DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[EPA–HQ–OW–2018–0149; FRL–9988–15–OW]

RIN 2040–AF75

Revised Definition of ''Waters of the United States''

AGENCY: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency and the Department of the Army (''the agencies'') are publishing for public comment a proposed rule defining the scope of waters federally regulated under the Clean Water Act (CWA). This proposal is the second step in a comprehensive, two-step process intended to review and revise the definition of ''waters of the United States'' consistent with the Executive Order signed on February 28, 2017, ''Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.'' This proposed rule is intended to increase CWA program predictability and consistency by increasing clarity as to the scope of ''waters of the United States'' federally regulated under the Act. This proposed definition revision is also intended to clearly implement the overall objective of the CWA to restore and maintain the quality of the nation's waters while respecting State and tribal authority over their own land and water resources.

DATES: Comments must be received on or before April 15, 2019.

ADDRESSES: You may submit comments, identified by Docket ID No. EPA–HQ–OW–2018–0149, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: OW-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OW–2018–0149 in the subject line of the message.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery/Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''How should I submit comments?'' heading of the GENERAL INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Michael McDavit, Oceans, Wetlands, and Communities Division, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–2428; email address: *CWAwotus@epa.gov;* or Jennifer A. Moyer, Regulatory Community of Practice (CECW–CO–R), U.S. Army Corps of Engineers, 441 G Street NW, Washington, DC 20314; telephone number: (202) 761–5903; email address: *USACE_CWA_Rule@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

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I. General Information

A. How can I get copies of this document and related information?

1. *Docket.* An official public docket for this action has been established under Docket ID No. EPA–HQ–OW–2018–0149. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202–566–2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this **Federal Register** document electronically under the **Federal Register** listings at *http://www.regulations.gov.* An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You

may access EPA Dockets at *http://www.regulations.gov* to view public comments as they are submitted and posted, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets*. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

B. Under what legal authority is this proposed rule issued?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.,* including sections 301, 304, 311, 401, 402, 404, and 501.

C. How should I submit comments?

Throughout this notice, the agencies solicit comment on a number of issues related to the proposed rulemaking. Submit your comments, identified by Docket ID No. EPA–HQ–OW–2018–0149, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

This rule is the outgrowth of other rulemakings and extensive outreach efforts, including requests for recommendations and comments, and the agencies have taken recommendations and comments received into account in developing this proposal. In developing a final rule, the agencies will be considering comments submitted on this proposal. Persons who wish to provide views or recommendations on this proposal must provide comments to the agencies as part of this comment process. To facilitate the processing of comments, commenters are encouraged to organize their comments in a manner that corresponds to the outline of this proposal.

II. Background

A. Executive Summary

The U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) (together, the agencies) are publishing for public comment a proposed rule defining the scope of waters subject to federal regulation under the Clean Water Act (CWA), in light of the U.S. Supreme Court cases in *United States* v. *Riverside Bayview Homes* (*Riverside Bayview*), *Solid Waste Agency of Northern Cook County* v. *United States* (*SWANCC*), and *Rapanos* v. *United States* (*Rapanos*), and consistent with Executive Order 13778, signed on February 28, 2017, entitled ''Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.''

The agencies propose to interpret the term ''waters of the United States'' to encompass: Traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters.

The agencies propose as a baseline concept that ''waters of the United States'' are waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes, ponds, and wetlands, and that not all waters are ''waters of the United States.'' Under this proposed rule, a tributary is defined as a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other tributaries, jurisdictional ditches, jurisdictional lakes and ponds, jurisdictional impoundments, and adjacent wetlands or through water features identified in paragraph (b) of this proposal so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. Ditches are generally proposed not to be ''waters of the United States'' unless they meet certain criteria, such as functioning as traditional navigable waters, if they are constructed in a tributary and also satisfy the conditions of the proposed ''tributary'' definition, or if they are constructed in an adjacent wetland and also satisfy the conditions of the proposed ''tributary'' definition.

The proposal defines ''adjacent wetlands'' as wetlands that abut or have a direct hydrological surface connection to other ''waters of the United States'' in a typical year. ''Abut'' is proposed to mean when a wetland touches an otherwise jurisdictional water at either a point or side. A ''direct hydrologic surface connection'' as proposed occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and jurisdictional water. Wetlands physically separated from other waters of the United States by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent under this proposal.

The proposal would exclude from the definition of ''waters of the United States'' waters or water features not mentioned above. The proposed definition specifically clarifies that ''waters of the United States'' do not include features that flow only in response to precipitation; groundwater, including groundwater drained through subsurface drainage systems; certain ditches; prior converted cropland; artificially irrigated areas that would revert to upland if artificial irrigation ceases; certain artificial lakes and ponds constructed in upland; water-filled depressions created in upland incidental to mining or construction activity; stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off; wastewater recycling structures constructed in upland; and waste treatment systems. In addition, the agencies are proposing to clarify and define the terms ''prior converted cropland'' and ''waste treatment system'' to improve regulatory predictability and clarity.

In response to the interest expressed by some States in participating in the federal jurisdictional determination process, the agencies are soliciting comment as to how they could establish an approach to authorize States, Tribes, and Federal agencies to establish

geospatial datasets of ''waters of the United States,'' as well as waters that the agencies propose to exclude, within their respective borders for approval by the agencies. Under a separate action, the agencies may propose creating a framework under which States, Tribes, and Federal agencies could choose to develop datasets for approval for all, some, or none of the ''waters of the United States'' within their boundaries. If the agencies were to pursue such an action, they would do so in coordination with other Federal agencies, State, tribal, and interested stakeholders. This approach would not require State and tribal governments to establish these datasets; it would simply make this process available to those government agencies that would find it useful.

The fundamental basis used by the agencies for the revised definition proposed today is the text and structure of the CWA, as informed by its legislative history and Supreme Court precedent, taking into account agency policy choices and other relevant factors. This proposed definition revision is intended to strike a balance between Federal and State waters and would carry out Congress' overall objective to restore and maintain the integrity of the nation's waters in a manner that preserves the traditional sovereignty of States over their own land and water resources. The agencies believe the proposed definition would also ensure clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public. This proposed rule is intended to ensure that the agencies are operating within the scope of the Federal government's authority over navigable waters under the CWA and the Commerce Clause of the U.S. Constitution.

B. The Clean Water Act and Regulatory Definition of ''Waters of the United States''

1. The Clean Water Act

Congress amended the Federal Water Pollution Control Act (FWPCA), or Clean Water Act (CWA) as it is commonly called,[1] in 1972 to address longstanding concerns regarding the quality of the nation's waters and the federal government's ability to address those concerns under existing law. Prior to 1972, the ability to control and redress water pollution in the nation's waters largely fell to the U.S. Army Corps of Engineers (Corps) under the Rivers and Harbors Act of 1899 (RHA). While much of that statute focused on restricting obstructions to navigation on the nation's major waterways, section 13 of the RHA made it unlawful to discharge refuse ''into any navigable water of the United States,[2] or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.'' 33 U.S.C. 407. Congress had also enacted the Water Pollution Control Act of 1948, Public Law 80–845, 62 Stat. 1155 (June 30, 1948), to address interstate water pollution, and subsequently amended that statute in 1956 (giving the statute its current formal name), 1961, and 1965. The early versions of the CWA promoted the development of pollution abatement programs, required States to develop water quality standards, and authorized the Federal government to bring enforcement actions to abate water pollution.

These early statutory efforts, however, proved inadequate to address the decline in the quality of the nation's waters, *see City of Milwaukee* v. *Illinois,* 451 U.S. 304, 310 (1981), so Congress performed a ''total restructuring'' and ''complete rewriting'' of the existing statutory framework in 1972, *id.* at 317 (quoting legislative history of 1972 amendments). That restructuring resulted in the enactment of a comprehensive scheme (including voluntary as well as regulatory programs) designed to prevent, reduce, and eliminate pollution in the nation's waters generally, and to regulate the discharge of pollutants into navigable waters specifically. *See, e.g., S.D. Warren Co.* v. *Maine Bd. of Environmental Protection,* 547 U.S. 370, 385 (2006) (noting that ''the Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally'').

The objective of the new statutory scheme was ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). In order to meet that objective, Congress declared two national goals: (1) ''that the discharge of pollutants into the navigable waters be eliminated by 1985;'' and (2) ''that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 . . . .'' *Id.* at 1251(a)(1)–(2).

