

# FINDING OF NO SIGNIFICANT IMPACT

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## ADOPTION OF THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES



U.S. Army  
Office of the Assistant Secretary of the Army for Civil Works  
Washington DC

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# FINDING OF NO SIGNIFICANT IMPACT

## ADOPTION OF THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES

My office has prepared an Environmental Assessment (EA) consistent with the National Environmental Policy Act (NEPA) of 1969, to assess the impacts of adopting the final proposed rule entitled: Adoption of the Clean Water Rule: Definition of Waters of the United States. The purpose of completing the EA was to (1) document the potential environmental effects of the proposed clarification of the definition of waters of the United States pursuant to the Clean Water Act, and (2) to determine whether to prepare an environmental impact statement for the proposed clarification or a finding of no significant impacts (FONSI). The EA includes a discussion of the purpose and need for the proposed action, the potential environmental impacts to the quality of the human environment of the proposed action, and the alternative (no action) and the EA is incorporated by reference.

The public was provided with significant environmental information about the proposed rule in order to allow members of the public to provide their views and inform agency decision-making. The draft rule was published in the Federal Register (Vol. 79, No. 76) on April 21, 2014 for public comment through July 21, 2014 and extended at the request of stakeholders until November 14, 2014. After publication of the draft rule approximately 400 stakeholder engagements were held in the form of meetings, webinars, and phone calls. Of the approximately 1.2 million comments received, the vast majority of the comments were form letters from mass letter writing campaigns. A subset of the 1.2 million comments, 20,567 were identified as unique and evaluated further to determine if the comments were substantive. Changes to the final proposed rule were made that address many of the substantive comments. Responses to the substantive comments have been developed by the Environmental Protection Agency and the U.S. Army Corps of Engineers (USACE).

The baseline for the No Action alternative analysis is the set of current processes and procedures utilized by the agencies to identify waters that are subject to jurisdiction under the Clean Water Act. Current process and procedures are based upon the 1986 regulatory definition of a waters of the United States, and guidance developed as a result of the SWANCC and Rapanos U.S. Supreme Court decisions. The final proposed rule includes eight categories of jurisdictional waters, maintains existing exemptions for certain categories of activities and waters, and adds additional exclusions for categories of waters that were never covered under the Act.

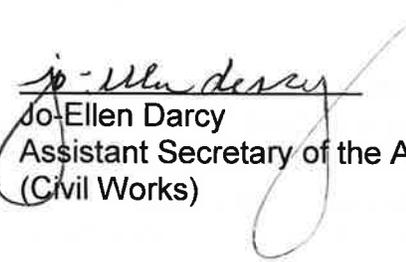
Based upon an analysis of a random selection of negative jurisdictional determinations completed in Fiscal Years 2013 and 2014 in which waters were found to not be subject

to jurisdiction under the Clean Water Act, it was determined that there would be an incremental increase in the waters found to be jurisdictional. The analysis showed that with adoption of the rule there would be between a 2.8 to 4.6 percent increase in positive jurisdictional determinations. The majority of the increase in determinations would be in the category "Other Waters."

Thus, any proposed projects that would impact the areas subject to jurisdiction would be subject to review under the USACE public interest analysis, the Section 404(b)(1) Guidelines and any other applicable federal requirements (e.g., NEPA, section 7 of the ESA) that would not occur if areas were not subject to jurisdiction (No Action). Under the Section 404(b)(1) guidelines, some impacts to biota may be avoided or minimized as a result of the implementation of the proposed action and for areas that are impacted due to unavoidable actions the expectation is that the functional losses would be offset by compensatory mitigation.

With respect to the socio-economic analysis of the costs and benefits associated with adoption of the rule and the increase in waters found to be jurisdictional under the Clean Water Act, indirect incremental benefits are expected to exceed indirect incremental costs. The "other waters" category represents the greatest potential for changes in jurisdictional determinations and the costs discussed in the EA represent estimated increases in permitting and regulatory activities, while the benefits represent the public's willingness to pay for the preservation of wetlands, as reflected, in the anticipated increases in compensatory mitigation acres that would offset permitted losses from the Clean Water Act Section 404 program.

**DETERMINATION:** Based upon the analysis contained in the Environmental Assessment and supporting documentation, I have concluded that adoption of the rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act for which an environmental impact statement is required.

  
Jo-Ellen Darcy  
Assistant Secretary of the Army  
(Civil Works)

May 26, 2015  
Date

# FINAL ENVIRONMENTAL ASSESSMENT

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## ADOPTION OF THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES

26 May 2015



U.S. Army  
Office of the Assistant Secretary of the Army for Civil Works  
Washington DC

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# **FINAL ENVIRONMENTAL ASSESSMENT**

## **ADOPTION OF THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES**

### **1.0 INTRODUCTION**

The Assistant Secretary of the Army for Civil Works (ASA(CW)) has prepared this Environmental Assessment (EA) to evaluate the potential impacts of adopting the final proposed rule entitled: Adoption of the Clean Water Rule: Definition of Waters of the United States. A draft rule entitled: 33 CFR Part 328 Definition of Waters of the United States of title 33 Chapter I of the Code of Federal Regulations was published in the Federal Register (Vol. 79, No. 76) for public comment from April 21, 2014 to November 14, 2014. This EA has been prepared consistent with the National Environmental Policy Act (NEPA) of 1969 and the Council on Environmental Quality's Regulations (40 CFR 1500-1508). Electronic copies of the documents incorporated into this EA as well as the final EA are located in the docket for this rulemaking, Docket EPA-HQ-OW-2011-0880.

The scope of this EA is to (1) document the potential environmental effects of the proposed clarification of the definition of waters of the United States pursuant to the Clean Water Act (proposed action) and, (2) to determine whether to prepare an environmental impact statement for the proposed clarification or a finding of no significant impact (FONSI). This EA includes a brief discussion of the need for the proposed action and, the potential environmental impacts of the proposed action and the alternative (no action).

### **1.1 PURPOSE**

The foundation of the Clean Water Act is a desire by the Nation to restore and maintain the chemical, physical, and biological integrity of the waters of the United States. The term "waters of the United States" identifies waters which are subject to the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act). The purposes of the final proposed rule are to (1) clarify the scope of the regulatory term "waters of the United States", and (2) simplify implementation of the Clean Water Act consistent with its purposes through clearer definitions and increased use of bright-line rules. The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) have developed this rule based upon language in the Clean Water Act, available science, Supreme Court decisions, public comments, and the agencies' experience and technical expertise. Because the purpose of the final proposed rule is to define a waters of the United States the implementation of the rule would not affect

or alter the Department of the Army permit application process or the decision-making processes in place by the agencies. The final proposed rule, Adoption of the Clean Water Rule: Definition of Waters of the United States is herein incorporated by reference.

## **1.2 NEED**

The need addressed by promulgating this rule is to resolve the ambiguity that exists under current regulations and practices following recent Supreme Court decisions, under which virtually all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), the Supreme Court held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the Clean Water Act. Although the SWANCC decision did not call into question earlier decisions upholding the Clean Water Act’s coverage of wetlands or other waters “adjacent” to traditional navigable waters, it created uncertainty with regard to the jurisdiction of other waters and wetlands that, in many instances, may play an important role in protecting the integrity of the nation’s waters. The majority opinion in SWANCC introduced the concept that it was a “significant nexus” that informed the Court’s reading of Clean Water Act jurisdiction over waters that are not navigable in fact.

Five years later, in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*), all Members of the Court agreed that the term “waters of the United States” encompasses some waters that are not navigable in the traditional sense. In addition, Justice Kennedy’s opinion stated that the critical factor in determining the Clean Water Act’s coverage is whether a water has a “significant nexus” to downstream traditional navigable waters such that the water is important to protecting the chemical, physical, or biological integrity of the navigable water, referring back to the Court’s decision in SWANCC.

The “significant nexus” standard articulated and refined in these Supreme Court opinions is the touchstone for the agencies’ interpretation of the Clean Water Act’s jurisdictional scope. In response to these opinions, the agencies issued guidance in 2003 (post-SWANCC) and 2008 (post-*Rapanos*). However, these two guidance documents are not effective in providing the public or agency staff with the information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific jurisdictional analysis to determine whether a “significant nexus” exists, and this time and resource intensive process can result in inconsistent interpretation of Clean Water Act jurisdiction and perpetuate ambiguity over where the Clean Water Act applies. Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the Clean Water Act clearer, simpler, and faster. In the rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected

under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

## **2.0 ALTERNATIVES**

This EA analyses the impacts of either implementing the proposed action (adoption of the final proposed rule) or selecting the No Action alternative (the existing rule and guidance would remain unchanged).

### **2.1 ADOPTION OF THE FINAL PROPOSED RULE ALTERNATIVE (Proposed Action)**

The agencies administer the Clean Water Act Section 404 process and the USACE issues four types of permits: standard permits, letters of permission, nationwide permits, and regional general permits. In most situations a jurisdictional determination (preliminary or approved) is required to be completed. Jurisdictional determinations are conducted by the USACE to establish the geographic extent of on-site waters and wetlands subject to the Clean Water Act. Current practice for the determination of the extent of jurisdictional waters of the United States is based upon regulations dated November 16, 1986, and interagency guidance documents dated January 15, 2003 and December 2, 2008.

The agencies developed a draft rule (appendix A) that was published in the Federal Register (Vol. 79, No. 76) on April 21, 2014 for a public comment period through July 21, 2014. At the request of stakeholders the comment period was extended until November 14, 2014. Approximately 1.2 million comments were received during the comment period. After publication of the draft rule approximately 400 stakeholder engagements in the form of meetings, webinars, and phone calls were conducted to gather input and listen to stakeholders concerns with the draft rule. Upon review of the comments received, 20,567 were identified as unique; the remaining comments were form letters from mass letter writing efforts. The unique comments were evaluated further to identify comments that were substantive. Responses to the substantive comments have been developed by the agencies and are located in the docket for this rulemaking, Docket EPA-HQ-OW-2011-0880. Based upon a review of the comments and discussions with stakeholders, Federal agencies, and Congress, the draft rule was amended to incorporate changes into a final proposed rule (appendix B) that address the ambiguity that exists under current regulations and practices, while striving to simplify the process for identifying waters of the United States.

