without the benefit of the water provider’s knowledge or participation. While the agencies appear to indicate in the preamble that an entity can “back out” an individual waterbody after such a basin-wide or regional determination has been made, it is unclear how this would occur.

6. Stormwater Control Features: The final rule includes an exclusion for stormwater control features “created in dry land”. While the preamble states that “dry land” is defined in the 1986 and 1988 rulemaking preambles as “not streams, rivers, and lakes,” uncertainty remains relative to stormwater control features placed in low lying depressions or drainage ways that periodically flow in response to significant precipitation events. This includes natural drainages in forest lands where wildfires have created the need to install facilities designed to control post-fire sediment and debris flows. Though the preamble indicates that “dry land” can be further defined during implementation, the best time is now as, especially in burn areas,

remediation decisions must be made expeditiously once the fire is out. Clarification on this issue is of pre-eminent concern in the West, where such fires have become commonplace.

CSU hopes that this recitation of our concerns aids in your understanding of our position on the final “waters of the U.S.” rule. Once we can complete our review of additional portions of the agency background documentation and those comments and judicial complaints filed by others, and hopefully speak with the agencies concerning their interpretations and potential implementation guidance, we may be in a position to share additional thoughts on this matter.

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