Congress also established several key policies that direct the work of the agencies to effectuate those goals. For example, Congress declared as a national policy ''that the discharge of toxic pollutants in toxic amounts be prohibited; . . . . that Federal financial assistance be provided to construct publicly owned waste treatment works; . . . . that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; . . . [and] that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.'' *Id.* at 1251(a)(3)–(7).

Congress provided a major role for the States in implementing the CWA, balancing the traditional power of States to regulate land and water resources within their borders with the need for a national water quality regulation. For example, the statute highlighted ''the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution'' and ''to plan the development and use . . . . of land and water resources . . . . .'' *Id.* at 1251(b). Congress also declared as a national policy that States manage the major construction grant program and implement the core permitting programs authorized by the statute, among other responsibilities. *Id.* Congress added that ''[e]xcept as expressly provided in this Act, nothing in this Act shall . . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.'' *Id.* at 1370.[3] Congress pledged to provide technical support and financial aid to the States ''in connection with the prevention, reduction, and elimination of pollution.'' *Id.* at 1251(b).

To carry out these policies, Congress broadly defined ''pollution'' to mean ''the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of

[1] The FWCPA is commonly referred to as the CWA following the 1977 amendments to the FWPCA. Public Law 95–217, 91 Stat. 1566 (1977). For ease of reference, the agencies will generally refer to the FWPCA in this notice as the CWA or the Act.

[2] The term ''navigable water of the United States'' is a term of art used to refer to waters subject to federal jurisdiction under the RHA. *See, e.g.,* 33 CFR 329.1. The term is not synonymous with the phrase ''waters of the United States'' under the CWA, *see id.,* and the general term ''navigable waters'' has different meanings depending on the context of the statute in which it is used. *See, e.g., PPL Montana, LLC* v. *Montana,* 132 S. Ct. 1215, 1228 (2012).

[3] 33 U.S.C. 1370 also prohibits authorized States from adopting any limitations, prohibitions, or standards that are less stringent than required by the CWA.

water,'' *id.* at 1362(19), to parallel the broad objective of the Act ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' *Id.* at 1251(a). Congress then crafted a non-regulatory statutory framework to provide technical and financial assistance to the States to prevent, reduce, and eliminate pollution in the nation's waters generally. For example, section 105 of the Act, ''Grants for research and development,'' authorized EPA ''to make grants to any State, municipality, or intermunicipal or interstate agency for the purpose of assisting in the development of any project which will demonstrate a new or improved method of preventing, reducing, and eliminating the discharge into *any waters* of pollutants from sewers which carry storm water or both storm water and pollutants.'' 33 U.S.C. 1255(a)(1) (emphasis added). Section 105 also authorized EPA ''to make grants to any State or States or interstate agency to demonstrate, in *river basins or portions thereof,* advanced treatment and environmental enhancement techniques to control pollution from all sources . . . . including nonpoint sources, ... [and] . . . . to carry out the purposes of section 301 of this Act . . . . for research and demonstration projects for prevention of pollution of *any waters* by industry including, but not limited to, the prevention, reduction, and elimination of the discharge of pollutants.'' 33 U.S.C. 1255(b)–(c) (emphasis added); *see also id.* at 1256(a) (authorizing EPA to issue ''grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution''). Section 108, ''Pollution Control in Great Lakes,'' authorized EPA to enter into agreements with any State to develop plans for the ''elimination or control of pollution, *within all or any part of the watersheds* of the Great Lakes.'' *Id.* at 1258(a) (emphasis added); *see also id.* at 1268(a)(3)(C) (defining the ''Great Lakes System'' as ''*all* the streams, rivers, lakes and other bodies of water within the drainage basin of the Great Lakes'') (emphasis added). Similar broad pollution control programs were created for other major watersheds, including, for example, the Chesapeake Bay, *see id.* at 1267(a)(3), Long Island Sound, *see id.* at 1269(c)(2)(D), and Lake Champlain, *see id.* at 1270(g)(2).

In addition to the Act's non-regulatory measures to control pollution of the nation's waters generally, Congress created a federal regulatory permitting program designed to address the discharge of pollutants into a subset of those waters identified as ''navigable waters'' or ''the waters of the United States,'' *id.* at 1362(7). Section 301 contains the key regulatory mechanism: ''Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.'' *Id.* at 1311(a). A ''discharge of a pollutant'' is defined to include ''any addition of any pollutant to navigable waters from any point source,'' such as a pipe, ditch or other ''discernible, confined and discrete conveyance.'' *Id.* at 1362(12), (14). The term ''pollutant'' means ''dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.'' *Id.* at 1362(6). Thus, it is unlawful to discharge pollutants into the waters of the United States from a point source unless the discharge is in compliance with certain enumerated sections of the CWA, including obtaining authorization pursuant to the section 402 National Pollutant Discharge Elimination System (NPDES) permit program or the section 404 dredged or fill material permit program. *See id.* at 1342 and 1344. Congress therefore hoped to achieve the Act's objective ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters'' by addressing pollution of all waters via non-regulatory means and federally regulating the discharge of pollutants to the subset of waters identified as ''navigable waters.'' [4]

Under this statutory scheme, the States are primarily responsible for developing water quality standards for ''waters of the United States'' within their borders and reporting on the condition of those waters to EPA every two years. *Id.* at 1313, 1315. States must develop total maximum daily loads (TMDLs) for waters that are not meeting established water quality standards and must submit those TMDLs to EPA for approval. *Id.* at 1313(d). States also have authority to issue water quality certifications or waive certification for every federal permit or license issued within their borders that may result in a discharge to navigable waters. *Id.* at 1341.

These same regulatory authorities can be assumed by Indian tribes under section 518 of the CWA, which authorizes EPA to treat eligible Indian tribes with reservations in a manner similar to States for a variety of purposes, including administering each of the principal CWA regulatory programs. *Id.* at 1377(e). In addition, States and Tribes retain authority to protect and manage the use of those waters that are not navigable waters under the CWA. *See, e.g., id.* at 1251(b), 1251(g), 1370, 1377(a). At this time, forty-seven states administer portions of the CWA section 402 permit program for those ''waters of the United States'' within their boundaries,[5] and two states (Michigan and New Jersey) administer the section 404 permit program. At present, no Tribes administer the section 402 or 404 programs, although some are exploring the possibility. For additional information regarding State and tribal programs, *see* the Technical Support Document.

2. Regulatory History

In May 1973, the EPA issued its first set of regulations to implement the new NPDES permit program established in the 1972 CWA amendments. Those regulations defined the phrase ''navigable waters'' as:

- All navigable waters of the United States;
- Tributaries of navigable waters of the United States;
- Interstate waters;
- Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
- Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
- Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

38 FR 13528, 13529 (May 22, 1973) (codified at 40 CFR 125.1 (1973)).

[4] Members of Congress were aware when they drafted the 1972 CWA amendments that different types of the Nation's waters would be subject to different degrees of federal control. For instance, in House Debate regarding a proposed and ultimately failed amendment to prohibit the discharge of pollutants to ground waters in addition to navigable waters, Representative Don H. Clausen stated, ''Mr. Chairman, in the early deliberations within the committee which resulted in the introduction of H.R. 11896, a provision for ground waters . . . . was thoroughly reviewed and it was determined by the committee that there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters. I refer the gentleman to the objectives of this act as stated in section 101(a). The objective of this act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. I call your attention to the fact that this does not say the Nation's 'navigable waters,' 'interstate waters,' or 'intrastate waters.' It just says 'waters.' This includes ground waters.'' 118 Cong. Rec. at 10,667 (daily ed. March 28, 1972).

[5] Three states (Massachusetts, New Hampshire, and New Mexico) do not currently administer any part of the CWA section 402 program.

In 1974, the Corps issued its first set of regulations defining ''waters of the United States'' for the purpose of implementing section 404 of the CWA, as well as sections 9, 10, 11, 13, and 14 of the RHA, that reaffirmed the Corps' view that its dredged and fill jurisdiction under section 404 was the same as its traditional jurisdiction under the RHA. *See* 39 FR 12115, 12119 (Apr. 3, 1974) (codified at 33 CFR 209.12033). Specifically, the Corps defined ''the waters of the United States'' as waters that ''are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.'' 39 FR 12119.