The final proposed rule establishes jurisdiction for: waters that are jurisdictional in all instances (traditional navigable waters and impoundments of jurisdictional waters), waters that are jurisdictional, but only if they meet specific definitions in the rule (tributaries and adjacent waters), and a narrowed category of waters subject to case-specific analysis (other waters). Decisions about these waters are based on the law, peer-reviewed science, and the agencies' technical expertise, and were informed by public comments. The final proposed rule replaces existing procedures and guidance that often depend on individual, time-consuming, and often inconsistent analyses of the relationship between a particular stream, wetland, lake, or other water with downstream

navigable waters. The agencies have greatly reduced the extent of waters subject to an individual review by incorporating the scientific literature described in the EPA's science report characterizing the nature and strength of the chemical, physical, and biological connections between upstream and downstream waters. The result of applying this scientific analysis is that the agencies can more effectively focus the rule on identifying waters that are clearly covered by the Clean Water Act and those that are clearly not covered, making the final proposed rule easier to understand, more consistent, in application, and environmentally more protective.

Traditional navigable waters (including interstate waters and the territorial seas) are jurisdictional by rule in all cases. Impoundments of jurisdictional waters are also jurisdictional by rule in all cases. The waters in the next two categories, "tributaries" and "adjacent" waters are jurisdictional by rule, as defined, because the science confirms that, as defined, they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas. For waters that are jurisdictional by rule, no additional significant nexus analysis is required.

The final two categories of jurisdictional waters are those waters subject to case-specific analysis to determine whether they have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with similarly situated waters in the region.

Consistent with existing regulations and the April 2014 proposed rule, the final proposed rule includes traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters in the definition of "waters of the United States." These waters are jurisdictional by rule.

#### Tributaries

Previous definitions of "waters of the United States" regulated all tributaries without qualification. This final proposed rule more precisely defines "tributaries" as waters that are characterized by the presence of physical indicators of flow – bed and banks and ordinary high water mark – and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas. The final proposed rule concludes that such tributaries are "waters of the United States." The great majority of tributaries as defined by the final proposed rule are headwater streams that play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters. The physical indicators of bed and banks and ordinary high water mark demonstrate that there is sufficient volume, frequency, and flow in such tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus. "Tributaries," as defined, are jurisdictional by rule.

The final proposed rule only covers as tributaries those waters that science tells us provide chemical, physical, or biological functions to downstream waters and that meet the significant nexus standard. The agencies identify these functions in the definition of "significant nexus" at paragraph (c)(5) of the final proposed rule. Features not meeting this legal and scientific test are not jurisdictional under the final proposed rule. The final

proposed rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries or, in certain circumstances drain wetlands, or that science clearly demonstrates are functioning as a tributary. These jurisdictional waters affect the chemical, physical, and biological integrity of downstream waters. The rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation. Further, the rule explicitly excludes from the definition of “waters of the United States” erosional features, including gullies, rills, and ephemeral features such as ephemeral streams that do not have a bed and banks and ordinary high water mark.

### Adjacent Waters

The agencies determined that “adjacent waters,” as defined in the final proposed rule, have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas based upon their hydrological and ecological connections to, and interactions with, those waters. Under the final proposed rule, “adjacent” means bordering, contiguous, or neighboring, including waters separated from other “waters of the United States” by constructed dikes or barriers, natural river berms, beach dunes and the like. Further, waters that connect segments of, or are at the head of, a stream or river are “adjacent” to that stream or river. “Adjacent waters” include wetlands, ponds, lakes, oxbows, impoundments, and similar water features. However, it is important to note that “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 Clean Water Act.

The final proposed rule establishes a definition of “neighboring” for purposes of determining adjacency. In the final proposed rule, the agencies identify three circumstances under which waters would be “neighboring” and therefore “waters of the United States”:

- (1) Waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary, as defined in the final proposed rule.
- (2) Waters located in whole or in part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary, as defined in the final proposed rule (“floodplain waters”).
- (3) Waters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas and waters located within 1,500 feet of the ordinary high water mark of the Great Lakes.

The agencies emphasize that the rule has defined as “adjacent waters” those waters that currently available science demonstrates possess the requisite connection to downstream waters and function as a system to protect the chemical, physical, or biological integrity of those waters. The agencies also emphasize that the rule does not cover “adjacent waters” that are otherwise excluded. Further, the agencies recognize the establishment of bright line boundaries in the final proposed rule for adjacency does not in any way restrict states from considering state specific information and concerns,

as well as emerging science to evaluate the need to more broadly protect their waters under state law. The Clean Water Act establishes both national and state roles to ensure that states specific circumstances are properly considered to complement and reinforce actions taken at the national level.

“Adjacent” waters as defined, are jurisdictional by rule. The agencies recognize that there are individual waters outside of the “neighboring” boundaries stated above where the science may demonstrate through a case-specific analysis that there exists a significant nexus to a downstream traditional navigable water, interstate water, or the territorial seas. However, these waters are not determined jurisdictional by rule and would be evaluated through a case-specific analysis. The strength of the science and the significance of the nexus would be established on a case-specific basis as described in the final proposed rule.

The final proposed rule establishes a definition of “neighboring” for purposes of determining adjacency. In the final proposed rule, the agencies identify three circumstances (bright lines) under which waters would be “neighboring” and therefore “waters of the United States”:

- (1) Waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary.
- (2) Waters located in whole or in part in the 100-year floodplain that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary (“floodplain waters”).
- (3) Waters located in whole or in part within 1,500 feet of the high tide line or the ordinary high water mark of a tidally-influenced traditional navigable water, including the Great Lakes, or territorial sea.

#### Case-Specific Significant Nexus

The rule identifies particular waters that are not jurisdictional by rule but are subject to case-specific analysis to determine if a significant nexus exists and the water is a “water of the United States.” This category of case-specific waters is based upon available science and the law, and in response to public comments that encouraged the agencies to ensure more consistent determinations and reduce the complexity of conducting jurisdictional determinations. Consistent with the significant nexus standard articulated in the Supreme Court opinions, waters are “waters of the United States” if they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. This determination would most typically be made on a water individually, but can, when warranted, be made in combination with other waters where waters function together.

In the final proposed rule, the agencies have identified by rule, five specific types of waters in specific regions that science demonstrates should be subject to a significant nexus analysis and are considered similarly situated by rule because they function alike and are sufficiently close to function together in affecting downstream waters. These five types of waters are Prairie potholes, Carolina and Delmarva bays, pocosins,

western vernal pools in California, and Texas coastal prairie wetlands. Consistent with Justice Kennedy's opinion in *Rapanos*, the agencies determined that such waters should be analyzed "in combination" (as a group, rather than individually) in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific analysis of whether these waters have a significant nexus to traditional navigable waters, interstate waters, or territorial seas.

The final proposed rule also provides that waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary are subject to case-specific significant nexus determinations, unless the water is excluded under paragraph (b) of the rule. The science available today does not establish that waters beyond those defined as "adjacent" should be jurisdictional as a category under the Clean Water Act, but the agencies' experience and expertise indicate that there are many waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or out to 4,000 feet where the science demonstrates that they have a significant effect on downstream waters.

In circumstances where waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within 4,000 feet of the high tide line or ordinary high water mark are subject to a case-specific significant nexus analysis and such waters may be evaluated as "similarly situated," it must be first demonstrated that these waters function alike and are sufficiently close to function together in affecting downstream waters. The significant nexus analysis must then be conducted based on consideration of the functions provided by those waters in combination in the point of entry watershed. A "similarly situated" analysis is conducted where it is determined that there is a likelihood that there are waters that function together to affect downstream water integrity. To provide greater clarity and transparency in determining what functions would be considered in determining what constitutes a significant nexus, the final proposed rule lists specific functions that the agencies would consider.

In establishing both the 100-year floodplain and the 4,000 foot bright line boundaries for these case-specific significant nexus determinations in the rule, the agencies are carefully applying the available science. Consistent with the Clean Water Act, the agencies would work with the states in connection with the prevention, reduction and elimination of pollution from state waters. The agencies would work with states to more closely evaluate state-specific circumstances that may be present within their borders and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters.

The rule identifies particular waters that are not jurisdictional by rule but are subject to case-specific analysis to determine if a significant nexus exists and the water is a "water of the United States." This category of case-specific waters was determined using

available science, the law, and in response to public comments received during the public comment period that encouraged the agencies to ensure more consistent determinations and reduce the complexity of conducting jurisdictional determinations.

Under the significant nexus standard articulated in the Supreme Court opinions, waters are “waters of the United States” if they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

In this final proposed rule, based in particular on the Connectivity Report and the input of the EPA science Advisory Board, contained in the administrative record for the rule the agencies have identified by rule, five specific types of waters in specific regions that should be subject to a significant nexus analysis and are considered similarly situated by rule because they perform similar functions and are located sufficiently close together in the watershed to function as a single system in affecting downstream waters. These five types of waters are prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. As explained in the preamble to the final proposed rule and the Technical Support document contained in the administrative record for the final proposed rule, the agencies determined that such waters should be analyzed “in combination” (as a group, rather than individually) in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific analysis of whether these waters have a significant nexus to traditional navigable waters, interstate waters, or territorial seas. “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” was completed by the EPA, January 2015 and is incorporated by reference.

The final proposed rule also provides that waters within the 100-year floodplain or 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary are subject to case specific significant nexus determinations. The science available today would not support inclusion of all waters beyond those defined as “adjacent” as jurisdictional by rule under the Clean Water Act. The agencies’ experience and expertise have shown there are waters where the science demonstrates that they often do have a significant effect on downstream waters. In establishing the 4,000 feet “bright line” the agencies have balanced protection of the environment and clarity of the definition of a water of the United States, scientific uncertainties and regulatory experience, and established a line that is, in their judgment, reasonable and consistent with the statute and its goals and objectives. It is the judgment of the agencies that the 4,000 feet bright line would capture the vast majority of the waters that have a significant nexus to waters covered by the rule and thus should also be subject to jurisdiction under the Clean Water Act.

In circumstances where waters within the 100-year floodplain or 4,000 feet of the high tide line or ordinary high water mark are subject to a case-specific significant nexus analysis and such waters are to be evaluated as “similarly situated,” it must be first demonstrated that these waters function alike and are sufficiently close to function

together in affecting downstream waters. The significant nexus analysis must then be conducted based on consideration of the functions provided by those waters in combination in the point of entry watershed. A “similarly situated” analysis is conducted where it is determined that there is a likelihood that there are waters that function as a system to affect downstream water integrity. To provide greater clarity and transparency in determining what functions would be considered in determining what constitutes a significant nexus, the final proposed rule lists specific functions that the agencies would consider.

#### Exclusions

All existing exclusions from the definition of “waters of the United States” are retained, and several exclusions reflecting longstanding agency practice are added to the regulation for the first time.

Prior converted cropland and waste treatment systems have been excluded from the definition of “waters of the United States” definition since 1992 and 1979 respectively, and only ministerial changes are made. These two exclusions remain substantively and operationally unchanged.

