Revised Definition of "Waters of the United States"
Response to Comments Document
SECTION 7 – IMPOUNDMENTS

See the Introduction to this Response to Comments Document for a discussion of the U.S. Environmental Protection Agency and the U.S. Department of the Army's (hereinafter, the agencies') comment response process and organization of the eighteen sections.

7 IMPOUNDMENTS

7.1 Definition of Impoundment

Many commenters requested the agencies provide greater clarity about the definition of impoundments.

One commenter requested that the agencies define impoundments as "an enclosure of a geographic area that encompasses a preexisting ["waters of the United States"] (*e.g.*, an artificial lake overlapping a stretch of a river), not an upland or isolated feature filled with water from a ["waters of the United States"] (*e.g.*, an isolated pond filled with water pumped from that river)."

One commenter expressed opposition to the agencies' proposed definition for impoundments because according to the commenter, "relatively permanent tributaries and adjacent wetlands can be jurisdictional merely based on their connection to impoundments."

One commenter expressed concern that the definition of impoundments is being changed in the proposed rule due to the addition of new language that was not present in the 1986 regulations.

One commenter supported a return to the longstanding language whereby any impoundment of waters otherwise defined as "waters of the United States" are considered jurisdictional. This commenter expanded that "[t]hese waters include … impoundments which are standing bodies of open water that contribute surface water flow to or from 'waters of the United States.' Furthermore, an … impoundment of a jurisdictional water contributes surface water flow to a downstream jurisdictional water in a typical year through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. These impounded waterbodies would include any associated berms, dikes, levees, dams, and connected floodplains as jurisdictional."

> **<u>Agencies' Response</u>: The agencies acknowledge many commenters' request for a definition of "impoundment" and the various commenters' suggestions for specific definitions of "impoundment." While the agencies are not defining "impoundment" in the final rule, in the preamble the agencies are providing additional clarity about the types of impoundments that are and that are not considered "waters of the United States" under paragraph (a)(2). Paragraph (a)(2) waters include impoundments created in waters that were jurisdictional under this rule's definition at the time the impoundment was created, as well as impoundments of waters that are currently jurisdictional under paragraphs (a)(1), (a)(3), or (a)(4) of this rule regardless of the water's jurisdictional status at the time the impoundment was created. This is generally consistent with the agencies' longstanding approach to impoundments. As stated in Section IV.C.3 in the Preamble to the Final Rule, impoundments are distinguishable from natural lakes and ponds because they are created by discrete structures (often human-built) like dams or levees that typically have the effect of raising the water surface elevation, creating or expanding the area of open water, or both. Paragraph (a)(2) impoundments under the final rule can include both natural impoundments (like beaver ponds) and artificial impoundments (like reservoirs). Impoundments under the final rule can be located off-channel (*i.e.*, an impoundment with no outlet or hydrologic connection to the tributary network) or in-line with the channel (*i.e.*, an impoundment with a hydrologic connection to the tributary network). As with any final**

regulations, the agencies will consider developing new guidance to facilitate implementation of the final rule should questions arise in the field regarding application of the rule to impoundments. Nevertheless, the agencies conclude that the final rule, together with the preamble and existing tools, provide sufficient clarity to allow consistent implementation of the final rule without a codified definition of "impoundment."