Environmental organizations challenged the Corps' 1974 regulation in the District Court for the District of Columbia based on the concern that the Corps' definition of ''navigable waters'' did not include tributaries or coastal marshes above the mean high tide mark or wetlands above the ordinary high water mark. The District Court held that the term ''navigable waters'' is not limited to the traditional tests of navigability and ordered the Corps to revoke its definition and publish a new one ''clearly recognizing the full regulatory mandate of the Water Act.'' *Natural Resources Defense Council, Inc.* v. *Callaway,* 392 F. Supp. 685 (D.D.C. 1975).

In response to this decision, the Corps issued interim regulations in 1975 that defined the term ''navigable waters'' to include periodically inundated coastal wetlands contiguous with or adjacent to navigable waters, periodically inundated freshwater wetlands contiguous with or adjacent to navigable waters, and, like EPA's 1973 regulations, certain intrastate waters based on non-transportation impacts on interstate commerce. The Corps revised the definition in 1977 to encompass traditional navigable waters, tributaries to navigable waters, interstate waters, adjacent wetlands to those categories of waters, and ''[a]ll other waters'' the ''degradation or destruction of which could affect interstate commerce.'' 42 FR 37122, 37144 (July 19, 1977).

The EPA and the Corps through the years have maintained separate regulations defining the statutory term ''waters of the United States,'' but the text of the regulations has been virtually identical starting in 1986.[6] In 1986, for example, the Corps consolidated and recodified its regulations to align with clarifications EPA had previously promulgated. *See* 51 FR 41206 (Nov. 13, 1986). While the Corps stated in 1986 that the recodified regulation neither reduced nor expanded jurisdiction, its previous exclusion for ditches was moved from the regulatory text to the final rule preamble. *Id.* at 41216–17. And the Corps added to the preamble what later became known as the ''Migratory Bird Rule,'' which claimed jurisdiction over any water which is or may be used by birds protected by migratory bird treaties or may be used as habitat for birds flying across state lines, and waters which may be used by endangered species, and waters used to irrigate crops sold in interstate commerce. *Id.* at 41217.

The 1986 regulatory text identified the following as ''waters of the United States'':

- All traditional navigable waters,[7] interstate waters, and the territorial seas;
- All impoundments of jurisdictional waters;
- All ''other waters'' such as lakes, ponds, and sloughs the ''use, degradation or destruction of which could affect interstate or foreign commerce'';
- Tributaries of traditional navigable waters, interstate waters, the territorial seas, impoundments, or ''other waters''; and,
- Wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments, tributaries, or ''other waters'' (other than waters that are themselves wetlands).

33 CFR 328.3(a)(1)–(7) (1987). The 1986 regulation also excluded ''waste treatment systems'' from the definition of ''waters of the United States.'' *Id.* at 328.3(a)(7), (b) (1987).

On August 25, 1993, the agencies amended the regulatory definition of ''waters of the United States'' to categorically exclude ''prior converted croplands.'' 58 FR 45008, 45031 (Aug. 25, 1993) (''1993 Rule'') (codified at 33 CFR 328.3(b)(2) (1994)). The stated purpose of the amendment was to promote ''consistency among various federal programs affecting wetlands,'' in particular the Food Security Act (FSA) programs implemented by the U.S. Department of Agriculture (USDA) and the CWA programs implemented by the agencies. 58 FR 45033. The agencies did not include a definition of ''prior converted cropland'' in the text of the Code of Federal Regulations but noted in the preamble to the 1993 Rule that the term was defined at that time by the USDA National Food Security Act Manual (NFSAM). The agencies at that time also declined to establish clear rules for when the prior converted cropland designation is no longer applicable. In the preamble to the 1993 Rule, the agencies stated that ''[t]he Corps and EPA will use the [Natural Resources Conservation Service's] provisions on 'abandonment,' thereby ensuring that PC cropland that is abandoned within the meaning of those provisions and which exhibit[s] wetlands characteristics will be considered wetlands subject to Section 404 regulation.'' *Id.* at 45034. The agencies summarized these abandonment provisions by explaining that prior converted cropland which now meets wetland criteria is considered to be abandoned unless: At least once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production. *Id.*

Congress amended the wetland conservation (''Swampbuster'') provisions of the FSA in 1996 to state that USDA certifications of eligibility for program benefits (*e.g.,* determinations by Natural Resources Conservation Service (NRCS) that particular areas constitute prior converted cropland) ''shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary [of Agriculture].'' Public Law 104–127, 322(a)(4); 16 U.S.C. 3822(a)(4). Thus, for purposes of farm program eligibility, the 1996 amendments designate as prior converted cropland those areas that may not have qualified for the CWA exclusion under the abandonment principles from the 1993 preamble, so long as such areas remain in agricultural use. The agencies did not update their prior converted cropland regulations for purposes of the CWA following the 1996 Swampbuster amendments, as those regulations neither defined prior converted cropland nor specified when a valid prior converted cropland determination might cease to be valid. However, in 2005, the Army and USDA issued a joint Memorandum to the Field (the 2005 Memorandum) in an effort to again align the CWA 404 program with

[6] For convenience, the agencies generally refer to the Corps' regulations throughout this notice. EPA codification of the definition of ''waters of the United States'' is found at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 401.11, and Appendix E to Part 300.

[7] ''Traditional navigable waters'' (or waters that are traditionally understood as navigable) refers to 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 subject to the ebb and flow of the tide.

Swampbuster.[8] The 2005 Memorandum provided that a ''certified [prior converted] determination made by [USDA] remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the [prior converted] determination is no longer applicable and a new wetland determination is required for CWA purposes.''

The 2005 Memorandum did not clearly address the abandonment principle that the agencies had been implementing since the 1993 rulemaking. The change in use policy was also never promulgated as a rule and was declared unlawful by one district court because it effectively modified the 1993 preamble language without any formal rulemaking process. *New Hope Power Co.* v. *U.S. Army Corps of Eng'rs,* 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010).

3. Supreme Court Decisions

From the earliest rulemaking efforts following adoption of the 1972 CWA amendments, to the agencies most recent attempt to define ''waters of the United States'' in 2015, the sparse statutory definition has spurred substantial litigation testing the meaning of the phrase. Hundreds of cases and dozens of courts have attempted to discern the intent of Congress when crafting the phrase. *See, e.g., Rapanos* v. *United States,* 547 U.S. 715, 739 (2006) (Scalia, J., plurality) (briefly summarizing case history). The federal courts have established different analytical frameworks to interpret the phrase, and the applicable test may differ from state to state. *See, e.g.,* Memorandum from Dick Pedersen, President of the Environmental Council of the States (ECOS) of September 11, 2014 Concerning Waters of the United States under the Act at 2–23 (2014) (hereinafter, the ''ECOS Memorandum''), *available at http://acoel.org/file.axd?file=2014%2f9%2fWaters+of+the+U+S+Final+9_11_14.pdf* (summarizing case history following *Rapanos*).

As part of this complex litigation history, three key U.S. Supreme Court decisions have interpreted the term ''waters of the United States'' and its implementing regulations and serve as guideposts for the agencies' interpretation of the phrase ''waters of the United States.'' In 1985, for example, the Supreme Court deferred to the Corps' assertion of jurisdiction over wetlands actually abutting a traditional navigable water in Michigan, stating that adjacent wetlands may be regulated as ''waters of the United States'' because they are ''inseparably bound up'' with navigable waters and ''in the majority of cases'' have ''significant effects on water quality and the aquatic ecosystem'' in those waters. *United States* v. *Riverside Bayview Homes,* 474 U.S. 121, 131–35 & n.9 (1985). The Court recognized that ''[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins . . . . . Where on this continuum to find the limit of 'waters' is far from obvious.'' *Id.* at 132. The Court acknowledged the ''inherent difficulties of defining precise bounds to regulable waters,'' and deferred to the agencies' interpretation that the close ecological relationship between adjacent wetlands and traditional navigable waters provided a legal justification for treating wetlands as waters. *Id.* at 134. The Court also ''conclude[d] that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.'' *Id.* at 135.