The agencies add exclusions for waters and features previously identified as generally exempt (e.g., exclusion for certain ditches that are not located in or drain wetlands) in preamble language from *Federal Register* notices by the USACE on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. The agencies for the first time also establish by rule that certain ditches are excluded from jurisdiction, including ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or drain wetlands. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies’ intent, such as stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land. These exclusions reflect the agencies’ current practice, and their inclusion in the rule as specifically excluded furthers the agencies’ goal of providing greater clarity over what waters are and are not protected under the Clean Water Act.

With adoption of the final proposed rule, the definition of waters of the United States would be changed in the regulation. The new definition would be applicable nationwide and utilized by stakeholders and regulators in making jurisdictional determinations under Section 404 of the Clean Water Act. The USACE completes jurisdictional determinations at the request of a landowner or developer, during processing of a Department of the Army permit application, or in conjunction with an enforcement action. The jurisdictional determination concludes whether lands for which an action may be proposed meet the criteria to be a waters of the United States and therefore subject to the Clean Water Act. Because the purpose of the final proposed rule is to define a waters of the United States the implementation of the rule would not affect or

alter the Department of the Army permit application process or the decision-making processes in place by the agencies.

The final proposed rule includes eight standalone categories of jurisdictional waters, maintains existing exemptions for certain categories of activities and waters, and adds additional exclusions for categories of waters that are never covered under the Act. Navigable waters as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas. The eight jurisdictional water categories are:

- (a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:
- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  - (2) All interstate waters, including interstate wetlands;
  - (3) The territorial seas;
  - (4) All impoundments of waters otherwise identified as waters of the United States under this section;
  - (5) All tributaries, as defined in paragraph (c)(3) of the final proposed rule, of waters identified in paragraphs (a)(1) through (3) of this section;
  - (6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
  - (7) All waters in paragraphs (i) through (v) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (i) through (v) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.
    - (i) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
    - (ii) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
    - (iii) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.
    - (iv) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

- (v) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.
- (8) All waters located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (iv) through (viii) of the section above.

- (b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.
  - (1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
  - (2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
  - (3) The following ditches:
    - (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
    - (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
    - (iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.
  - (4) The following features:
    - (i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
    - (ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
    - (iii) Artificial reflecting pools or swimming pools created in dry land;
    - (iv) Small ornamental waters created in dry land;

- (v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
  - (vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
  - (vii) Puddles.
- (5) Groundwater, including groundwater drained through subsurface drainage systems.
  - (6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
  - (7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

## **2.2 NO ACTION ALTERNATIVE**

The analysis of the No Action alternative is based upon the existing conditions, rules, process, and procedures currently utilized by the agencies in making and enforcing jurisdictional determinations on the lands of the United States that are subject to protection under the Clean Water Act. The USACE is the lead agency for completing jurisdictional determinations. Jurisdictional determinations are the process employed by the USACE to complete a formal scientific based evaluation of a parcel of land to determine whether lands, for which an action may be proposed, meets the criteria to be a waters of the United States and therefore subject to the Clean Water Act. The USACE completes jurisdictional determinations at the request of a landowner or developer, during processing of a Department of the Army permit application, or in conjunction with an enforcement action. Jurisdictional determinations can be completed in two ways. If a permit applicant elects to set aside the question of jurisdiction and voluntarily opts in to the permitting process, a “preliminary” jurisdictional determination is adopted. A preliminary jurisdictional determination can avoid the longer process associated with completing an “approved” jurisdictional determination. In Fiscal Year 2014, 66 percent of jurisdictional determinations completed were preliminary and 34 percent were approved.

The baseline for the No Action alternative analysis is the set of current processes and procedures utilized by the agencies of identifying waters that are subject to jurisdiction under the Clean Water Act based upon the 1986 regulatory definition, and guidance developed as a result of the SWANCC and Rapanos U.S. Supreme Court decisions. The analysis of the No Action alternative focuses on the potential impacts to potentially impacted environmental resources that are reasonable and foreseeable.

Existing regulations (last codified in 1986) define waters of the United States as traditional navigable waters, interstate waters, impoundments of waters of the United States, tributaries, the territorial seas, adjacent wetlands, and all other waters that could affect interstate or foreign commerce (33 CFR 328.3). Under this definition, the

agencies only have Clean Water Act jurisdictional authority over "isolated" waters under the Commerce Clause "if their use, degradation, or destruction could affect interstate or foreign commerce." Intrastate waters that could affect interstate commerce solely by virtue of their use as habitat for migratory birds are not considered to be waters of the United States, in accordance with the SWANCC decision.

In response to the SWANCC decision, approximately 20 million acres of "isolated" wetlands were removed from consideration as waters of the United States, and the definition of waters of the United States was updated in interagency guidance.

## **2.3 ALTERNATIVES CONSIDERED BUT ELIMINATED**

### **2.3.1 DRAFT RULE ALTERNATIVE**

The agencies developed a draft rule (appendix A) in April 2014 which was published in the Federal Register (Vol. 79, No. 76) for a public comment period. Approximately 1.2 million comments were received. Additionally, approximately 400 stakeholder engagements in the form of meetings, webinars, and phone calls were conducted to gather input and listen to stakeholders concerns with the draft rule. The substantive comments were evaluated and incorporated into the final proposed rule.

The ASA(CW) considered whether to analyze the draft rule in this Environmental Assessment, but removed it from further consideration because it is no longer a viable option to accomplish the purpose and need for action. The draft rule was modified based upon a review of the substantive comments received during the public comment period. As a result, and recognizing the myriad components of such a rule, it was determined that analyzing the various component elements of the final proposed rule was appropriate. Accordingly, this environmental assessment focuses only on "Adoption of the Final Proposed Rule" alternative and the No Action alternative (baseline).

## **3.0 ENVIRONMENTAL SETTING**

### **3.1.1 WATERS OF THE UNITED STATES**

Wetlands are lands where saturation with water is the dominant factor determining the nature of soil development and the types of plant and animal communities living in the soil and on its surface. Wetland characteristics can vary widely because of regional and local differences in soils, topography, climate, hydrology, water chemistry, vegetation, and other factors, including human disturbance. Wetlands are found from the tundra to the tropics and on every continent except Antarctica.

For regulatory purposes under the Clean Water Act, 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." (40 CFR 230.3(t))

Wetlands and open waters in non-floodplain landscape settings provide numerous functions that benefit downstream water integrity (Connectivity Report). These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species. This diverse group of wetlands (e.g., many prairie potholes, vernal pools, playa lakes) can be connected to downstream waters through surface-water, shallow subsurface-water, and ground-water flows and through biological and chemical connections.

Streams are the dominant source of water in most rivers, and individually or cumulatively, exert a strong influence on the integrity of downstream waters. The majority of tributaries are perennial, intermittent, or ephemeral headwater streams. Headwater streams convey water into local storage compartments such as ponds, shallow aquifers, or stream banks, as well as regional and alluvial aquifers; these local storage compartments are important sources of water for maintaining baseflow in rivers.

All tributary streams are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Physical, chemical, and biological connections between streams and downstream waters interact via integrative processes such as nutrient spiraling, in which stream communities assimilate and chemically transform large quantities of nitrogen and other nutrients that otherwise would be transported directly downstream, increasing nutrient loads and associated impairments due to excess nutrients in downstream waters.

Streams transport water, sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in rivers. They are biologically connected to downstream waters by the dispersal and migration of aquatic and semiaquatic organisms, including fish, amphibians, plants, microorganisms, and invertebrates, that use both upstream and downstream habitats during one or more stages of their life cycles, or provide food resources to downstream communities. In addition to material transport and biological connectivity, ephemeral, intermittent, and perennial flows influence fundamental biogeochemical processes by connecting channels and shallow ground water with other landscape elements.

Stream and wetland connections have particularly important consequences for downstream water integrity. Most of the materials, in rivers, for example, originate from aquatic ecosystems located upstream or elsewhere in the watershed. Longitudinal flows through ephemeral, intermittent, and perennial stream channels are much more efficient for transport of water, materials, and organisms than diffuse overland flows, and areas that concentrate water provide mechanisms for the storage and transformation, as well as transport, of materials.

In addition to material transport and biological connectivity, ephemeral, intermittent, and perennial stream flows influence fundamental biogeochemical processes by connecting channels and shallow ground water with other landscape elements.

Connectivity of streams and wetlands to downstream waters occurs along a continuum that is described in terms of the frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters. Variations in the degree of connectivity influence the range of functions provided by streams and wetlands, and are critical to the integrity and sustainability of downstream waters.

Human alterations affect the frequency, duration, magnitude, timing, and rate of change of connections between headwater streams, including ephemeral and intermittent streams, and downstream waters. Human activities and built structures (e.g., channelization, dams, groundwater withdrawals) can either enhance or fragment longitudinal connections between headwater streams and downstream waters, while also constraining lateral and vertical exchanges and tightly controlling the temporal dimension of connectivity.

The agencies administer the Clean Water Act Section 404 process and the USACE issues four types of permits: standard permits, letters of permission, nationwide permits, and regional general permits. All of these permits may require a jurisdictional determination (preliminary or approved) to be conducted by the USACE to establish the geographic extent of on-site waters and wetlands subject to the Clean Water Act. Current practice for the determination of the extent of jurisdictional waters of the United States is based upon regulations dated November 16, 1986, and interagency guidance documents dated January 15, 2003 and December 2, 2008.

Aquatic resources protected under the Clean Water Act are regulated under Section 404 of the Act and efforts are made through the regulatory processes to avoid and minimize impacts to the fullest extent possible. Compensatory mitigation, in compliance with the law, is required for any unavoidable impacts.

### **3.1.2 CLIMATE CHANGE**

The analysis of global climate change related impacts to natural resources and the potential responses to those impacts has become a priority as precipitation patterns may shift, extreme heat and cold events may become more common, and sea levels rise (Flournoy 2013). Because wetlands support a number of migratory birds, threatened species, endangered species, interjurisdictional fish, marine mammals, and other species of concern and have been linked to water quality and other environmental values, their susceptibility to climatic variations is an important consideration. Due in part to their limited capacity for adaptation, wetlands have been considered among the ecosystems most vulnerable to climate change (Bates et al. 2008).

Global climate change is recognized as a threat to species survival and the health of natural systems. Scientists worldwide are looking at the ecological and hydrological impacts resulting from climate change. Climate change is projected to make future

efforts to protect, restore, and manage wetlands more complex. Wetland systems are vulnerable to changes in quantity and quality of their water supply, and it is expected that climate change would have a pronounced effect on wetlands through alterations in hydrological regimes with great global variability. Wetland habitat responses to climate change and the implications for restoration would be realized differently on a regional and mega-watershed level, making it important to recognize that specific restoration and management plans would require examination by habitat. Floodplains, mangroves, seagrasses, saltmarshes, arctic wetlands, peatlands, freshwater marshes and forests are very diverse habitats, with different stressors.