The agencies disagree with the commenters who expressed concern over change in the definition of impoundment as a "water of the United States" given in the proposed rule. To clarify, the agencies do not define what constitutes an "impoundment," but the agencies do define the scope of jurisdiction over impoundments, and in this definition on scope of jurisdiction, the agencies have narrowed the scope of jurisdiction compared to text in the pre-2015 regulations by delineating that impoundments of paragraph (a)(5) waters are not categorically jurisdictional as impoundments. In a change from the 1986 regulation, waters that are jurisdictional under paragraph (a)(5) and that are subsequently impounded do not retain their jurisdictional status by rule under the (a)(2) impoundments provision but may still be determined to be jurisdictional if they meet the requirements of a category of "waters of the United States" other than paragraph (a)(2) at the time of assessment (*i.e.*, as a traditional navigable water, the territorial seas, interstate water, jurisdictional tributary, jurisdictional adjacent wetland, or paragraph (a)(5) water). Impounded paragraph (a)(5) waters will most likely continue to not meet any of the other categories of jurisdictional waters and will therefore need to be re-assessed under paragraph (a)(5). However, if, once impounded, such a water became, for example, a traditional navigable water, it would be jurisdictional under paragraph (a)(1) of this rule. This approach in this rule is consistent with the agencies' careful approach to jurisdiction over paragraph (a)(5) waters. This change from the 1986 regulations reflects the agencies' consideration of the jurisdictional concerns and limitations of the statute as informed by *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC")* and *Rapanos v. United States, 547 U.S. 715 (2006) ("Rapanos")*.

The agencies disagree that the scope of jurisdiction for impoundments in the final rule would create scenarios where tributaries or adjacent wetlands would now be found to be jurisdictional simply because of their connections to impoundments. The final rule is generally consistent with the agencies' longstanding approach to impoundments. Consistent with the 1986 regulations, under this rule tributaries may be tributaries to paragraph (a)(1) or (a)(2) waters. Tributaries to paragraph (a)(2) impoundments, and wetlands adjacent to such tributaries, are jurisdictional if they meet either the relatively permanent standard or the significant nexus standard. Additionally, wetlands adjacent to paragraph (a)(2) impoundments are jurisdictional if they meet either the relatively permanent standard or the significant nexus standard. Final Rule Preamble Section IV.C.3.c.ii explains how the agencies will determine jurisdiction for tributaries of impoundments, wetlands adjacent to impoundments, and wetlands adjacent to tributaries of impoundments.

7.2 Jurisdictional Characterization

7.2.1 General support for jurisdiction over impoundments

A few commenters made general statements of support for the definition and inclusion of impoundments as jurisdictional waters in the proposed rule.

A few commenters expressed support for the identification of "impoundments" as a separate category of jurisdictional waters.

> **Agencies' Response: The agencies agree with commenters that impoundments of "waters of the United States" should continue to be protected under the final rule as a separate category of jurisdictional water. In this rule, the agencies are exercising their discretionary authority to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court precedent, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States." Through this rulemaking process, the agencies have considered all timely public comments on the proposed rule, including changes that improve the clarity, implementability, and durability of the definition. The regulations established in this rule are founded on the familiar framework of the 1986 regulations and are generally consistent with the pre-2015 regulatory regime. In addition, the agencies find that this final rule increases clarity and implementability by streamlining and restructuring the 1986 regulations and providing implementation guidance informed by sound science, implementation tools, and other resources. Further, because this rule is founded upon a longstanding regulatory framework and reflects consideration of the agencies' experience and expertise, as well as updates in implementation tools and resources, the agencies find that the final rule is generally familiar to the public and implementable. See Final Rule Preamble Section IV.A.4 for further discussion of the agencies' finding that the final rule is both familiar and implementable.**

7.2.2 Opposition to jurisdiction over impoundments

A few commenters expressed support for impounded features no longer being considered jurisdictional in the cases where section 404 permits apply.

A few commenters expressed concern regarding the jurisdictional status of impoundments in the proposed rule, due to a lack of legal and/or scientific basis for asserting authority over impoundments.

A few commenters expressed concern regarding implementation issues using the process under the proposed rule where "impounding a water can create a relatively permanent water even if the water that is being impounded is a non-relatively permanent water." The commenter argued that this could lead to an expansion of jurisdiction.

Some commenters expressed support for the exclusion of impounded waterbodies identified as "other waters" from the impoundments category.

