

**Revised Definition of “Waters of the United States”
Response to Comments Document**

SECTION 9 – LAKES AND PONDS

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.

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9 LAKES AND PONDS

9.1 Jurisdictional Characterization

9.1.1 Separate Category of Waters for Lakes and Ponds

Some commenters requested that lakes and ponds be split into a separate jurisdictional category as done in the 2020 Navigable Waters Protection Rule (2020 NWPR). Several commenters further requested that the “agencies . . . define a jurisdictional category for lakes and ponds and to only include lakes or ponds that contribute flow to traditional navigable waters on a perennial, as opposed to intermittent, basis in any final [“waters of the United States”] rule.” Additionally, these commenters requested that the agencies provide a clear definition of lakes and ponds to provide “clarity and certainty for regulators and the public.”

One commenter specifically requested that lakes be considered a separate category of jurisdiction rather than “an ‘other water.’” In particular, this commenter referenced Indiana lakes, and the estimated value of their recreational resources, in suggesting that lakes should be categorically jurisdictional rather than subject to a “significance review.”

Agencies’ Response: The agencies acknowledge commenters who requested that the rule identify lakes and ponds as a separate category of “waters of the United States.” Consistent with the agencies’ pre-2015 regulations, the final rule does not include a separate category of waters for lakes and ponds. In this action, the agencies are finalizing a definition of “waters of the United States” that is within the agencies’ authority under the Act; that advances the objective of the Clean Water Act; that establishes limitations that are consistent with the statutory text, supported by the scientific record, and informed by relevant Supreme Court decisions; and that is both familiar and implementable. See Final Rule Preamble Section IV.A. The agencies have extensive experience implementing this approach under pre-2015 practice. Certain streams, rivers, lakes, ponds, wetlands, and impoundments can be assessed as traditional navigable waters or interstate waters under paragraph (a)(1)(i) or (a)(1)(iii) of this rule; other streams, rivers, lakes, ponds, and impoundments are situated such that they are part of the tributary system and can be assessed under paragraph (a)(3) of this rule; and certain lakes, ponds, and impoundments are situated such that they are *not* part of the tributary system and would be assessed under paragraph (a)(5) of the final rule.

For the agencies’ response to comments on the flow contributions of lakes and ponds to downstream paragraph (a)(1) waters, see Section 8 Tributaries.

The agencies acknowledge commenters’ requests for clear definitions of lakes and ponds. While the agencies are not defining “lakes” or “ponds” in this rule, in the final rule preamble the agencies have provided additional clarity about the types of lakes and ponds that are and that are not considered “waters of the United States.” Additionally, Section IV.C of the Preamble to the Final Rule provides implementation guidance for identifying jurisdictional lakes and ponds.

The agencies recognize the importance of specific local or regional aquatic resources and acknowledge the commenter who requested that lakes be treated as categorically jurisdictional. Agencies may choose to proceed via rulemaking or adjudication. *NLRB v.*

***Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“the choice between rulemaking and adjudication lies in the first instance within the [agency’s] discretion”). With respect to the significant nexus standard in particular, Justice Kennedy stated that the agencies could proceed to determine waters jurisdictional through regulations or adjudication. See 547 U.S. at 780-81. The agencies have concluded that adjudication of which tributaries or paragraph (a)(5) waters, including lakes and ponds, are within Clean Water Act protections through case-specific application of the significant nexus standard or the relatively permanent standard under this rule is appropriate.**

9.1.2 Lakes and Ponds as Tributaries

One commenter expressed support for “classifying ponds as tributaries if they meet either the relatively permanent waters or significant nexus tests,” suggesting that doing so would promote consistency. The commenter further noted that the agencies should consider whether there is science to support these ponds as jurisdictional in a potential second rulemaking.

Agencies’ Response: The agencies interpret tributary for purposes of the final rule to include rivers, streams, lakes, ponds, and impoundments that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, an interstate water, or a paragraph (a)(2) impoundment. Lakes and ponds function as part of the tributary system where they contribute flow to downstream waters, and therefore it is reasonable to assess them for jurisdiction as tributaries under the final rule. See Technical Support Document (TSD) Section III.A. Tributaries are jurisdictional when they meet the relatively permanent standard or significant standard. Under the final rule, lakes or ponds may also be jurisdictional under paragraph (a)(5) if they meet the relatively permanent standard or significant nexus standard. See Final Rule Preamble Section IV.C.6.

In the preamble to the proposed rule, the agencies stated that they would consider changes through a second rulemaking that they anticipated proposing in the future, which would build upon the foundation of this rule. The agencies have concluded that this rule is durable and implementable because it is founded on the familiar framework of the 1986 regulations, fully consistent with the statute, informed by relevant Supreme Court decisions, and reflects the record before the agencies, including consideration of the best available science, as well as the agencies’ expertise and experience implementing the pre-2015 regulatory regime. The agencies may consider further refinements in a future rule to address implementation or other issues that may arise.