The Supreme Court again addressed the definition of ''waters of the United States'' in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (*SWANCC*). In *SWANCC,* the Court relied on the statute to reject a claim of federal jurisdiction over nonnavigable, isolated, intrastate ponds that lack a sufficient connection to traditional navigable waters, noting that the term ''navigable'' must be given meaning within the context and application of the statute. *Id.* The Court held that interpreting the statute to extend to nonnavigable, isolated, intrastate ponds that lack a sufficient connection to traditional navigable waters would invoke the outer limits of Congress' power under the Commerce Clause. *Id.* at 172. Where an administrative interpretation of a statute presses against the outer limits of Congress' constitutional authority, the Court explained, it expects a clear statement from Congress that it intended that result, and even more so when the broad interpretation authorizes federal encroachment upon a traditional state power. *Id.* The CWA contains no such clear statement. *Id.* at 174.

In January 2003, EPA and the Corps issued joint guidance interpreting the Supreme Court decision in *SWANCC.*[9] The guidance indicated that *SWANCC* focused on nonnavigable, isolated, intrastate waters, and called for field staff to coordinate with their respective Corps or EPA Headquarters on jurisdictional determinations which asserted jurisdiction over such waters. The agencies at that time focused the application of *SWANCC* to its facts, and applied the decision as restricting the exercise of federal jurisdiction based on the Migratory Bird Rule.

The Court most recently interpreted the term ''waters of the United States'' in *Rapanos* v. *United States,* 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands located near man-made ditches that were ultimately connected to traditional navigable waters. 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.

A four-Justice plurality interpreted the term ''waters of the United States'' to ''include[ ] only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,' '' *Rapanos,* 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)), and ''wetlands with a continuous surface connection'' to a relatively permanent water. *Id.* at 742. The plurality explained that ''[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview,*'' and thus do not have the ''necessary connection'' to covered waters that triggers CWA jurisdiction. *Id.* at 742. The plurality also noted that its reference to ''relatively permanent'' waters did ''not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,'' or ''*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months . . . .'' *Id.* at 732 n.5 (emphasis in original).

In a concurring opinion, Justice Kennedy took a different approach, concluding that ''to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or

[8] Memorandum to the Field on Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act, February 25, 2005, *available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2508.*

[9] *See* Legal Memoranda Regarding *Solid Waste Agency of Northern Cook County (SWANCC)* v. *United States* (Jan. 15, 2003), *available at https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf.*

were navigable in fact or that could reasonably be so made.'' *Id.* at 759 (citing *SWANCC,* 531 U.S. at 167, 172). He stated that adjacent wetlands possess the requisite significant nexus if the wetlands ''either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' '' *Id.* at 780.

Following *Rapanos,* on June 7, 2007, the agencies issued joint guidance entitled, ''Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States* and *Carabell* v. *United States,*'' to address the waters at issue in that decision but did not change the codified definition. The guidance indicated that the agencies would assert jurisdiction over traditional navigable waters and their adjacent wetlands, relatively permanent nonnavigable tributaries of traditional navigable waters and wetlands that abut them, nonnavigable tributaries that are not relatively permanent if they have a significant nexus with a traditional navigable water, and wetlands adjacent to nonnavigable tributaries that are not relatively permanent if they have a significant nexus with a traditional navigable water. The guidance was reissued on December 2, 2008, with minor changes (hereinafter, the ''*Rapanos* Guidance'').[10] After issuance of the *Rapanos* Guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies, and others asked the agencies to replace the guidance with a regulation that would provide clarity and certainty regarding the scope of the waters federally regulated under the CWA.

Since *Rapanos,* litigation has continued to confuse the regulatory landscape. *See, e.g.,* the ECOS Memorandum at 2–23. The Supreme Court also has twice weighed in on topics related to the agencies' implementation of their authorities under the CWA to help clarify federal authority in this area. In each case, members of the Court noted the longstanding confusion regarding the scope of federal jurisdiction under the CWA and the importance of providing clear guidance to the regulated community. In 2012, for example, the Supreme Court unanimously rejected EPA's long-standing position that compliance orders issued under the CWA to force property owners to restore wetlands are not judicially reviewable as final agency actions. *See Sackett* v. *EPA,* 132 S. Ct. 1367, 1374 (2012). In a concurring opinion, Justice Alito referred to the jurisdictional reach of the CWA as ''notoriously unclear'' and noted that the Court's decision provided only ''a modest measure of relief.'' *Id.* at 1375 (''For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase'' waters of the United States.).

In 2016, the Supreme Court in a unanimous opinion rejected the Corps' longstanding position that jurisdictional determinations issued by the Corps were not judicially reviewable as final agency actions. Writing for the Court, the Chief Justice recognized that it ''is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does.'' *U.S. Army Corps of Engineers* v. *Hawkes,* 136 S. Ct. 1807, 1812 (2016). Given those important consequences, the Court held that jurisdictional determinations are subject to immediate judicial review when made. Justice Kennedy authored a concurring opinion, ''not to qualify what the Court says but to point out, that based on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern.'' *Id.* at 1816 (referring to the ''ominous reach'' of the Act). On remand, the lower court found that the Corps' assertion of jurisdiction over a peat farm more than 90 miles from the nearest traditional navigable water based on the ''significant nexus'' test described in the agencies' *Rapanos* Guidance was ''arbitrary and capricious.'' *Hawkes Co.* v. *United States Army Corps of Eng'rs,* No. 13–107 ADM/TNL, 2017 U.S. Dist. LEXIS 10680 at *33 (D. Minn. Jan. 24, 2017).

4. The 2015 Rule

On June 29, 2015, the agencies issued a final rule amending various portions of the Code of Federal Regulations that set forth a new definition of ''waters of the United States.'' 80 FR 37054 (June 29, 2015). The 2015 Rule revised the definition of ''waters of the United States'' by grouping waters and features in three categories: (1) Waters that are jurisdictional by rule; (2) waters that will be found jurisdictional only upon a case-specific showing of a significant nexus with a primary water; [11] and (3) waters and aquatic features that are expressly excluded from jurisdiction. *Id.* at 37057. The 2015 Rule did not modify the regulatory text from the 1986 regulation for traditional navigable waters, interstate waters, the territorial seas, or impoundments of jurisdictional waters. *Id.* at 37058.

As in the 1986 regulation and its predecessors, the 2015 Rule identified tributaries as jurisdictional. Unlike the 1986 regulation, the 2015 Rule defined ''tributary'' as a water that ''contributes flow, either directly or through another water,'' to a traditional navigable water, interstate water, or the territorial seas, and that has the ''physical indicators of a bed and banks and an ordinary high water mark.'' *Id.* at 37104, 37105–6. The 2015 Rule also defined ''waters of the United States'' to include ''wetlands, ponds, lakes, oxbows, impoundments, and similar waters'' that are ''adjacent to'' a primary water, impoundment, or tributary. *Id.* at 37104. The term ''adjacent'' continued to be defined as in the 1986 regulation to mean ''bordering, contiguous, or neighboring.'' *Id.* at 37105. The 2015 Rule, however, promulgated a new definition for ''neighboring,'' interpreting that term to encompass all waters located within 100 feet of the ordinary high water mark of a category (1) through (5) ''jurisdictional by rule'' water; all waters located within the 100-year floodplain of a category (1) through (5) ''jurisdictional by rule'' water and not more than 1,500 feet from the ordinary high water mark of such water; all waters located within 1,500 feet of the high tide line of a primary water; and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. *Id.* at 37105. Under the 2015 Rule, the entire water is considered neighboring if any portion of it lies within one of these zones. *See id.*

In addition to the six categories of ''jurisdictional by rule'' waters, the 2015 Rule identifies two other categories of waters that are subject to a case-specific analysis to determine if they have a ''significant nexus'' to a primary water. *Id.* at 37104–5. The first category of these waters consists of five specific types of waters in specific regions of the country considered similarly situated: Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. *Id.* at 37105. The second category consists of all waters located within the 100-year floodplain of any primary water and all waters located

[10] *See* U.S. EPA and U.S. Army Corps of Engineers. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States & Carabell v. United States* at 1 (Dec. 2, 2008) (''*Rapanos* Guidance''), *available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.*

[11] In this notice, a ''primary'' water is a category (1) through (3) ''jurisdictional by rule'' water according to the 2015 Rule.

within 4,000 feet of the high tide line or ordinary high water mark of any category (1) through (5) ''jurisdictional by rule'' water. *Id.*

The 2015 Rule also changed the implementation of ''significant nexus'' previously adopted by the agencies in the *Rapanos* Guidance. The 2015 Rule defines ''significant nexus'' to mean a water, including wetlands, that either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a primary water. 80 FR 37106. ''For an effect to be significant, it must be more than speculative or insubstantial.'' *Id.* The term ''in the region'' means ''the watershed that drains to the nearest'' primary water, and waters are ''similarly situated'' when they function alike and are sufficiently close to function together in affecting downstream primary waters. *Id.* This definition is different than the test articulated by the agencies in their *Rapanos* Guidance. That guidance interpreted ''similarly situated'' to include all wetlands (not waters) adjacent to the same tributary, a less expansive treatment of similarly situated waters than in the 2015 Rule.