<u>Agencies' Response</u>: The agencies disagree that jurisdiction over impoundments of "waters of the United States" lacks a legal and/or scientific basis. The agencies have determined that as a matter of law, science, and policy, impoundments do not de-federalize a water, and therefore impoundments of "waters of the United States" remain "waters of the United States." The Supreme Court has confirmed that damming or impounding a "water of the United States" does not make the water non-jurisdictional. *See S.D. Warren Co. v. Maine Bd. Of Envtl. Prot.*, 547 U.S. 370, 379 n. 5 (2006). While *S.D. Warren* addressed the meaning of the word "discharge" rather than the definition of "waters of the United States," the Court's conclusion regarding the jurisdictional status of a dammed river supports the agencies' longstanding interpretation of the Clean Water Act that "waters of the United States" remain "waters of the United States" even if impounded, as reflected in the 1986 regulations and continued in the final rule. Essentially, the action of creating an impoundment cannot on its own render a "water of the United States" no longer jurisdictional. The Court of Appeals for the Ninth Circuit has similarly found that "it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern." *United States v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008). Asserting Clean Water Act jurisdiction over impoundments also aligns with the scientific literature, as well as the agencies' scientific and technical expertise and experience, which confirm that impoundments have chemical, physical, and biological effects on downstream waters through surface or subsurface hydrologic connections.

With regard to the commenters concerned with the relative permanence of impoundments as compared to the relative permanence of the impoundments' source waters, the agencies disagree that such scenarios would constitute an expansion of jurisdiction. An impoundment is jurisdictional under paragraph (a)(2) of this rule if the impounded water met the definition of "waters of the United States" based on this rule's definition when the impoundment was created (other than impoundments of paragraph (a)(5) waters). To determine if an impoundment meets this criterion, the water would be assessed to see if the water was jurisdictional as a paragraph (a)(1) water, tributary, or adjacent wetland based on this rule's definition at the time it was impounded. Paragraph (a)(2) waters also include impoundments of waters that at the time of assessment are jurisdictional under paragraph (a)(1), (a)(3), or (a)(4) of this rule regardless of the water's jurisdictional status at the time the impoundment was created. This approach is consistent with pre-2015 practice. In assessing whether an impoundment is jurisdictional, the agencies must be able to at the time of the assessment trace a flowpath directly or indirectly through another water or waters, downstream from the structure that creates the impoundment to a paragraph (a)(1) water. Similar to assessment of tributaries under this rule, while the physical flowpath from the paragraph (a)(2) impoundment to the paragraph (a)(1) water must be traceable, there is not a need to demonstrate that flow from the impoundment reaches the paragraph (a)(1) water.

In a change from the 1986 regulation, waters that are jurisdictional under paragraph (a)(5) and that are subsequently impounded do not retain their jurisdictional status as "waters of the United States" by rule under the (a)(2) impoundment provision. However, a

subsequently impounded jurisdictional paragraph (a)(5) water may still be determined to be jurisdictional if it meets the requirements of a category of "waters of the United States" other than paragraph (a)(2) at the time of assessment (*i.e.*, as a traditional navigable water, territorial sea, interstate water, jurisdictional tributary, jurisdictional adjacent wetland, or paragraph (a)(5) water).

The approach in the final rule is consistent with the agencies' careful approach to jurisdiction over paragraph (a)(5) waters. For example, as discussed in Final Rule Preamble Sections IV.C.4 and IV.C.5, the tributaries category does not include tributaries to paragraph (a)(5) waters and the adjacent wetlands category does not include wetlands adjacent to paragraph (a)(5) waters. This change from the 1986 regulations reflects the agencies' consideration of the jurisdictional concerns and limitations of the statute as informed by *SWANCC* and *Rapanos*. See the agencies' response to comments Section 11 Paragraph (a)(5) Waters for further details.

See also the agencies' response to comments on this topic in Section 7.3 below for discussion of the scientific rationale for impoundments of "waters of the United States" being found to be jurisdictional.

7.3 Science/Function

One commenter asserted that, though the 2015 Clean Water Rule's approach to impoundments was based in science, it was not clear.

One commenter stated, "The Proposed Rule's approach to impoundments is also without scientific support[,]" and the agencies' assertion that "impoundments have chemical, physical, and biological effects on downstream waters through surface or subsurface hydrologic connections … is not a sufficient ground to claim jurisdiction over all impoundments."