Sea level rose during the 20th century, and observations and projections suggest that it would rise at a higher rate during the 21st century. Rising seas increase the risk of coastal flooding, storm surge inundation, coastal erosion and shoreline retreat, and wetland loss (The National Research Council, 2012). Sea level rise is a major factor in sustainability of wetlands and their function. As sea level rises some wetlands would be inundated and become open water and some non jurisdictional areas would experience hydrologic changes such that they would transition to wetlands. This would result in changes in the biota of the United States (wetlands, fish, wildlife, plants) over time. Additionally, there would be changes in the Ordinary High Water Mark for some waters of the United States as sea level rises.

#### **4.0 RELEVANT RESOURCES**

This section contains a description of the relevant resources that could be impacted by the proposed action. The principal relevant resource for the purposes of this analysis is the set of waters that are subject to a determination under the Clean Water Act as waters of the United States. Covered water bodies include oceans, rivers and streams, lakes, ponds, impoundments (in some circumstances), wetlands, playa lakes, channels, and in some circumstances, various unique ecological features such as Carolina/Delmarva Bays, Pocosins, Prairie Potholes, Texas Coastal Wetlands, and Vernal Pools. Other relevant resources discussed include fish and wildlife, recreation, socio-economic effects and flood risk reduction.

#### **4.1 AFFECTED ENVIRONMENT**

##### **4.1.1 WATERS OF THE UNITED STATES**

Streams and wetlands provide many functions, including water supply; groundwater recharge; sediment trapping; nutrient recycling; pollutant removal; retention and attenuation of floodwaters; shoreline stabilization; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and nursery areas) for fish, shellfish, and wildlife including threatened and endangered species. The effect of upstream water can be significant even when a water, alone or in combination, is providing a subset, or even just one, of the functions listed.

Science demonstrates that the aquatic functions provided by smaller streams, ponds, wetlands and other waters are important for contributing to the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas. For example, States identify sediment and nutrients as the primary contaminants in the nation's waters. Sediment storage and export via streams to downstream waters is critical for maintaining the river network, including the formation of channel features. Although sediment is essential to river systems, excess sediment can impair ecological integrity by filling interstitial spaces, reducing channel capacity, blocking sunlight transmission through the water column, and increasing contaminant and nutrient concentrations. Streams and wetlands can prevent excess deposits of sediment downstream and reduce pollutant concentrations in downstream waters.

Nutrient recycling results in the uptake and transformation of large quantities of nitrogen and other nutrients that otherwise would be transported directly downstream, thereby decreasing nutrient loads and associated impairments due to excess nutrients in downstream waters. Streams, wetlands and open waters improve water quality through the assimilation, transformation, or sequestration of pollutants, including excess nutrients and chemical contaminants such as pesticides and metals that can degrade downstream water integrity. Nutrient transport exports nutrients downstream and can degrade water quality and lead to stream impairments. Nutrients are necessary to support aquatic life, but excess nutrients lead to excessive plant growth and hypoxia, in which over-enrichment causes dissolved oxygen concentrations to fall below the level necessary to sustain most aquatic animal life in the downstream waters. Nutrient recycling, retention, and export can significantly affect downstream chemical integrity by impacting downstream water quality.

The contribution of flow downstream is an important role, as upstream waters are a cumulative source of the majority of the total mean annual flow to bigger downstream rivers and waters, in ways that influence the recharge of baseflow. Streams, wetlands, and open waters contribute surface and subsurface water downstream, and are the dominant sources of water in most rivers.

Small streams and wetlands are particularly effective at retaining and attenuating floodwaters. By subsequently releasing (desynchronizing) floodwaters and retaining large volumes of stormwater that could otherwise negatively affect the condition or function of downstream waters, streams and adjacent wetlands and open waters can reduce flood peaks downstream and can also maintain downstream river base flows by recharging alluvial aquifers.

Streams, wetlands, and open waters supply downstream waters with dissolved and particulate organic matter (e.g., leaves, wood), which support biological activity throughout the river network. In addition to organic matter, streams, wetlands, and open waters can also export other food resources downstream, such as aquatic insects that are the food source for fish in downstream waters. The export of organic matter and food resources downstream is important to maintaining the food webs.

Streams, wetlands, and open waters provide life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area) for species located in traditional navigable waters, interstate waters, or the territorial seas. Many species require different habitats for different resources (e.g., food, spawning habitat, overwintering habitat), and thus move throughout the river network over their life-cycles. For example, headwater streams can provide refuge habitat under adverse conditions, enabling fish to persist and recolonize downstream areas once conditions have improved. These upstream systems form integral components of downstream food webs, providing nursery habitat for breeding fish and amphibians, colonization opportunities for stream invertebrates, and maturation habitat for stream insects, including for species that are critical to downstream ecosystem function.

The conterminous United States contained an estimated 110.1 million acres of wetlands in 2009 (Dahl 2011). An estimated 95 percent of all wetlands were freshwater and 5 percent were in the marine or estuarine systems. Estuarine emergent (salt marsh) wetland was the most prevalent type of all estuarine and marine intertidal wetland. Salt marsh made up an estimated 66.7 percent of all estuarine and marine wetland area. Forested wetlands made up the single largest category (49.5 percent) of wetland in the freshwater system. Freshwater emergent made up an estimated 26.3 percent, shrub wetlands 17.8 percent and freshwater ponds 6.3 percent by area (Dahl 2011).

In 1994, an estimated 174 million acres of wetland existed in Alaska (Hall, 1994). Hawaii had 52,000 acres as of the 1980s (Dahl, 1990). Next to Alaska, Florida (11.4 million) (Dahl, 2005), Minnesota (10.6 million) (Klobier, 2010), Louisiana (7.8 million) (Caffey, 2003), and Texas (7.6 million) (Dahl 1990) have the largest wetland acreage (Dahl 2011). The wetlands described above were determined using the Cowardin *et al.* system that was adopted as a standard by the U.S. Fish and Wildlife Service and subsequently became a Federal Geographic Data Committee (FGDC). This definition differs from the Regulatory definition of a wetlands as used in the final proposed rule

Wetland area declined by an estimated 62,300 acres between 2004 and 2009 according to the Status and Trends of Wetland in the Conterminous United States 2004 to 2009 (Dahl 2011). The reasons for this loss are complex and reflect economic conditions, land use trends, changing wetland regulation and enforcement measures, and climatic changes. Certain types of wetland declined while others increased in area. For example, between 2004 and 2009, 489,600 acres of former uplands were re-classified as wetlands. These increases were attributed to wetland reestablishment and creation on agricultural lands and other uplands with undetermined land use including undeveloped land, lands in conservation program or idle lands. The rate of wetland reestablishment increased by an estimated 17 percent from previous study periods (1998 and 2004). Conversely, the estimated wetland loss rate increased 140 percent during the same time period and as a consequence, national wetland losses have outdistanced gains (Dahl 2011).

#### **4.1.2 FISH AND WILDLIFE**

The significance of wildlife resources is demonstrated by the multitude of legislative acts that exist to manage and conserve the resource. Pivotal among these are the Coastal Zone Management Act; the Estuary Protection Act; the Fish and Wildlife Coordination Act of 1958, as amended; the Migratory Bird Conservation Act of 1929 as amended; the migratory Bird Treaty Act of 1918; the Endangered Species Act of 1973 (ESA), as amended; the Fish and Wildlife Conservation Act of 1980; the North American Wetlands Conservation Act; Executive Order 13186 Migratory Bird Habitat Protection; and the Magnuson-Stevens Fishery Conservation and Management of 1976, as amended.

Wildlife resources are critical elements of the ecosystem and important indicators of the health of the ecosystem. Wetlands provide habitat for waterfowl and other wildlife, habitat for rare and endangered species, food production, and plant production. Wetlands provide valuable habitat for recreational and commercial fishing and nursery areas for a wide variety of finfish and shellfish.

Fish and wildlife resources are important because of the high priority that the public places on their esthetic, recreational, and commercial value. Living marine resources constitute valuable and renewable resources that contribute to the food supply, economy, welfare, health, and recreational opportunities of the Nation (Magnuson-Stevens Act, 1996). Wildlife serve as agents of pollination, are a food source, control the rate and extent by which nutrients are distributed in an ecosystem, contain compounds that are the basis of some medicines, and can provide a safe, effective and less expensive alternative to chemical pest control.

Threatened and endangered fish, wildlife, and plant species “are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” Biodiversity is essential for a healthy and functional ecosystem. There are currently 678 fish and wildlife species listed as threatened and endangered in the United States. Since passage of the Endangered Species Act in 1973, over 1,300 endangered and threatened species have been protected in the United States and its territories. Male and Bean (Male, 2005), in a review of 1988 to 2002 Federal agency reports to the United States Congress, “found that 52 percent of species showed repeated improvements or were not declining over this time. Species status improved over time, with only 35 percent still declining 13 years or more after protection.”

#### **4.1.3 RECREATION**

Wetlands have recreational value to the Nation. More than half of all U.S. adults (98 million) hunt, fish, bird watching or photograph wildlife (EPA). While individual significance or value of recreation may differ greatly, nationally it is very significant. A 1999 report drafted by the National Recreation Lakes Study Commission, states “recreation constitutes 10.5 percent of all consumer spending and contributes more than \$350 billion annually to the Gross Domestic Product” (1999). The 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation revealed that over 90 million U.S. residents 16 years old and older participated in wildlife-related recreation. During that year, 33.1 million people fished, 13.7 million hunted, and 71.8 million participated in

at least one type of wildlife-watching activity including observing, feeding, or photographing fish and other wildlife in the United States.

## **4.2 SOCIO-ECONOMIC**

Wetlands have a socio-economic value to the Nation and its residents and visitors, especially in providing positive ecosystem services that contribute to human well-being. Some of these services include preservation of food supply (i.e. rice farming); preservation of habitats and food supply for a variety of species including fish, migratory birds and other organisms; increasing water supply, purification, and quality; providing additional resiliency in coastal protection and flood regulation (per Section 4.3) and increasing recreational opportunities and tourism (per Section 4.1.3).

These services are difficult to quantify as monetized values, because they are not market goods with a direct dollar value, but instead are qualitative and can be derived by noting in addition to their services, their preventative contribution to flooding and general environmental degradation. Waters of the United States contribute to a desirable quality of life and sustainability of that quality of life. The EPA estimates that wetlands could have a value of up to \$15 trillion (The Millennium Ecosystem Assessment, 1997) and studies of the role of coastal wetlands in reducing the severity of impacts from hurricanes in the United States found that they provided storm damage reduction services with an estimated value of \$23.2 billion per year (Costanza 2008).