9.2 Science/Functions

One commenter expressed concern that their state has not considered a specific spring pond jurisdictional, despite the fact that the pond conveys surface water flow and dissolved carbonates to a jurisdictional river, thereby supporting habitat and prime trout fishing. The commenter requested that the agencies provide clearer guidance for identifying such features, including in states which have assumed Clean Water Act section 404 authorities.

One commenter recommended protection of “ephemeral, seasonal ponds” due to their importance to wildlife.

One commenter argued that headwaters and their overall health have an impact on downstream water quality. The commenter contended that this is directly relevant to lakes, which are increasingly subject to algal blooms due to a changing climate.

Agencies’ Response: The final rule preamble includes clear guidance for identifying which lakes and ponds are jurisdictional as “waters of the United States.” Lakes and ponds will be assessed on a case-specific basis to determine if they are jurisdictional, as described further in Section IV.C of the Final Rule Preamble. However, determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking.

The agencies acknowledge commenters who described the benefits that headwater lakes and ponds can have on downstream waters. The scientific literature unequivocally demonstrates that wetlands and open waters in riparian areas and floodplains are chemically, physically, and biologically integrated with rivers via functions that improve 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 TSD Sections I and III.

9.3 Implementation

9.3.1 Relative Permanence

One commenter asserted that certain types of lakes and ponds should not be jurisdictional, including “isolated lentic structures” or lakes and ponds that dry out either seasonally or from irrigation use of their water.

One commenter provided the following recommendation: “Lakes and ponds should only be ‘Waters of the [United States]’ if:

- a) they are supplied through jurisdictional waters
- b) contribute perennial flow to jurisdictional water
- c) must be flooded by a jurisdictional water during a typical year; ecological connections between physically separated lakes and ponds and otherwise jurisdictional water should not be used to assert jurisdiction.”

Another commenter recommended that the agencies provide an explicit explanation of the proposed rule’s approach to jurisdiction over relatively permanent tributary lakes and ponds to help clarify the scope of jurisdiction under the rule.

Agencies’ Response: The agencies disagree with the commenter who stated that isolated lentic systems should be categorically excluded under this rule. The scientific literature unequivocally demonstrates that wetlands and open waters in non-floodplain landscape settings (hereafter called “non-floodplain wetlands”) can provide numerous functions that benefit the chemical, physical, and biological integrity of larger downstream waters, including the paragraph (a)(1) waters, particularly when analyzed in the aggregate. These functions include: storage of floodwater; recharge of groundwater that sustains river

baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules (*e.g.*, seeds, eggs, spores) 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 groundwater flows and through biological and chemical connections. Some effects of non-floodplain wetlands on larger downstream waters are due to their relative isolation, rather than their connectivity. Where the wetland intercepts materials that otherwise would reach downstream water, wetland “sink” functions trap materials and prevent their export to downstream waters (*e.g.*, sediment and entrained pollutant removal, water storage). See Technical Support Document Sections I, III.B, and III.D and the Final Rule Preamble Section IV.C.6 for additional information and clarification regarding implementation of the intrastate lakes and ponds assessed under paragraph (a)(5) of the final rule.

The agencies acknowledge commenters who provided recommendations on specific types of connections that lakes and ponds must have with jurisdictional waters to be considered “waters of the United States.” Under the final rule, lakes and ponds can be jurisdictional as tributaries if they meet the relatively permanent standard or significant nexus standard. See Final Rule Preamble Section IV.C.4 for additional discussion and rationale. Under the final rule, lakes and ponds can also be jurisdictional as paragraph (a)(5) waters if they meet the relatively permanent standard or significant nexus standard. See Final Rule Preamble Section IV.C.6 for additional discussion and rationale.

See Final Rule Preamble Section IV.C.4.c for the agencies’ approach to implementing the relatively permanent standard for tributaries under the final rule, including for lakes and ponds that qualify as tributaries.

9.3.2 Mapping

In the context of discussing lakes and ponds, one commenter stated that United States Geological Survey maps are a good resource but expressed concern that they can be outdated and missing information. The commenter recommended “use of google earth or similar, up to date, satellite surveillance or LIDAR.”

Agencies’ Response: As discussed in Final Rule Preamble Section IV.C and IV.G, the agencies have identified a variety of implementation guidance, tools, and methods available for assessing lakes and ponds under the final rule. The agencies are not mandating specific data or tools to implement the final rule. The agencies will assess jurisdiction based on the most applicable methods and best available sources of information for the specific site under evaluation.