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By identifying ditches that “contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or impoundment” as a Water of the United States in the new proposed rules, EPA and the Corps have significantly increased the scope of WOUS and potentially limited the longstanding waste treatment exception.

Ditches and EPA/Corps WOUS Rule

The proposed WOUS rule for the first time includes ditches¹ unless they fall within the following two exceptions:

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or impoundment.

Photo 29. Ephemeral tributary, a concrete flood control channel, Santa Barbara, CA.



By identifying ditches that “contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or impoundment,” EPA and the Corps have dramatically increased the scope of WOUS and potentially limited the waste treatment exception. Most ditches under a sufficient rain event contribute flow directly or indirectly to a feature that would itself qualify as a water of the United States or lead to a water of the United States.² The rule explains also that ditches with an ‘ordinary high water mark’ would be regulated. Under Corps guidance, most storm water ditches including completely encapsulated and culverted features would have the requisite features to qualify as a WOUS. See Figure at left, Source: U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK (2007)

Hundreds of thousands of miles of rail, road, MS4s,³ and other ditches currently unregulated will become waters of the United States under the proposed EPA/Corps WOUS rule. The result will be litigation,⁴ NPDES and Section 404 permits, mitigation, spill and emergency response issues, and even protected species critical habitat issues.

¹ In current CWA regulations, “ditch” is not found in the comprehensive definition of “waters of the United States” despite a long list of examples of features that would be WOUS. *See, e.g.* 40 C.F.R. § 122.2.

² Note also that under the decision *Quivera Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), *cert. den.* 106 S.Ct. 791 (1986), a pre-*Rapanos* decision, dry arroyos were identified as WOUS.

³ *San Francisco Baykeeper v. W. Bay Sanitary Dist.*, 791 F. Supp. 2d 719, 773 (N.D. Cal. 2011).

⁴ Vacatur of EPA’s water transfer rule will also increase ditch regulation *Catskill Mountains Chapter of Trout Unlimited Inc., et al. v. EPA* consolidated case Nos. 08-cv-0560 and 08-cv-9430 (S.D.N.Y., March 28, 2014).