Under the 2015 Rule, to determine whether a water, alone or in combination with similarly situated waters, has a significant nexus, one must look at nine functions, including sediment trapping, runoff storage, provision of life cycle dependent aquatic habitat, and others. It is sufficient for determining whether a water has a significant nexus if any single function performed by the water, alone or together with similarly situated waters in the watershed, contributes significantly to the chemical, physical, or biological integrity of the nearest primary water. *Id.* Taken together, the enumeration of the nine functions and the more expansive consideration of ''similarly situated'' in the 2015 Rule relative to the *Rapanos* Guidance could mean that the vast majority of water features in the United States not otherwise excluded from the 2015 Rule's definition of ''waters of the United States'' may come within the jurisdictional purview of the federal government.[12]

The agencies retained exclusions from the definition of ''waters of the United States'' for prior converted cropland and waste treatment systems. *Id.* In addition, the agencies codified several exclusions that reflected longstanding agency practice. *Id.* For instance, certain ditches and artificial, constructed lakes and ponds (including small ornamental waters created in dry land) are excluded from jurisdiction under the 2015 Rule, as are groundwater and a number of other specified features. *See* 80 FR 37109. The agencies also added specific exclusions for ''puddles'' and ''swimming pools'' in response to concerns raised by many stakeholders during the public comment period on the proposed 2015 Rule.

Following publication of the 2015 Rule, 31 States [13] and 53 non-state parties, including environmental groups and groups representing farming, recreational, forestry, and other interests, filed complaints and petitions for review in multiple federal district [14] and appellate [15] courts challenging the 2015 Rule. In those cases, the challengers alleged numerous procedural deficiencies in the development and promulgation of the 2015 Rule and significant substantive deficiencies in the 2015 Rule itself.

The day before the 2015 Rule's August 28, 2015 effective date, the U.S. District Court for the District of North Dakota preliminarily enjoined the 2015 Rule in the 13 States that challenged the rule in that court.[16] The district court found those States were ''likely to succeed'' on the merits of their challenge to the 2015 Rule because, among other reasons, ''it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule.'' *North Dakota* v. *EPA,* 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015). In particular, the court noted concern that the 2015 Rule's definition of tributary ''includes vast numbers of waters that are unlikely to have a nexus to navigable waters.'' *Id.* at 1056. Further, the court found that ''it appears likely that the EPA failed to comply with [Administrative Procedure Act (APA)] requirements when promulgating the Rule,'' suggesting that certain distance-based measures were not a logical outgrowth of the proposal to the 2015 Rule. *Id. at* 1058. No party sought an interlocutory appeal.

The numerous petitions for review filed in the courts of appeals were consolidated in the U.S. Court of Appeals for the Sixth Circuit. In that litigation, state and industry petitioners raised concerns about whether the 2015 Rule violated the Constitution and the CWA, and whether its promulgation violated the APA and other statutes. Environmental petitioners also challenged the 2015 Rule, claiming that the 2015 Rule was too narrow. On October 9, 2015, approximately six weeks after the 2015 Rule took effect in the 37 States, the District of Columbia, and U.S. Territories that were not subject to the preliminary injunction issued by the District of North Dakota, the Sixth Circuit stayed the 2015 Rule nationwide after finding, among other things, that State petitioners had demonstrated ''a substantial possibility of success on the merits of their claims.'' *In re EPA & Dep't of Def. Final Rule,* 803 F.3d 804 (6th Cir. 2015) (''*In re EPA*'').

On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the courts of appeals have original jurisdiction to review challenges to the 2015 Rule. *See Nat'l Ass'n of Mfrs.* v. *Dep't of Defense,* 137 S. Ct. 811 (2017). The Sixth Circuit granted petitioners' motion to hold in abeyance the briefing schedule in the litigation challenging the 2015 Rule pending a Supreme Court decision on the question of the court of appeals' jurisdiction. On January 22, 2018, the Supreme Court, in a unanimous opinion, held that the 2015 Rule is subject to direct review in the district courts. *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.,* 138 S. Ct. 617, 624 (Jan. 22, 2018). Throughout the pendency of the Supreme Court litigation (and for a short time thereafter), the Sixth Circuit's nationwide stay remained in effect. In response to the Supreme Court's decision, on February 28, 2018, the Sixth Circuit lifted the stay and dismissed the corresponding petitions for review. *See In re Dep't of Def. & EPA Final Rule,* 713 Fed. Appx. 489 (6th Cir. 2018).

[12] ''[T]he vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea.'' U.S. EPA and Department of the Army. Economic Analysis of the EPA-Army Clean Water Rule at 11 (May 20, 2015) (''2015 Rule Economic Analysis'') (Docket ID: EPA–HQ–OW–2011–0880–20866), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866.*

[13] Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico (Environment Department and State Engineer), North Carolina (Department of Environment and Natural Resources), North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming. Iowa joined the challenge later in the process, bringing the total to 32 States.

[14] U.S. District Courts for the Northern and Southern District of Georgia, District of Minnesota, District of North Dakota, Southern District of Ohio, Northern District of Oklahoma, Southern District of Texas, District of Arizona, Northern District of Florida, District of the District of Columbia, Western District of Washington, Northern District of California, and Northern District of West Virginia.

[15] U.S. Court of Appeals for the Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

[16] Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. The agencies note that Iowa is now also subject to the preliminary injunction issued by the District of North Dakota. *See* Order, *North Dakota* v. *EPA,* No. 3:15–cv–59 (D.N.D. Sept. 18, 2018).

Since the Supreme Court's jurisdictional ruling, district court litigation regarding the 2015 Rule has resumed. The 2015 Rule continues to be subject to a preliminary injunction issued by the District of North Dakota as to 14 States: Alaska, Arizona, Arkansas, Colorado, Idaho, Iowa, Missouri, Montana, Nebraska, Nevada, North Dakota, South Dakota, Wyoming, and New Mexico. The 2015 Rule also is subject to a preliminary injunction recently issued by the United States District Court for the Southern District of Georgia as to 11 more States: Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin. *See Georgia* v. *Pruitt,* No. 15–cv–79 (S.D. Ga.). When issuing the preliminary injunction, the Southern District of Georgia court held that the State plaintiffs had demonstrated ''a likelihood of success on their claims that the [2015] WOTUS Rule was promulgated in violation of the CWA and the APA.'' *Georgia* v. *Pruitt,* No. 15–cv–79, slip op. at 10 (S.D. Ga. June 8, 2018) (Order Granting Preliminary Injunction) (''*Georgia*''). In support of the preliminary injunction, the court stated that the 2015 Rule failed to meet the standard expounded in *SWANCC* and *Rapanos,* and that the rule was fatally defective because it ''allows the Agencies to regulate waters that do not bear any effect on the 'chemical, physical, and biological integrity' of any navigable-in-fact water.'' *Id.* at 12. The court also held that the plaintiffs ''have demonstrated a likelihood of success on both of their claims under the APA'' that the 2015 Rule ''is arbitrary and capricious'' and ''that the final rule is not a logical outgrowth of the proposed rule.'' *Id.* at 13.

In September 2018, the United States District Court for the Southern District of Texas issued a preliminary injunction against the 2015 Rule in response to motions filed by the States of Texas, Louisiana, and Mississippi and several business associations, finding that enjoining the rule would provide ''much needed governmental, administrative, and economic stability'' while the rule undergoes judicial review. *See Texas* v. *EPA,* No. 3:15–cv–162, 2018 U.S. Dist. LEXIS 160443, at *4 (S.D. Tex. Sept. 12, 2018). The court observed that if it did not temporarily enjoin the rule, ''it risks asking the states, their governmental subdivisions, and their citizens to expend valuable resources and time operationalizing a rule that may not survive judicial review.'' *Id.* At this time, the 2015 Rule is enjoined in 28 States and remains in effect following the lift of the Sixth Circuit stay in 22 States, the District of Columbia, and U.S. Territories.