## **4.3 FLOOD RISK REDUCTION**

Wetlands serve a vital role in temporarily storing storm water during flooding events. Wetlands function as natural sponges that trap and slowly release surface water, rain, snowmelt, groundwater and flood waters. Trees, root mats, and other wetland vegetation also slow the speed of flood waters and distributes them more slowly over the floodplain. This combined water storage and braking action lowers flood heights and reduces erosion. As discussed in the connectivity Report wetlands within and downstream of urban areas are particularly valuable, counteracting the greatly increased rate and volume of surface- water runoff from pavement and buildings.

A one-acre wetland can typically store about three-acre feet of water, or up to one and half million gallons. The holding capacity of wetlands helps control floods and prevents water logging of crops. Preserving and restoring wetlands, together with other water retention, can often provide the level of flood risk reduction otherwise provided by expensive dredge operations and levees.

Coastal wetlands can have an impact on storm surge associated with coastal storms. Wetland plants help retard shoreline erosion by holding the soil in place with their roots and absorbing the energy of waves.

## 5.0 ENVIRONMENTAL CONSEQUENCES

### 5.1 WATERS OF THE UNITED STATES

#### 5.1.1 ADOPTION OF THE FINAL PROPOSED RULE ALTERNATIVE (Proposed Action)

Adoption of the final proposed rule would have no direct effect on the environment. Indirect effects under NEPA are those caused by an action that are later in time or farther removed in distance but are still reasonably foreseeable. See 40 C.F.R. 1508.8(b). Compared to a baseline of the existing regulations and historic practice, prior to the SWANCC case, the adoption of the final proposed rule results in a decrease in Clean Water Act jurisdiction because the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. However, when compared to the No Action alternative, the set of current processes and procedures utilized by the agencies of identifying waters that are subject to jurisdiction under the Clean Water Act based upon the 1986 regulatory definition, and guidance developed as a result of the SWANCC and Rapanos U.S. Supreme Court decisions, this rule is projected to result in an incremental increase in Clean Water Act jurisdiction because the uncertainty caused by the efforts to implement the Supreme Court cases, and the resulting caution in asserting jurisdiction, would be resolved by the rule which provides clarity about which waters are covered by the Clean Water Act.

Based upon an analysis performed as a part of the economic analysis, a random selection of 188 negative jurisdictional determinations made in Fiscal Years 2013 and 2014 covering 32 states, in which waters were found to not be subject to jurisdiction under the Clean Water Act, were reviewed and a determination was made if the waters in those jurisdictional determinations would be determined to be positive with adoption of the final proposed rule. The analysis used negative jurisdiction determinations from the three categories of waters of the United States: streams, wetlands, and other waters. Of the 188 jurisdictional determinations 65 percent were streams, 29 percent were wetlands, and 6 percent were other waters. Based upon that analysis it was determined that there would be an increase of between 2.8 and 4.6 percent in the waters found to be jurisdictional with adoption of the rule. The majority of the change occurring in the determinations would be in the category for waters that fit the "Other Waters" category.

A positive jurisdictional determination is a determination made by the USACE that finds the waters/wetlands to be waters of the United States.

Negative jurisdictional determination is a determination made by the USACE that finds the waters/wetlands to not be waters of the United States.

Upon request the USACE evaluates a parcel of land for jurisdiction, as such, a jurisdictional determination may include jurisdictional areas as well as non-jurisdictional areas. Additionally, in many cases a single jurisdictional determination evaluates all waters the on the parcel of property, thus, one or more waters may be included in a single jurisdictional determination and those water may fall into different categories of waters of the United States.

For the purposes of the analysis performed in this EA, a subsample of the total number of jurisdictional determinations made were examined. Based upon that analysis a determination was made that there would be an incremental increase in the number of waters found to be subject to jurisdiction under the Clean Water Act. No analysis was made to determine the actual number of acres of waters that would be and for this reason it is not possible to estimate the number of acres that would be captured by this increase in positive jurisdictional determinations. As described below, the majority of the incremental change in jurisdiction would occur in the category of "Other Waters." Other Waters are those waters that do not fit within the categories of waters jurisdictional by rule and would only be jurisdictional upon a case-specific determination that those waters have a significant nexus to a water which is currently used, was used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; all interstate waters, including interstate wetlands; and the territorial seas. Based upon the analysis of the negative jurisdictional determinations that would be found to be positive with adoption of the rule the following impacts could be expected to occur:

Streams - the estimated percentage of positive jurisdictional determinations for streams would go from 99.3 percent to 100 percent (tributaries) under the new rule. (a)(1)

Adjacent Wetlands - the estimated percentage of positive jurisdictional determinations for wetlands would go from 98.9 percent to 100 percent under the new rule. (a)(6)

The estimated change in positive jurisdictional determinations for Other Waters is estimated at 34.5 percent. ((a)(6), (a)(7), and (a)(8))

Other Waters (adjacent waters) – estimated that there would be up to a 17.1 percent increase in positive jurisdictional determinations for "other waters," based on the assumption that they are "adjacent waters." (a)(6)

Other Waters (significant nexus) - estimated that there would be up to a 15.7 percent increase in positive jurisdictional determinations for "other waters," based on the assumption that there is a significant nexus to a nearby water of the United States. (a)(7)

Other Waters (Bright Line) - estimated that there would be up to a 1.7 percent increase in positive jurisdictional determinations for "other waters," based on the assumption that there is a significant nexus to a (a)(1) to (a)(5) waters of the United States within the 100-year floodplain or 4,000 feet of a high tide line or ordinary high water mark of a waters of the United States. (a)(8)

As discussed above, estimates are that under paragraph (a)(8) of the final proposed rule there could be a 1.7 percent increase in positive jurisdictional determinations, there is also the possibility that some wetlands that might have been found jurisdictional as "adjacent" under current rules and practice, would no longer be jurisdictional under the final proposed rule. Specifically, in a few instances in the past the USACE has determined that there were jurisdictional wetlands based on a surface or subsurface hydrologic connection to regulated waters, but those wetlands would fall outside either

the 100-year floodplain or 4,000 feet from the high tide line or ordinary high water mark. These wetlands would have been considered “adjacent” under the current regulation, but would not be “adjacent” based on the definition of neighboring in the final proposed rule. However, in the agencies experience the vast majority of wetlands with a significant nexus are located within the 4,000 foot boundary. It is anticipated that the incremental decrease in jurisdictional determinations for wetlands outside the 100 year floodplain or 4,000 feet of the high tide line or ordinary high water mark of jurisdictional waters would correspondingly be small. It is also speculative and hypothetical as to what the environmental consequences would be for such waters beyond the 100-year floodplain or 4,000 feet if they are not subject to the Section 404 permitting process. The consequences would depend on other factors not related to this rule, such as the nature of any activity proposed for such waters and the waters affected, and any other requirements (e.g., Section 9 of the Endangered Species Act, or state and local law) that may be applicable.

With adoption of the final proposed rule there would be an incremental increase in the amount of waters of the United States subject to jurisdiction under the Clean Water Act, and any proposals that would impact jurisdictional areas would be subject to review under the USACE public interest analysis, the section 404(b)(1) Guidelines and any other applicable federal requirements (e.g., NEPA, section 7 of the ESA) that would not occur if areas were not subject to jurisdiction (No Action). Under the Section 404(b)(1) guidelines, some impacts to waters may be avoided or minimized as a result of the implementation of the proposed action and for areas that are impacted due to unavoidable actions the expectation is that the functional losses would be offset by compensatory mitigation.

### **5.1.2 NO ACTION ALTERNATIVE**

Between 2004 and 2009, an estimated 62,300 acres of wetlands were lost in the conterminous United States. Various factors have contributed to the decline in the loss rate including implementation and enforcement of wetland protection measures and elimination of some incentives of wetland drainage. Certain types of wetland declined while others increased in area. For example, between 2004 and 2009, 489,600 acres of uplands were re-classified as wetlands. These increases were attributed to wetland reestablishment and creation on agricultural lands and other uplands with undetermined land use including undeveloped land, lands in conservation program or idle lands. The rate of wetland reestablishment increased by an estimated 17 percent from previous study period (1998 and 2004). Conversely, the estimated wetland loss rate increased 140 percent during the same time period and as a consequence, national wetland losses have outdistanced gains (Dahl 2011).

Under the No Action Alternative, the current procedures, processes, and definitions used by the USACE to complete jurisdictional determinations would continue to be utilized and the process and procedures would not be impacted by the changes to jurisdiction with the adoption of the final proposed rule. However, as discussed in Section 5.1.1, under this alternative, the scope of Clean Water Act jurisdiction and permitting would be incrementally smaller than under the final proposed rule alternative.

## **5.2 FISH AND WILDLIFE**

### **5.2.1 ADOPTION OF THE FINAL PROPOSED RULE ALTERNATIVE (Proposed Action)**

The reasonable and foreseeable future for the biota of the United States (wetlands, fish, wildlife, plants) would primarily be changes associated with the effects of climate change and continued pressure from parties interested in development. Low lying wetlands would be completely inundated as waters rise, while some of the land at higher elevations would experience hydrologic changes such that they would transition to wetland habitats.

Under the final proposed rule there would be an incremental increase in the amount of waters of the United States subject to jurisdiction under the Clean Water Act, and any proposals that would impact jurisdictional areas would be subject to review under the USACE public interest analysis, the Section 404(b)(1) Guidelines and any other applicable federal requirements (e.g. NEPA, Section 7 of the ESA) that would not occur if areas were not subject to jurisdiction (No Action). Under the Section 404(b)(1) guidelines (40 C.F.R. part 230), some impacts to biota may be avoided or minimized as a result of the implementation of the proposed action and for areas that are impacted due to unavoidable actions the expectation is that the functional losses would be offset by compensatory mitigation. The additional protections associated with the incremental increase in the amount of waters subject to Clean Water Act jurisdiction is expected to have a beneficial impact on fish and wildlife for which the protected waters provide habitat.

### **5.2.2 NO ACTION ALTERNATIVE**

Impacts to fish and wildlife would continue to occur as a result of climate change and development. Existing wetlands would be impacted negatively as waters rise and other areas would experience hydrologic changes and transition into wetland habitats. Impacts to areas as a result of development, would continue in accordance with existing practice and areas not subject to jurisdiction under the Clean Water Act would occur and not be subject to requirements related to mitigation (avoid, minimize, or compensatory mitigation) required in the Section 404 program.

Impacts to Threatened and Endangered Species would be similar in nature and scope to those discussed above for Fish and Wildlife. Potential impacts from takings on non-jurisdictional lands would continue.