One commenter expressed concern regarding jurisdictional status of impoundments due to the potential for pollutants to accumulate and impact waterbodies. In addition, the commenter stated that impoundments that "block[] upstream aquatic life from upstream migration to spawn and feed have significant impacts on the biological integrity of the entire stream." This commenter expressed support for impoundments to be protected and considered jurisdictional.

<u>Agencies' Response</u>: The agencies disagree that the rule's approach to impoundments is without scientific support. As discussed in Final Rule Preamble Section IV.C.3.b and Section III.C of the Technical Support Document, impoundments are typically built to maintain some level of hydrologic connection between the water that is being impounded and the downstream tributary network. For example, water may pass from the reservoir to the downstream side of an impoundment by passing through the main spillway or outlet works, passing over an auxiliary spillway, or overtopping the impoundment. Berms, dikes, and similar features used to create impoundments typically do not block all water flow. Further, as an agency with expertise and responsibilities in engineering and public works, the Corps extensively studies water retention structures like berms, levees, and earth and rock-fill dams. The agency has found that all water retention structures are subject to seepage through their foundations and abutments.

Because of the continued existence of these hydrologic connections, the agencies affirm in this rule that impoundments of "waters of the United States" remain "waters of the United States," except for impoundments of paragraph (a)(5) waters, which the agencies conclude are better assessed under other categories of this rule. The agencies recognize the importance of protecting water resources and agree that streams, wetlands, and other waters serve a variety of important functions for protection of water quality. See Final Rule Preamble Section IV.A for a discussion of key functions provided by tributaries, wetlands, impoundments, lakes, ponds, streams, and other types of waters that restore and maintain the chemical, physical, and biological integrity of downstream paragraph (a)(1) waters. See Technical Support Document Sections I and III for additional supporting information on this topic.

The final rule is generally consistent with the agencies' longstanding approach to impoundments. The agencies have concluded that it is appropriate based on relevant case law, science, and as a practical matter to interpret "waters of the United States" to include both impoundments of waters that qualified as "waters of the United States" under this rule's definition at the time of impoundment, and impoundments of waters that at the time of assessment meet the definition of "waters of the United States" (other than waters jurisdictional under paragraph (a)(5)). In developing the final rule, the agencies thoroughly considered alternatives to this rule, including the 2015 Clean Water Rule, and have concluded that this final rule best accomplishes the agencies' goals to promulgate a rule that advances the objective of the Clean Water Act, is consistent with Supreme Court decisions, is informed by the best available science, and promptly and durably restores vital protections to the nation's waters. See Section IV.B.1 of the Preamble to the Final Rule for further discussion of the agencies' grounds for concluding that the 2015 Clean Water Rule is not a suitable alternative to the final rule.

The agencies agree that impoundments have chemical, physical, and biological effects on downstream and upstream waters. The agencies have determined that as a matter of law, science, and policy, impoundments do not de-federalize a water, and therefore impoundments of "waters of the United States" remain "waters of the United States." Asserting Clean Water Act jurisdiction over impoundments also aligns with the scientific literature, as well as the agencies' scientific and technical expertise and experience, which confirm that impoundments have chemical, physical, and biological effects on waters through surface or subsurface hydrologic connections.

7.4 Implementation

7.4.1 Endorsing use of the relatively permanent and significant nexus standards

A few commenters expressed support for the application of the relatively permanent and significant nexus standards to impoundments for the purposes of jurisdiction.

Agencies' Response: The agencies agree that the relatively permanent and significant nexus standards are necessary for determining jurisdiction over impoundments of tributaries and adjacent wetlands. In implementing this rule, the agencies consider paragraph (a)(2)