C. Executive Order 13778, the ''Step One'' Notice of Proposed Rulemaking, and the Applicability Date Rule

On February 28, 2017, the President issued Executive Order 13778 entitled ''Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.'' Section 1 of the Executive Order states, ''[i]t is in the national interest to ensure the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.'' The Executive Order directs the EPA and the Army to review the 2015 Rule for consistency with the policy outlined in section 1 of the Order and to issue a proposed rule rescinding or revising the 2015 Rule as appropriate and consistent with law (Section 2). The Executive Order also directs the agencies to ''consider interpreting the term 'navigable waters' . . . in a manner consistent with'' Justice Scalia's plurality opinion in *Rapanos* v. *United States,* 547 U.S. 715 (2006) (Section 3).

On March 6, 2017, the agencies published a notice of intent to review the 2015 Rule and provide notice of a forthcoming proposed rulemaking consistent with the Executive Order. 82 FR 12532. Shortly thereafter, the agencies announced that they would implement the Executive Order in a two-step approach. On July 27, 2017, the agencies issued the ''Step One'' notice of proposed rulemaking (82 FR 34899) that proposed to repeal the 2015 Rule and recodify the regulatory text that governed prior to the promulgation of the 2015 Rule, consistent with Supreme Court decisions and informed by applicable guidance documents and agency practice, and which the agencies have been implementing since the judicial stay of the 2015 Rule. 82 FR 34899. The agencies invited comment on the notice of proposed rulemaking over a 62-day period. On July 12, 2018, the agencies published a supplemental notice of proposed rulemaking to clarify, supplement, and seek additional comment on the Step One notice of proposed rulemaking. 83 FR 32227.

On November 22, 2017, the agencies published and solicited public comment on a proposal to establish an applicability date for the 2015 Rule that would be two years from the date of any final rule (82 FR 55542). On February 6, 2018, the agencies issued a final rule, 83 FR 5200 (Feb. 6, 2018), adding an applicability date to the 2015 Rule. The applicability date was established as February 6, 2020. When adding an applicability date to the 2015 Rule, the agencies clarified that they will continue to implement nationwide the previous regulatory definition of ''waters of the United States,'' consistent with the practice and procedures the agencies implemented long before and immediately following the 2015 Rule pursuant to the preliminary injunction issued by the District of North Dakota and the nationwide stay issued by the Sixth Circuit. The agencies further explained that the final applicability date rule would ensure regulatory certainty and consistent implementation of the CWA nationwide while the agencies reconsider the 2015 Rule and pursue further rulemaking to develop a new definition of ''waters of the United States.''

The applicability date rule was challenged in a number of district courts by States and environmental organizations. On August 16, 2018, the U.S. District Court for the District of South Carolina granted summary judgment in favor of the plaintiffs and enjoined the Applicability Date Rule nationwide. *South Carolina Coastal Conservation League, et al.,* v. *Pruitt,* No. 2–18–cv–330–DCN, 2018 U.S. Dist. LEXIS 138595 (D.S.C. Aug. 16, 2018). In addition, on November 26, 2018, the U.S. District Court for the Western District of Washington vacated the Applicability Date Rule nationwide. *Puget Soundkeeper Alliance, et al.* v. *Andrew Wheeler, et al.,* No. C15–1342–JCC (W.D. Wash. November 26, 2018). As a result, the 2015 Rule is now in effect in 22 States.[17] The 2015 Rule continues to be subject to preliminary injunctions issued by the U.S. District Court for the District of North Dakota, the U.S. District Court for the Southern District of Georgia, and the U.S. District Court for the Southern District of Texas in a total of 28 States.

D. Summary of Stakeholder Outreach

Following the March 6, 2017 **Federal Register** notice announcing the agencies' intent to review and rescind or revise the 2015 Rule, the agencies initiated an effort to engage the public to hear perspectives as to how the agencies could define ''waters of the United States,'' including creating a new website to provide information on the

[17] To assist the public in keeping up with the changing regulatory landscape of federal jurisdiction under the CWA, the EPA has posted a map of current effective regulation by state online at *https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update.*

rulemaking. *See www.epa.gov/wotus-rule.* On April 19, 2017, the agencies held an initial Federalism consultation with State and local government officials as well as national organizations representing such officials. The agencies also convened several additional meetings with intergovernmental associations and their members to solicit input on the future rule. The EPA, with participation from the Army, initiated Tribal consultation on April 20, 2017, under the *EPA Policy on Consultation and Coordination with Indian Tribes.* See Section VI for further details on the agencies' Federalism and Tribal consultations.

In addition to engaging key State, tribal and local officials through Federalism and Tribal consultations, the agencies sought feedback on the definition of ''waters of the United States'' from a broad audience of stakeholders, including small entities (small businesses, small organizations and small government jurisdictions), through a series of outreach webinars that were held September 9, 2017, through November 21, 2017, as well as an in-person meeting for small entities on October 23, 2017. A summary of these public meetings is available in the docket (Docket Id. No. EPA–HQ–OW–2018–0149) for this proposed rule. The webinars were tailored to specific sectors, including agriculture (row crop, livestock, silviculture); conservation (hunters and anglers); small entities (small businesses, small organizations, small jurisdictions); construction and transportation; environment and public advocacy (including health and environmental justice); mining; energy and chemical industry; scientific organizations and academia; stormwater, wastewater management, and drinking water agencies; and the general public.

At the webinars and meetings, the agencies provided a presentation and sought input on specific issues, such as potential approaches to defining ''relatively permanent'' waters and ''continuous surface connections'' after the plurality opinion in *Rapanos.* The agencies did not provide participants with specific rule text or alternatives for consideration, but requested feedback on other considerations addressing specific geomorphological features, exclusions and exemptions, costs and benefits, and aquatic resource data that the agencies might consider in the technical analyses for a future rule. Participant comments and letters submitted represent a diverse range of interests, positions, suggestions, and recommendations provided to the agencies. Several themes emerged throughout this process, including support for ongoing State and tribal engagement; clarity and predictability of the regulation; specific suggestions for rule language; suggested exclusions and exemptions; regionalization of the definition; and, procedural concerns.

As part of this outreach effort, the agencies established a public recommendations docket (Docket ID No. EPA–HQ–OW–2017–0480) that opened August 28, 2017, and closed November 28, 2017. The agencies received over 6,300 recommendations that have been considered as the agencies developed this proposed rule, which are available on *Regulations.gov* at *https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0480.* Another source of recommendations as to how the agencies should define ''waters of the United States'' came from public comments on the agencies' proposed ''Step One'' rule (82 FR 34899) and the July 2018 supplemental notice of proposed rulemaking (83 FR 32227). These comments also have been considered.

In addition, on March 8 and 9, 2018, the agencies held an in-person meeting with a group of nine states (Arizona, Arkansas, Florida, Iowa, Maryland, Minnesota, Oregon, Pennsylvania, and Wyoming), and convened a subsequent in-person meeting on March 22, 2018, with representatives from all states at the spring meeting of the Environmental Council of the States. The agencies also held an in-person Tribal Co-Regulators Workshop on March 6 and 7, 2018. These meetings were intended to seek technical input on the proposed rule. A summary of these meetings is available in the docket (Docket Id. No. EPA–HQ–OW–2018–0149) for this proposed rule.

E. Overview of Legal Construct for the Proposed Rule

As the preceding summary of the statutory and regulatory history makes clear, the central term delineating the federal geographic scope of authority under the CWA—''waters of the United States''—has been the subject of debate and litigation for many years. The agencies today are proposing to establish a regulation that would define ''waters of the United States'' in simple, understandable, and implementable terms to reflect the ordinary meaning of the statutory term, as well as to adhere to Constitutional and statutory limitations, the policies of the CWA, and case law, and to meet the needs of regulatory agencies and the regulated community. This subsection summarizes the legal principles that inform the agencies' proposal, and the following section (Section III) describes how the agencies are applying those legal principles to support the proposed ''waters of the United States'' definition.