## **5.3 RECREATION**

### **5.3.1 ADOPTION OF THE FINAL PROPOSED RULE ALTERNATIVE (Proposed Action)**

Under the proposed action, there would be an incremental increase in the amount of waters of the United States subject to jurisdiction and therefore protected under the Clean Water Act. Thus, any proposed projects that would impact the areas subject to jurisdiction would be subject to review under the USACE public interest analysis, the section 404(b)(1) Guidelines and any other applicable federal requirements (e.g., NEPA, Section 7 of the ESA) that would not occur if the areas were not subject to

jurisdiction. Under the section 404(b)(1) Guidelines, some impacts to biota may be avoided or minimized as a result of the implementation of the proposed action and for areas that are impacted due to unavoidable actions the expectation is that the functional losses would be offset by compensatory mitigation. The additional protections associated with the incremental increase in the amount of waters subject to Clean Water Act jurisdiction is expected to have a beneficial impact on recreation, based on the increase in wildlife available for hunting, fishing, bird watching, and photography.

### **5.3.2 NO ACTION ALTERNATIVE**

The Nation's wetlands provide visitors with opportunities to experience unique and rewarding adventures in a natural environment. Recreation opportunities would continue along existing trends under this alternative.

## **5.4 SOCIO-ECONOMIC**

### **5.4.1 ADOPTION OF THE FINAL PROPOSED RULE ALTERNATIVE (Proposed Action)**

There would be an incremental increase in the amount of waters of the United States subject to jurisdiction and therefore protected under the Clean Water Act. Based upon the information available there would be approximately a 2.8 to 4.6 percent increase in jurisdictional waters with adoption of the rule. This increase in jurisdiction expected to impact several aspects of the regulatory program; specifically Sections 410, 402 and 404, and each program could be impacted in different ways.

An economic analysis was prepared to estimate the incremental costs and benefits that may result from any change in the number of positive jurisdictional determinations associated with Clean Water Act programs relying on the definition of waters of the United States. The economic report entitled: "Economic Analysis of the EPA-Army Clean Water Rule" – May 2015 is incorporated by reference into this Environmental Assessment. The agencies concluded that adoption of the new rule would result in an increase in the number of positive jurisdictional determinations and an associated increase in both costs and benefits that derive from conducting of Clean Water Act programs, based on an approximate 2.8 to 4.6 percent increase in positive jurisdictional determinations for waters annually, due to adoption of the new rule when compared with current process and procedures.

To estimate annual costs and benefits, the agencies uniformly applied the 2.8 and 4.6 percent incremental change in jurisdiction to the total costs and benefits for the Sections 311, 401, 402 (stormwater, pesticide general permit, Confined Animal Feeding Operation permits (CAFO)) and 404 programs to account for an estimated increase in permitting and regulatory activities that would result. The increase varies across programs and is based upon varying assumptions about the number of permits and the cost of permits involved for each program. To estimate costs, the agencies relied on existing annual administrative and compliance cost information, and updated cost figures to 2014 dollars. On the benefits side, the focus of the benefits analysis is based on an anticipated increase in Clean Water Act 404 permits that would result in ecological benefits from those permitted losses being offset through compensatory

mitigation acres. The agency estimated the potential benefits from Clean Water Act 404 compensatory mitigation based upon a benefits transfer analysis from approximately 12 studies across the United States that used a contingent valuation survey method to measure willingness to pay for the preservation of wetlands similar to the type likely to be protected by adoption of this rule. There are several costs and benefits that the agencies were unable to monetize, including permitting time and project redesign costs under Section 404, as well as the benefits of Section 404 stream mitigation, benefits of the 402 pesticide general permit, and benefits of the 401 certification program. The agencies assumed, however, that costs and benefits associated with each of these programs would be relatively small.

The table below summarizes the range of costs and benefits that the agencies estimated for each program, given an assumed positive 2.8 to 4.6 percent change in the number of waters affected by new jurisdictional determinations.

### Estimated Annual Indirect Costs and Benefits

	Annual Costs (FY14\$ millions)		Annual Benefits (FY14\$ millions)	
	Low	High	Low	High
Clean Water Action Section				
402 CAFO Administration	\$0.3	\$0.3	\$6.2	\$10.8
402 CAFO Implementation	\$9.9	\$9.9		
402 Stormwater Administration	\$0.5	\$0.5	\$47.5	\$60.2
402 Stormwater Implementation	\$47.8	\$59.6		
404 Permit Application	\$47.0	\$80.3	\$501.2	\$501.2
404 Mitigation – Wetlands	\$89.0	\$249.4		
<b>SUBTOTAL</b>	<b>\$194.5</b>	<b>\$400.0</b>	<b>\$554.9</b>	<b>\$572.3</b>
311 Compliance	\$12.7	\$12.7	<i>not quantified</i>	
401 Administration	\$1.3	\$1.3	<i>not quantified</i>	
402 Pesticide General Permit Implementation	\$5.4	\$5.9	<i>not quantified</i>	
404 Mitigation – Streams	\$22.8	\$45.2	<i>not quantified</i>	
<b>TOTAL</b>	<b>\$236.8</b>	<b>\$465.1</b>	<b>\$554.9</b>	<b>\$572.3</b>

Implementation of the rule is expected, based upon past experience in implementing rules, to have a lag time for policy and rules change to occur, such that permitting and other resource regulatory programs could show a temporary impact in terms of increased cost and realized benefits.

#### **5.4.2 NO ACTION ALTERNATIVE**

If No Action is taken jurisdictional determinations would continue to be completed according to the process and procedures in place today. The ambiguity that exists under current regulations and practices following recent Supreme Court decisions, under which virtually all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination would continue to be an issue for landowners, developers and regulators.

### **5.5 FLOOD RISK REDUCTION**

#### **5.5.1 ADOPTION OF THE FINAL PROPOSED RULE ALTERNATIVE (Proposed Action)**

Under the proposed action, there would be an incremental increase in the amount of waters of the United States subject to jurisdiction and therefore protected under the Clean Water Act. Thus, any proposed projects that would impact the areas subject to jurisdiction would be subject to review under the USACE public interest analysis, the Section 404(b)(1) Guidelines and any other applicable federal requirements (e.g., NEPA, Section 7 of the ESA) that would not occur if the areas were not subject to jurisdiction (No Action).

Under the Section 404(b)(1) Guidelines, potential reduction in flood storage capacity would be avoided or minimized as a result of the adoption of the proposed action and for areas that are impacted due to unavoidable actions the expectation is that the losses would be offset by compensatory mitigation. The additional protections associated with the incremental increase in the amount of waters subject to Clean Water Act jurisdiction is expected to have a beneficial impact on flood risk reduction, based on the increase in wetland capacity for storage and slow release of snowmelt, groundwater, and flood waters.

#### **5.5.2 NO ACTION ALTERNATIVE**

As discussed in Section 5.1.2, between 2004 and 2009, an estimated 62,300 acres of wetlands were lost in the conterminous US. Certain types of wetland declined while others increased in area. For example, between 2004 and 2009, 489,600 acres of uplands were re-classified as wetlands (Dahl 2011). These increases were attributed to wetland reestablishment and creation on agricultural lands and other uplands with undetermined land use including undeveloped land, lands in conservation program or idle lands. These trends and associated impacts on flood storage capacity would be expected to continue as a result of natural and manmade factors.

### **5.6 CUMULATIVE IMPACT**

“Cumulative impact” is defined by the Council on Environmental Quality regulation as the impact on the environment resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future federal or non-federal actions. 40 C.F.R. 1508.7.

The effects of adopting the rule would be added to a multitude of past, present, and reasonably foreseeable federal and non-federal activities that have or may benefit or

adversely affect these waters. This includes environmental regulation, development, agriculture, and other activities and climate change.

The incremental impact of the rule when added to these other actions do not differ in a measurable (quantitative) way from the indirect effects of the rule discussed qualitatively throughout Section 5. The anticipated incremental increase in jurisdiction would not have any unique or reasonably foreseeable cumulative impact beyond the application of the Section 404 permitting program. Similarly, no cumulative impact is anticipated for waters that may no longer be subject to Section 404 permitting.

## **6.0 COORDINATION AND PUBLIC INVOLVEMENT IN SHAPING THE PROPOSED RULE**

The public was provided with significant environmental information about the proposed rule in order to allow members of the public to provide their views and inform agency decision-making. The draft rule was published in the Federal Register (Vol. 79, No. 76) on April 21, 2014 for public comment through July 21, 2014 and extended at the request of stakeholders until November 14, 2014. After publication of the draft rule approximately 400 stakeholder engagements in the form of meetings, webinars, and phone calls were conducted.

Of the approximately 1.2 million comments received, the vast majority of the comments were form letters from mass letter writing campaigns. A subset of the 1.2 million comments, 20,567 were identified as unique and evaluated further to determine if the comments were substantive. Responses to the substantive comments have been developed by the Environmental Protection Agency and the U.S. Army Corps of Engineers and are contained in the rulemaking. Docket EPA-HQ-OW-2011-0880.

## **7.0 CONCLUSION**

With adoption of the proposed action, there would be an incremental increase in the amount of waters of the United States subject to jurisdiction and therefore protected under the Clean Water Act. Thus, any proposed projects that would impact the areas subject to jurisdiction would be subject to review under the USACE public interest analysis, the Section 404(b)(1) Guidelines and any other applicable federal requirements (e.g., NEPA, Section 7 of the ESA) that would not occur if the areas were not subject to jurisdiction (No Action). Some adverse impacts to the aquatic environment would be avoided or minimized as a result of the adoption of the proposed action. For areas that are impacted due to unavoidable actions, the assumption is that the functional losses would be addressed through compensatory mitigation.

In respect to the Socio-Economic analysis of the costs and benefits conducted by the EPA, indications are that indirect incremental benefits exceed indirect incremental costs. The analysis acknowledges that there is a possibility that costs (and benefits) may be overstated because each new jurisdictional water may not be affected by all Clean Water Act programs simultaneously, and in some cases a particular activity affecting a waters of the United States may be exempt from permitting under the Clean

Water Act. The water in the “other waters” category represents the greatest potential for changes in jurisdictional determinations as a result of adoption of the rule. However, it is likely that the benefits may be understated because the benefits are based primarily on compensatory mitigation acres (from the Section 404 program) and that the willingness to pay analysis used to value these acres are from existing studies conducted between 1986 and 2000. In recent years the public has become more aware of the value of wetlands and updated studies might show a significant increase in willingness to pay associated with preserving wetlands, particularly when wetlands are tied to a concrete utility, such as improved water quality, hunting and fishing habitat, general recreation, or flood control.