impoundments to include (1) impoundments created by impounding one of the "waters of United States" that was jurisdictional under this rule's definition at the time the impoundment was created, and (2) impoundments of waters that at the time of assessment meet the definition of "waters of the United States" under the rule as a traditional navigable water, the territorial seas, interstate water, jurisdictional tributary, or jurisdictional adjacent wetland, regardless of the water's jurisdictional status at the time the impoundment was created. Consistent with the 1986 regulations, tributaries under this rule may be tributaries to paragraph (a)(1) or (a)(2) waters. Therefore, tributaries to paragraph (a)(2) impoundments, and wetlands adjacent to such tributaries, are jurisdictional if they meet either the relatively permanent standard or the significant nexus standard. Additionally, wetlands adjacent to paragraph (a)(2) impoundments are jurisdictional if they meet either the relatively permanent standard or the significant nexus standard. See Final Rule Preamble Section IV.C.4.c and Section IV.C.5.c for additional information on significant nexus evaluations for tributaries and adjacent wetlands.

As discussed further in Final Rule Preamble Section IV.A.3, the agencies have concluded that the significant nexus standard is consistent with the statutory text and legislative history, advances the objective of the Clean Water Act, is informed by the scientific record and Supreme Court case law, and appropriately considers the policies of the Act. The agencies have also determined that the relatively permanent standard is appropriate to include in this rule because, while it identifies only a subset of the "waters of the United States," it also provides important efficiencies and additional clarity for regulators and the public by more readily identifying a subset of waters that will virtually always significantly affect paragraph (a)(1) waters. Together the relatively permanent standard and the significant nexus standard, as codified in this rule, give effect to the Clean Water Act's broad terms and environmentally protective aim as well as its limitations. See Final Rule Preamble Section IV.C for a description of how the standards will be implemented in determining the jurisdiction of tributaries, adjacent wetlands, and other types of waters under the final rule.

7.4.2 Direct hydrologic surface connection and relatively permanent flow

A few commenters called for requiring a direct hydrologic surface connection and relatively permanent flow to a navigable water in order for a waterbody to be considered jurisdictional and argued that off-channel impoundments not meeting those two requirements should be considered geographically isolated waters. Another commenter argued, "the Agencies should clarify that 'off-channel' reservoirs constructed in uplands with no surface hydrologic connection to a [traditional navigable water] (*e.g.*, where the water is pumped in and out) are not ["waters of the Unites States"]."

A commenter stated that the agencies should consider varying pool elevations of impounded waters within hydrological connection.

One commenter suggested that impoundments or reservoirs that are connected to jurisdictional waters solely through "a valve or siphon" not be considered jurisdictional because of the lack of a hydrologic connection. This commenter requested that the agencies consider specific criteria, rather than relying on historical status, when identifying hydrologic surface connections, and that the criteria should include

location of the impoundment relative to the jurisdictional waters (*e.g.*, consideration for 'off-channel' placement) and potential tidal influence.

One commenter stated "the Agencies should clarify that an impoundment can sever jurisdiction for the perennial or intermittent stream on which it was constructed if surface water is not conveyed therefrom on a continuous or intermittent basis to traditional navigable waters or the territorial seas. Similarly, the Agencies need to acknowledge that if the upstream extent of a tributary is defined by an impoundment that ceases to contribute perennial or intermittent flow to the drainage downgradient of the impoundment, the drainage above the impoundment is not jurisdictional."

One commenter requested that impoundments of jurisdictional waters should be jurisdictional if they allow for the "pass-through" of those waters, but that jurisdiction should not apply in the absence of a hydrologic connection to a jurisdictional water, or if downstream flow from the impoundment is not frequent. The commenter added that, generally, impoundments should not be considered jurisdictional because they are not naturally occurring lakes or ponds.