1. Statutory Framework

To determine the scope of executive branch authority under the CWA, the agencies begin with the text of the statute. The objective of the CWA, as established by Congress, is ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). As discussed in Section II.B above, in order to meet that objective, Congress declared two national water quality goals and established several key policies that direct the work of the agencies. Congress also envisioned a major role for the States in implementing the CWA, carefully balancing the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation.

The agencies have developed programs designed to ensure that the full statute is implemented as Congress intended. *See, e.g., Hibbs* v. *Winn,* 542 U.S. 88, 101 (2004) (''A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.''). This includes pursuing the overall ''objective'' of the CWA while implementing the specific ''policy'' directives from Congress to, among other things, ''recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'' and ''to plan the development and use . . . of land and water resources,'' 33 U.S.C. 1251(b). *See Webster's II, New Riverside University Dictionary* (1994) (defining ''policy'' as a ''plan or course of action, as of a government[,] designed to influence and determine decisions and actions;'' an ''objective'' is ''something worked toward or aspired to: Goal'').[18] The

[18] As Congress drafted the 1972 CWA amendments, the Senate bill set the ''no-discharge of pollutants into the navigable water by 1985'' provision as a policy whereas the House bill set it as a goal. The Act was ultimately passed with the ''no-discharge by 1985'' provision established as a goal. *See* 33 U.S.C 1251(a)(1). In House consideration of the Conference Report, Congressman Jones captured the policy versus goal distinction in Section 101(a)(1) as follows: ''The objective of this legislation is to restore and preserve for the future the integrity of our Nation's waters. The bill sets forth as a national goal the complete elimination of all discharges into our navigable waters by 1985, but . . . the conference report states clearly that achieving the 1985 target date is a goal, not a national policy. As such, it serves as a focal point for long-range planning, and

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agencies therefore recognize a distinction between the specific word choices of Congress, including the need to develop regulatory programs that aim to accomplish the goals of the Act while implementing the specific policy directives of Congress.[19] To do so, the agencies must determine what Congress had in mind when it defined ''navigable waters'' in 1972 as simply ''the waters of the United States.''

Congress' authority to regulate navigable waters derives from its power to regulate the ''channels of interstate commerce'' under the Commerce Clause. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824); *see also United States* v. *Lopez,* 514 U.S. 549, 558–59 (1995) (describing the ''channels of interstate commerce'' as one of three areas of congressional authority under the Commerce Clause). The Supreme Court explained in *SWANCC* that the term ''navigable'' indicates ''what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'' 531 U.S. 159, 172 (2001). The Court further explained that nothing in the legislative history of the Act provides any indication that ''Congress intended to exert anything more than its commerce power over navigation.'' *Id.* at 168 n.3. The Supreme Court, however, has recognized that Congress intended ''to exercise its powers under the Commerce clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'' *Riverside Bayview,* 474 U.S. at 133; *see also SWANCC,* 531 U.S. at 167.

The classical understanding of the term navigable was first articulated by the Supreme Court in *The Daniel Ball:*

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. (10 Wall.) 557, 563 (1871). Over the years, this traditional test has been expanded to include waters that had been used in the past for interstate commerce, *see Economy Light & Power Co.* v. *United States,* 256 U.S. 113, 123 (1921), and waters that are susceptible for use with reasonable improvement, *see United States* v. *Appalachian Elec. Power Co.,* 311 U.S. 377, 407–10 (1940).

By the time the 1972 CWA amendments were enacted, the Supreme Court had also made clear that Congress' authority over the channels of interstate commerce was not limited to regulation of the channels themselves, but could extend to non-navigable tributaries as necessary to protect the channels. *See Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 523 (1941) (''Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions.''). The Supreme Court had also clarified that Congress could regulate waterways that formed a part of a channel of interstate commerce, even if they are not themselves navigable or do not cross state boundaries. *See Utah* v. *United States,* 403 U.S. 9, 11 (1971).

These developments were discussed during the legislative process leading up to the passage of the 1972 CWA amendments, and certain members referred to the scope of the amendments as encompassing waterways that serve as ''links in the chain'' of interstate commerce as it flows through various channels of transportation, such as railroads and highways. *See, e.g.,* 118 Cong. Rec. 33756–57 (1972) (statement of Rep. Dingell); 118 Cong. Rec. 33699 (Oct. 4, 1972) (statement of Sen. Muskie).[20] Other references suggest that congressional committees at least contemplated applying the ''control requirements'' of the Act ''to the navigable waters, portions thereof, and their tributaries.'' S. Rep. No. 92–414, 92nd Cong. 1st Sess. at 77 (1971). And in 1977, when Congress authorized State assumption over the section 404 dredged or fill material permitting program, Congress limited the scope of assumable waters by requiring the Corps to retain permitting authority over Rivers and Harbors Act waters (as identified by the *Daniel Ball* test) plus wetlands adjacent to those waters, minus historic use only waters. *See* 33 U.S.C. 1344(g)(1).[21] This suggests that Congress had in mind a broader scope of waters subject to CWA jurisdiction than waters traditionally understood as navigable. *See SWANCC,* 531 U.S. at 171; *Riverside Bayview,* 474 U.S. at 138 n.11.

Thus, Congress intended to assert federal authority over more than just waters traditionally understood as navigable, and Congress rooted that authority in ''its commerce power over navigation.'' *SWANCC,* 531 U.S. at 168 n.3. However, there must necessarily be a limit to that authority and to what water is subject to federal jurisdiction. How the agencies should exercise that authority has been the subject of dispute for decades, but the Supreme Court on three occasions has analyzed the issue and provided some instructional guidance.

2. Supreme Court Precedent

a. Adjacent Wetlands

In *Riverside Bayview,* the Supreme Court considered the Corps' assertion of jurisdiction over ''low-lying, marshy land'' immediately abutting a water traditionally understood as navigable on the grounds that it was an ''adjacent wetland'' within the meaning of the Corps' then existing regulations. 474 U.S. at 124. The Court addressed the question of whether non-navigable wetlands may be regulated as ''waters of the United States'' on the basis that they are ''adjacent to'' navigable-in-fact waters and ''inseparably bound up with'' them because of their ''significant effects on water quality and the aquatic ecosystem.'' *Id.* at 131–135 & n.9.

In determining whether to give deference to the Corps' assertion of jurisdiction over adjacent wetlands, the Court acknowledged the difficulty in determining where the limits of federal jurisdiction end, noting that the line is somewhere between open water and dry land:

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for research and development in water pollution control technology . . . . While it is our hope that we can succeed in eliminating all discharge into our waters by 1985, without unreasonable impact on the national life, we recognized in this report that too many imponderables exist, some still beyond our horizons, to prescribe this goal today as a legal requirement.'' 118 Cong. Rec. H. 33749 (daily ed. October 4, 1972).

[19] *See, e.g., Nat'l Fed'n of Indep. Bus.* v. *Sebelius,* 567 U.S. 519, 544, (2012) (''Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally''); *Russello* v. *United States,* 464 U.S. 16, 23 (1983) (''[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'').

[20] The agencies recognize that individual member statements are not a substitute for full congressional intent, but they do help provide context for issues that were discussed during the legislative debates. For a detailed discussion of the legislative history of the 1972 CWA amendments, *see, e.g.,* Albrecht & Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act,* 32 ELR 11042 (Sept. 2002).

[21] For a detailed discussion of the legislative history supporting the enactment of CWA section 404(g), see *Final Report of the Assumable Waters Subcommittee* (May 2017), App. F., *available at https://www.epa.gov/sites/production/files/2017-05/documents/awsubnaceptpresent5-final.pdf.*

In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of ''waters'' is far from obvious.

Id. at 132 (emphasis added). Within this statement, the Supreme Court identifies a basic principle for adjacent wetlands: The limits of jurisdiction lie within the ''continuum'' or ''transition'' ''between open waters and dry land.'' Observing that Congress intended the CWA ''to regulate at least some waters that would not be deemed 'navigable,' '' the Court therefore held that it is ''a permissible interpretation of the Act'' to conclude that ''a wetland that actually abuts on a navigable waterway'' falls within the ''definition of 'waters of the United States.' '' *Id.* at 133, 135. Thus, a wetland that abuts a navigable water traditionally understood as navigable is subject to CWA permitting because it is ''inseparably bound up with the 'waters' of the United States.'' *Id.* at 134. ''This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water.'' *Id.* The Court also noted that the agencies can establish categories of jurisdiction for adjacent wetlands. *See id.* at 135 n.9.