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Upon request hard copies of any materials or reports reference in this report can be obtained at any USACE District and Division offices and EPA regional and field offices

# **FINAL ENVIRONMENTAL ASSESSMENT**

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**ADOPTION OF  
THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES**

APPENDIX A  
PROPOSED DRAFT RULE (APRIL 2014)

26 May 2015



## Appendix A – Proposed Rule

- (a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in subsection (b) of this section, the term “waters of the United States” means:
- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  - (2) All interstate waters, including interstate wetlands;
  - (3) The territorial seas;
  - (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
  - (5) All tributaries of waters identified in paragraphs (1) through (3) of this section;
  - (6) All waters, including wetlands, adjacent to a water identified in paragraphs (1) through (5) of this section; and
  - (7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1) through (3) of this section.
- (b) The following are not “waters of the United States”
- (1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
  - (2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA; and,
  - (3) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease; artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; artificial reflecting pools or swimming pools created by excavating and/or diking dry land; small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; water-filled depressions created incidental to construction activity; groundwater drained through subsurface drainage systems; gullies and rills; non-wetland swales; and puddles;
  - (4) Ditches that are excavated wholly in uplands, drain only uplands or non-jurisdictional waters, and have no more than ephemeral flow; and
  - (5) Ditches that do not contribute flow, either directly or through other waterbodies, to a water identified in paragraphs (a)(1) through (a)(3) of this section.
- (c) Definitions
- Adjacent:** The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-

made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”

**Neighboring:** The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (a)(5) of this section, or waters with a surface or shallow subsurface hydrologic connection to such a jurisdictional water.

**Riparian area:** The term *riparian area* means an area bordering a water where surface or subsurface hydrology influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

**Floodplain:** The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

**Tributary:** The term tributary means a water body physically characterized by the presence of a bed and banks and ordinary high water mark, which contributes flow, either directly or through other water bodies, to a water identified in paragraphs (a)(1) through (a)(3) of this section. A water body 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 man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream or downstream of the break. In addition, wetlands are tributaries (even if they lack a bed and banks and ordinary high water mark) if they contribute flow, either directly or through other water bodies to a water identified in paragraphs (a)(1) through (a)(3) of this section. A tributary, including wetlands, can be a natural, man-altered, or man-made water body and includes waters such as rivers, streams, lakes, impoundments, canals, and ditches not excluded in paragraph (b)(4) and (b)(5) of this section.

**Wetlands:** 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.

**Significant nexus:** The term *significant nexus* means a more than speculative or insubstantial effect that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to a water identified in paragraphs (a)(1) through (3) of this section),

has on the chemical, physical or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or close to a “water of the U.S.” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3) of this section.

# **FINAL ENVIRONMENTAL ASSESSMENT**

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**ADOPTION OF  
THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES**

**APPENDIX B  
FINAL PROPOSED RULE**

26 May 2015



## Appendix B – Final Proposed Rule

### Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter I of the Code of Federal Regulations is amended as follows:

#### PART 328—DEFINITION OF WATERS OF THE UNITED STATES

1. The authority citation for part 328 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et. seq.*

2. Section 328.3 is amended by removing the introductory text, redesignating paragraph (f) as paragraph (d), and revising paragraphs (a)—(e), to read as follows:

#### § 328.3 Definitions.

- (a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:
- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  - (2) All interstate waters, including interstate wetlands;
  - (3) The territorial seas;
  - (4) All impoundments of waters otherwise identified as waters of the United States under this section;
  - (5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;
  - (6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
  - (7) All waters in paragraphs (i) through (v) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (i) through (v) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.
    - (i) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
    - (ii) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
    - (iii) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

- (iv) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.
  - (v) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.
- (8) All waters located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.
- (b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.
- (1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
  - (2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
  - (3) The following ditches:
    - (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
    - (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
    - (iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.
  - (4) The following features:
    - (i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
    - (ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
    - (iii) Artificial reflecting pools or swimming pools created in dry land;
    - (iv) Small ornamental waters created in dry land;

- (v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
  - (vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
  - (vii) Puddles.
- (5) Groundwater, including groundwater drained through subsurface drainage systems.
  - (6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
  - (7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.
- (c) Definitions—In this section, the following definitions apply:
- (1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
  - (2) *Neighboring*. The term *neighboring* means:
    - (i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
    - (ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
    - (iii) all waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

- (3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section 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. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.
- (4) *Wetlands*. 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.
- (5) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (i) through (ix) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:
- (i) sediment trapping,
  - (ii) nutrient recycling,
  - (iii) pollutant trapping, transformation, filtering, and transport,

- (iv) retention and attenuation of flood waters,
  - (v) runoff storage,
  - (vi) contribution of flow,
  - (vii) export of organic matter,
  - (viii) export of food resources, and
  - (ix) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.
- (6) *Ordinary high water mark.* The term *ordinary high water mark* means 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.
- (7) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

## **Title 40—Protection of the Environment**

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

### **PART 110—DISCHARGE OF OIL**

3. The authority citation for part 110 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1321 *et. seq.*

4. Section 110.1 is amended by revising the definition of “navigable waters” to read as follows:

#### **§ 110.1 Definitions.**

*Navigable waters* means waters of the United States, including the territorial seas.

- (1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:
  - (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  - (ii) All interstate waters, including interstate wetlands;
  - (iii) The territorial seas;
  - (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
  - (v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;
  - (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
  - (vii) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (A) through (E) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
    - (A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
    - (B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

- (C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.
  - (D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.
  - (E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.
- (viii) All waters located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
- (2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.
- (i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
  - (ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
  - (iii) The following ditches:
    - (A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
    - (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
    - (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this section.
  - (iv) The following features:
    - (A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
    - (B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

- (C) Artificial reflecting pools or swimming pools created in dry land;
  - (D) Small ornamental waters created in dry land;
  - (E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
  - (F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
  - (G) Puddles.
- (v) Groundwater, including groundwater drained through subsurface drainage systems.
  - (vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
  - (vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) Definitions—In this section, the following definitions apply:

- (i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
- (ii) *Neighboring*. The term *neighboring* means:
  - (A) all waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
  - (B) all waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
  - (C) all waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet

of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

- (iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this section 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. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this section.
- (iv) *Wetlands*. 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.
- (v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) sediment trapping,
  - (B) nutrient recycling,
  - (C) pollutant trapping, transformation, filtering, and transport,
  - (D) retention and attenuation of flood waters,
  - (E) runoff storage,
  - (F) contribution of flow,
  - (G) export of organic matter,
  - (H) export of food resources, and
  - (I) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.
- (vi) *Ordinary high water mark.* The term *ordinary high water mark* means 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.
- (vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

## PART 112 –OIL POLLUTION PREVENTION

5. The authority citation for part 112 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1321 *et. seq.*

6. Section 112.2 is amended by revising the definition of “navigable waters” to read as follows:

### § 112.2 Definitions

*Navigable waters* means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term

“waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;
- (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
- (vii) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (A) through (E) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
  - (A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
  - (B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
  - (C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.
  - (D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic

depression, soils with poor drainage, mild, wet winters and hot, dry summers.

- (E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.

- (i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- (ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
- (iii) The following ditches:
  - (A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
  - (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
  - (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this section.
- (iv) The following features:
  - (A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
  - (B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
  - (C) Artificial reflecting pools or swimming pools created in dry land;
  - (D) Small ornamental waters created in dry land;

- (E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
  - (F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
  - (G) Puddles.
- (v) Groundwater, including groundwater drained through subsurface drainage systems.
  - (vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
  - (vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.
- (3) Definitions—In this section, the following definitions apply:
- (i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
  - (ii) *Neighboring*. The term *neighboring* means:
    - (A) all waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
    - (B) all waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
    - (C) all waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

- (iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this section 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. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this section.
- (iv) *Wetlands*. 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.
- (v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:
- (A) sediment trapping,
  - (B) nutrient recycling,

- (C) pollutant trapping, transformation, filtering, and transport,
  - (D) retention and attenuation of flood waters,
  - (E) runoff storage,
  - (F) contribution of flow,
  - (G) export of organic matter,
  - (H) export of food resources, and
  - (I) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.
- (vi) *Ordinary high water mark*. The term *ordinary high water mark* means 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.
- (vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

## Part 116—DESIGNATION OF HAZARDOUS SUBSTANCE

7. The authority citation for part 116 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1321 *et. seq.*

8. Section 116.3 is amended by revising the definition of “navigable waters” to read as follows:

*Navigable waters* is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;
- (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
- (vii) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (A) through (E) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
  - (A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
  - (B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
  - (C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.
  - (D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic

depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

- (E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
- (F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
- (G) Puddles.
- (v) Groundwater, including groundwater drained through subsurface drainage systems.
- (vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
- (vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) Definitions—In this section, the following definitions apply:

- (i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
- (ii) *Neighboring*. The term *neighboring* means:
  - (A) all waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
  - (B) all waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
  - (C) all waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

- (iii) *Tributary and tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this section 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. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this section.
- (iv) *Wetlands.* 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.
- (v) *Significant Nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:
- (A) sediment trapping,
  - (B) nutrient recycling,

- (C) pollutant trapping, transformation, filtering, and transport,
  - (D) retention and attenuation of flood waters,
  - (E) runoff storage,
  - (F) contribution of flow,
  - (G) export of organic matter,
  - (H) export of food resources, and
  - (I) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.
- (vi) *Ordinary high water mark*. The term *ordinary high water mark* means 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.
- (vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

## PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

9. The authority citation for part 119 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1321 *et. seq.*

10. Section 117.1 is amended by revising the definition of “navigable waters” to read as follows:

### § 117.1 Definitions

(i) *Navigable waters* is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (A) through (E) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

- (D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.
  - (E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.
- (viii) All waters located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
- (2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.
- (i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
  - (ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
  - (iii) The following ditches:
    - (A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
    - (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
    - (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this section.
  - (iv) The following features:
    - (A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
    - (B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
    - (C) Artificial reflecting pools or swimming pools created in dry land;
    - (D) Small ornamental waters created in dry land;

- (E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
  - (F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
  - (G) Puddles.
- (v) Groundwater, including groundwater drained through subsurface drainage systems.
  - (vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
  - (vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.
- (3) Definitions—In this section, the following definitions apply:
- (i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
  - (ii) *Neighboring*. The term *neighboring* means:
    - (A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
    - (B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
    - (C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

- (iii) *Tributary and tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this section 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. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i1) through (iii) of this section.
- (iv) *Wetlands.* 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.
- (v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:
- (A) sediment trapping,
  - (B) nutrient recycling,
  - (C) pollutant trapping, transformation, filtering, and transport,

- (D) retention and attenuation of flood waters,
  - (E) runoff storage,
  - (F) contribution of flow,
  - (G) export of organic matter,
  - (H) export of food resources, and
  - (I) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.
- (vi) *Ordinary high water mark*. The term *ordinary high water mark* means 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.
- (vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

## PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

11. The authority citation for part 122 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et. seq.*

12. Section 122.2 is amended by revising the definition of “Waters of the United States” and removing the note and editorial note at the end of the section. The revision reads as follows:

### § 122.2 Definitions.

*Waters of the United States or waters of the U.S. means:*

- (a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:
- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  - (2) All interstate waters, including interstate wetlands;
  - (3) The territorial seas;
  - (4) All impoundments of waters otherwise identified as waters of the United States under this section;
  - (5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;
  - (6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
  - (7) All waters in paragraphs (i) through (v) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (i) through (v) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.
    - (i) **Prairie potholes.** Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
    - (ii) **Carolina bays and Delmarva bays.** Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
    - (iii) **Pocosins.** Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

- (iv) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.
  - (v) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.
- (8) All waters located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.
- (b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.
- (1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.<sup>1</sup>
  - (2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
  - (3) The following ditches:
    - (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
    - (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
    - (iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.
  - (4) The following features:

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<sup>1</sup> At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning “This exclusion applies...” in the definition of “Waters of the United States.” This revision (48 FR 14153, Apr. 1, 1983) continues that suspension.