> **Agencies' Response: The agencies acknowledge the comments on flow conditions that could substantiate or disprove a continuous surface connection. In regard to the commenters requesting that off-channel impoundments not be found to be jurisdictional, particularly those connected via syphon or valve, as stated in Final Rule Preamble Section IV.C.3.c.i, paragraph (a)(2) impoundments under this rule can be located off-channel or in-line with the channel. For the reasons discussed in Final Rule Preamble Section IV.A., limiting the definition of "waters of the United States" to the relatively permanent standard on its own would be inconsistent with the Act's text and objective and runs counter to scientific principles. Therefore, the agencies also disagree with the commenters that relative permanence of flow to a "navigable water" should be required for an impoundment or its upstream waters to be found to be jurisdictional.**
>
> **The agencies disagree with the commenter who requested a statement that an impoundment can sever jurisdiction for a perennial or intermittent stream on which it was constructed if surface water is not conveyed on a continuous or intermittent basis to traditional navigable waters or the territorial seas. The agencies further disagree that impoundments that do not convey continuous or intermittent surface water flow should sever jurisdictional for tributaries upstream of the impoundment. The final rule does not include a requirement for continuous or intermittent surface water flow from a tributary to a paragraph (a)(1) water, as described further in Final Rule Preamble Section IV.C.4, nor does the final rule include a requirement for continuous or intermittent surface water flow from an impoundment to a paragraph (a)(1) water, as described further in Final Rule Preamble Section IV.C.3. Rather, in assessing whether an impoundment is jurisdictional, the agencies must be able to at the time of the assessment trace a flowpath directly or indirectly through another water or waters, downstream from the structure that creates the impoundment to a paragraph (a)(1) water. Similar to assessment of tributaries under this rule, while the physical flowpath from the paragraph (a)(2) impoundment to the paragraph (a)(1) water must be traceable, there is not a need to demonstrate that flow from the impoundment reaches the paragraph (a)(1) water.**

In response to the commenter who recommended that the agencies consider varying pool elevations within impoundments, the agencies note that the agencies will assess impoundments for jurisdiction based on the criteria in the final rule for the reasons explained in Final Rule Preamble Section IV.C. Pool elevations are not incorporated as an explicit consideration. Note that because impoundments of jurisdictional waters under paragraph (a)(2) are not required to convey surface flow to a paragraph (a)(1) water, pool elevations and their influence on downstream hydrologic connections may not be relevant to that inquiry.

The agencies disagree with the commenter who stated that impoundments should not be jurisdictional because they are not naturally occurring. The scientific literature unequivocally demonstrates that open waters in riparian areas, such as impoundments, are chemically, physically, and biologically integrated with rivers via functions that improve downstream water quality in paragraph (a)(1) waters, including: the temporary storage and deposition of channel-forming sediment and woody debris; temporary storage of local groundwater that supports baseflow in rivers; transformation and transport of stored organic matter; assimilation, transformation, or sequestration of pollutants; providing nursery habitat for breeding fish and amphibians; colonization opportunities for stream invertebrates and maturation habitat for stream insects; desynchronization of flood waters; and sequestration of pollutants. See Technical Support Document Sections I and III.

7.4.3 General questions

One commenter requested the agencies provide explicit clarification on whether impoundments are excluded, rather than having to apply the relatively permanent or significant nexus standards under the "other waters" definition to determine if an impoundment is jurisdictional.

One commenter requested that the agencies provide more clarity for the term "most impoundments" within the proposed definition to prevent subjective and "varying interpretations" by the Corps and field personnel.

Agencies' Response: The agencies acknowledge the request for clarity regarding the term "most impoundments" used in the proposed rule. This term refers to the scope of jurisdiction under the proposed and final rules for impoundments of "waters of the United States." There are some impoundments of "waters of the United States" which may not be jurisdictional under the final rule. In particular, in a change from the 1986 regulation, waters that are jurisdictional under paragraph (a)(5) and that are subsequently impounded do not retain their jurisdictional status as "waters of the United States" by rule under the (a)(2) impoundment provision. However, a subsequently impounded jurisdictional paragraph (a)(5) water may still be determined to be jurisdictional if it meets the requirements of a category of "waters of the United States" other than paragraph (a)(2) at the time of assessment (*i.e.*, as a traditional navigable water, the territorial seas, interstate water, jurisdictional tributary, jurisdictional adjacent wetland, or paragraph (a)(5) water). See the agencies' response to comments Section 11 Paragraph (a)(5) Waters for further details.

As the final rule considers jurisdiction of impoundments of paragraph (a)(5) waters under the (a)(1), (a)(3), (a)(4), and (a)(5) categories, there is no exclusion for impoundments.