- (i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
  - (ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
  - (iii) Artificial reflecting pools or swimming pools created in dry land;
  - (iv) Small ornamental waters created in dry land;
  - (v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
  - (vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
  - (vii) Puddles.
- (5) Groundwater, including groundwater drained through subsurface drainage systems.
  - (6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
  - (7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.
- (c) Definitions—In this section, the following definitions apply:
- (1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
  - (2) *Neighboring*. The term *neighboring* means:
    - (i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
    - (ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

- (iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.
- (3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section 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. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.
- (4) *Wetlands*. 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.
- (5) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water

identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

- (i) sediment trapping,
- (ii) nutrient recycling,
- (iii) pollutant trapping, transformation, filtering, and transport,
- (iv) retention and attenuation of flood waters,
- (v) runoff storage,
- (vi) contribution of flow,
- (vii) export of organic matter,
- (viii) export of food resources, and
- (ix) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) *Ordinary high water mark*. The term *ordinary high water mark* means 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.

(7) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

**PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL.**

13. The authority citation for part 230 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et. seq.*

14. Section 230.3 is amended by revising paragraphs (s) and (t) and adding paragraph (u) to read as follows:

**§ 230.3 Definitions.**

(s) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters otherwise identified as waters of the United States under this section;
- (5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;
- (6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
- (7) All waters in paragraphs (i) through (v) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (i) through (v) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.
  - (i) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
  - (ii) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
  - (iii) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.
  - (iv) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic

depression, soils with poor drainage, mild, wet winters and hot, dry summers.

- (v) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.
- (8) All waters located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.
- (t) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.
  - (1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
  - (2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
  - (3) The following ditches:
    - (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
    - (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
    - (iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.
  - (4) The following features:
    - (i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
    - (ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
    - (iii) Artificial reflecting pools or swimming pools created in dry land;
    - (iv) Small ornamental waters created in dry land;

- (v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
  - (vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
  - (vii) Puddles.
  - (viii) Groundwater, including groundwater drained through subsurface drainage systems.
  - (ix) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
- (7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.
- (u) Definitions—In this section, the following definitions apply:
- (1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
  - (2) *Neighboring*. The term *neighboring* means:
    - (A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
    - (B) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
    - (C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.
  - (3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an

impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section 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. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

- (4) *Wetlands*. 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.
- (5) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:
  - (i) sediment trapping,
  - (ii) nutrient recycling,
  - (iii) pollutant trapping, transformation, filtering, and transport,
  - (iv) retention and attenuation of flood waters,
  - (v) runoff storage,
  - (vi) contribution of flow,

- (vii) export of organic matter,
  - (viii) export of food resources, and
  - (ix) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.
- (6) *Ordinary high water mark*. The term *ordinary high water mark* means 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.
- (7) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

## PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

15. The authority citation for part 230 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et seq.*

16. Section 232.2 is amended by revising the definition of “Waters of the United States” to read as follows:

### § 232.2 Definitions.

*Waters of the United States or waters* means:

- (1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:
  - (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  - (ii) All interstate waters, including interstate wetlands;
  - (iii) The territorial seas;
  - (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
  - (v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;
  - (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
  - (vii) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (A) through (E) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
    - (A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
    - (B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
    - (C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

- (D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.
  - (E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.
- (viii) All waters located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
- (2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.
- (i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
  - (ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
  - (iii) The following ditches:
    - (A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
    - (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
    - (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this section.
  - (iv) The following features:
    - (A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
    - (B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
    - (C) Artificial reflecting pools or swimming pools created in dry land;
    - (D) Small ornamental waters created in dry land;

- (E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
- (F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
- (G) Puddles.
- (v) Groundwater, including groundwater drained through subsurface drainage systems.
- (vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
- (vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) Definitions—In this section, the following definitions apply:

- (i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
- (ii) *Neighboring*. The term *neighboring* means:
  - (A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
  - (B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
  - (C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

- (iii) *Tributary and tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this section 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. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i1) through (iii) of this section.
- (iv) *Wetlands.* 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.
- (v) *Significant Nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:
- (A) sediment trapping,
  - (B) nutrient recycling,
  - (C) pollutant trapping, transformation, filtering, and transport,

- (D) retention and attenuation of flood waters,
- (E) runoff storage,
- (F) contribution of flow,
- (G) export of organic matter,
- (H) export of food resources, and
- (I) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means 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.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

## PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

17. The authority citation for part 300 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et. seq.*

18. Section 300.5 is amended by revising the definition of “navigable waters” to read as follows:

### § 300.5 Definitions.

*Navigable waters* as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;
- (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
- (vii) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (A) through (E) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
  - (A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
  - (B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
  - (C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

- (D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.
  - (E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.
- (viii) All waters located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
- (2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.
- (i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
  - (ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
  - (iii) The following ditches:
    - (A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
    - (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
    - (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this section.
  - (iv) The following features:
    - (A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
    - (B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
    - (C) Artificial reflecting pools or swimming pools created in dry land;
    - (D) Small ornamental waters created in dry land;

- (E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
  - (F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
  - (G) Puddles.
- (v) Groundwater, including groundwater drained through subsurface drainage systems.
  - (vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
  - (vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) Definitions—In this section, the following definitions apply:

- (i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
- (ii) *Neighboring*. The term *neighboring* means:
  - (A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
  - (B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
  - (C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.
- (iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including

an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this section 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. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this section.

- (iv) *Wetlands*. 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.
- (v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:
  - (A) sediment trapping,
  - (B) nutrient recycling,
  - (C) pollutant trapping, transformation, filtering, and transport,
  - (D) retention and attenuation of flood waters,
  - (E) runoff storage,

- (F) contribution of flow,
  - (G) export of organic matter,
  - (H) export of food resources, and
  - (I) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.
- (vi) *Ordinary high water mark.* The term *ordinary high water mark* means 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.
- (vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

19. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of “navigable waters” to read as follows:

**Appendix E to Part 300—Oil Spill Response.**

1.5 Definitions

*Navigable waters* as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas.

- (1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:
- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  - (ii) All interstate waters, including interstate wetlands;
  - (iii) The territorial seas;
  - (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
  - (v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;
  - (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
  - (vii) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (A) through (E) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
    - (A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
    - (B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
    - (C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.
    - (D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.
    - (E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges,

intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

- (G) Puddles.
  - (v) Groundwater, including groundwater drained through subsurface drainage systems.
  - (vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
  - (vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.
- (3) Definitions—In this section, the following definitions apply:
- (i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
  - (ii) *Neighboring*. The term *neighboring* means:
    - (A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
    - (B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
    - (C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.
  - (iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this section 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. A tributary can be a natural, man-altered, or man-

made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this section.

- (iv) *Wetlands*. 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.
- (v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:
  - (A) sediment trapping,
  - (B) nutrient recycling,
  - (C) pollutant trapping, transformation, filtering, and transport,
  - (D) retention and attenuation of flood waters,
  - (E) runoff storage,
  - (F) contribution of flow,
  - (G) export of organic matter,
  - (H) export of food resources, and
  - (I) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

- (vi) *Ordinary high water mark*. The term *ordinary high water mark* means 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.
- (vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

## **PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION**

20. The authority citation for part 302 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et. seq.*

21. Section 302.3 is amended by revising the definition of “navigable waters” to read as follows:

### **§ 302.3 Definitions.**

Navigable waters as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;
- (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
- (vii) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (A) through (E) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
  - (A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
  - (B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
  - (C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.
  - (D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic

depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

- (E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
  - (F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
  - (G) Puddles.
- (v) Groundwater, including groundwater drained through subsurface drainage systems.
  - (vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
  - (vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.
- (3) Definitions—In this section, the following definitions apply:
- (i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
  - (ii) *Neighboring*. The term *neighboring* means:
    - (A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
    - (B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
    - (C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

- (iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this section 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. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this section.
- (iv) *Wetlands*. 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.
- (v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:
- (A) sediment trapping,

- (B) nutrient recycling,
- (C) pollutant trapping, transformation, filtering, and transport,
- (D) retention and attenuation of flood waters,
- (E) runoff storage,
- (F) contribution of flow,
- (G) export of organic matter,
- (H) export of food resources, and
- (I) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means 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.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

## Part 401—GENERAL PROVISIONS

22. The authority citation for part 401 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et. seq.*

23. Section 401.11 is amended by revising the definition of “navigable waters” to read as follows:

### § 401.11 General definitions.

(l) The term *navigable waters* as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (A) through (E) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

- (D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.
  - (E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.
- (viii) All waters located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
- (2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.
- (i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
  - (ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
  - (iii) The following ditches:
    - (A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
    - (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
    - (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this section.
  - (iv) The following features:
    - (A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
    - (B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
    - (C) Artificial reflecting pools or swimming pools created in dry land;
    - (D) Small ornamental waters created in dry land;

- (E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
  - (F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
  - (G) Puddles.
- (v) Groundwater, including groundwater drained through subsurface drainage systems.
  - (vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
  - (vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.
- (3) Definitions—In this section, the following definitions apply:
- (i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 USC § 1344(f)) are not adjacent.
  - (ii) *Neighboring*. The term *neighboring* means:
    - (A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
    - (B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
    - (C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

- (iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this section 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. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this section. 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 banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this section.
- (iv) *Wetlands*. 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.
- (v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:
- (A) sediment trapping,

- (B) nutrient recycling,
- (C) pollutant trapping, transformation, filtering, and transport,
- (D) retention and attenuation of flood waters,
- (E) runoff storage,
- (F) contribution of flow,
- (G) export of organic matter,
- (H) export of food resources, and
- (I) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means 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.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.