The Supreme Court in *Riverside Bayview* declined to decide whether wetlands that are not adjacent to navigable waters could also be regulated by the agencies. *See id.* at 124 n.2 and 131 n.8. In *SWANCC* a few years later, however, the Supreme Court analyzed a similar question but in the context of an abandoned sand and gravel pit located some distance from a traditional navigable water, with excavation trenches that ponded—some only seasonally—and served as habitat for migratory birds. 531 U.S. at 162–64. The Supreme Court rejected the government's stated rationale for asserting jurisdiction over such ''nonnavigable, isolated, intrastate waters'' as outside the scope of CWA jurisdiction. *Id.* at 171–72. In doing so, the Supreme Court noted that *Riverside Bayview* upheld ''jurisdiction over wetlands that actually abutted on a navigable waterway'' because the wetlands were ''inseparably bound up with the 'waters' of the United States.'' *Id.* at 167.[22] As summarized by the *SWANCC* majority:

> It was the significant nexus between the wetlands and ''navigable waters'' that informed our reading of the CWA in *Riverside Bayview Homes.* Indeed, we did not ''express any opinion'' on the ''question of authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . . In order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.

Id. at 167–68 (internal citations omitted).

The Court also rejected the argument that the use of the abandoned ponds by migratory birds fell within the power of Congress to regulate activities that in the aggregate have a substantial effect on interstate commerce, or that the CWA regulated the use of the ponds as a municipal landfill because such use was commercial in nature. Such arguments, the Court noted, raised ''significant constitutional questions.'' *Id.* at 173. ''Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.'' *Id.* 172–73 (''Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority''). This is particularly true ''where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.'' *Id.* at 173; *see also Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234, 242 (1985) (''If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute,' ''); *Gregory* v. *Ashcroft,* 501 U.S. 452, 460–61 (1991) (''the plain statement rule . . . acknowledg[es] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.''). ''Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose [in the CWA] to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'' *Id.* at 174 (quoting 33 U.S.C. 1251(b)). The Court found no clear statement from Congress that it had intended to permit federal encroachment on traditional State power, and construed the CWA to avoid the significant constitutional questions related to the scope of Federal authority authorized therein. *Id.*

Historically, the Federal government has interpreted and applied the *SWANCC* decision narrowly, focusing on the specific holding in the case as rejecting federal jurisdiction over the isolated ponds and mudflats at issue in that case based on their use by migratory birds. By contrast, members of the regulated community, certain states and other interested stakeholders have argued that the case stands for a broader proposition based on key federalism and separation of powers principles. They argue that the case should be read as restricting federal jurisdiction over all ''nonnavigable, isolated, intrastate waters'' and argue for a broader interpretation and application of the rationale articulated in the decision.[23] As the agencies revisit the definition of ''waters of the United States'' in this rulemaking, the agencies solicit comment on the proper reading of *SWANCC.* In addition, the agencies solicit comment on whether to revoke their 2003 guidance on the subject should the agencies finalize this proposal because existence of the final rule may mean that guidance on *SWANCC* may no be longer needed.

Several years after *SWANCC,* the Supreme Court considered the concept of adjacency in consolidated cases arising out of the Sixth Circuit. *See Rapanos* v. *United States,* 547 U.S. 715 (2006). In one case, the Corps had determined that wetlands on three separate sites were subject to CWA jurisdiction because they were adjacent to ditches or man-made drains that eventually connected to traditional navigable waters several miles away through other ditches, drains, creeks, and/or rivers. *Id.* at 719, 729. In another case, the Corps had asserted jurisdiction over a wetland separated from a man-made drainage ditch by a four-foot-wide man-made berm. *Id.* at 730. The ditch emptied into another ditch, which then connected to a creek, and eventually connected to Lake St. Clair approximately a mile from the parcel at issue. The berm was largely or entirely

[22] For additional context, at oral argument during *Riverside Bayview,* the government attorney characterized the wetland at issue as ''in fact an adjacent wetland, adjacent—by adjacent, I mean it is immediately next to, abuts, adjoins, borders, whatever other adjective you might want to use, navigable waters of the United States.'' Official Tr. at 5–6, *quoted in* Edgar B. Washburn, *Current Status of the 404 Regulatory Programs,* ALI Wetlands L. & Reg. (May/June 2001).

[23] *See, e.g.,* American Farm Bureau Federation et al. to Hon. Andrew Wheeler and Hon. R.D. James. August 13, 2018. Docket ID: EPA–HQ–OW–2017–0203–15275), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-15275.*

impermeable, but may have permitted occasional overflow from the wetland to the ditch. *Id.* The Court, in a fractured opinion, vacated and remanded the Sixth Circuit's decision upholding the Corps' asserted jurisdiction over the four wetlands at issue, with Justice Scalia writing for the plurality and Justice Kennedy concurring in the judgment but on alternate grounds. *Id.* at 757 (plurality), 787 (Kennedy, J., concurring).

The plurality determined that CWA jurisdiction only extended to adjacent ''wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands.'' *Id.* at 742. The plurality then concluded that ''establishing . . . wetlands . . . covered by the Act requires two findings: First that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins.'' *Id.* (alteration in original).

In reaching the adjacency component of the two-part analysis, the plurality interpreted the *Riverside Bayview* decision, and subsequent *SWANCC* decision characterizing *Riverside Bayview,* as authorizing jurisdiction over wetlands that physically abutted traditional navigable waters. *Id.* at 740–42. The plurality focused on the ''inherent ambiguity'' described in *Riverside Bayview* in determining where on the continuum between open waters and dry land the scope of federal jurisdiction should end. *Id.* at 740. It was ''the inherent difficulties of defining precise bounds to regulable waters,'' *id.* at 741 n.10, according to the plurality, that prompted the Court in *Riverside Bayview* to defer to the Corps' inclusion of adjacent wetlands as ''waters'' subject to CWA jurisdiction based on proximity. *Id.* at 741 (''When we characterized the holding of *Riverside Bayview* in *SWANCC,* we referred to the close connection between waters and the wetlands they gradually blend into: 'It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes.*' ''); *see also Riverside Bayview,* 474 U.S. 134, quoting 42 FR 37128 (July 19, 1977) (''For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.''). The plurality also noted that ''*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview* . . . provided an *independent* basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.' *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction.'' *Id.* at 741–42 (original emphasis).

Justice Kennedy disagreed with the plurality's determination that adjacency requires a ''continuous surface connection'' to covered waters. *Id.* at 772. In reading the phrase ''continuous surface connection'' to mean a continuous ''surface-water connection,'' *id.* at 776, and interpreting the plurality's standard to include a ''surface-water-connection requirement,'' *id.* at 774, Justice Kennedy stated that ''when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters—even though such navigable waters were traditionally subject to federal authority,'' *id.* at 776, despite the fact that the *Riverside Bayview* Court ''deemed it irrelevant whether 'the moisture creating the wetlands . . . find[s] its source in the adjacent bodies of water.'' *Id.* at 772 (internal citations omitted).

The plurality did not directly address the precise distinction raised by Justice Kennedy, but did note in response that the ''*Riverside Bayview* opinion required'' a ''continuous *physical* connection,'' *id.* at 751 n.13 (emphasis added), and focused on evaluating adjacency between a ''water'' and a wetland ''in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview.*'' *Id.* at 757. The plurality also noted that its standard includes a ''physical-connection requirement'' between wetlands and covered waters. *Id.* at 751 n.13. In other words, the plurality appeared to be more focused on the abutting nature rather than the source of water creating the wetlands at issue in *Riverside Bayview* to describe the legal constructs applicable to adjacent wetlands, *see id.* at 747; *see also Webster's II, New Riverside University Dictionary* (1994) (defining ''abut'' to mean ''to border on'' or ''to touch at one end or side of something''), and indeed agreed with Justice Kennedy and the *Riverside Bayview* Court that ''[a]s long as the wetland is 'adjacent' to covered waters . . . its creation *vel non* by inundation is irrelevant.'' *Id.* at 751 n.13.[24]

Because wetlands with a physically remote hydrologic connection do not raise the same boundary-drawing problem presented by actually abutting wetlands, the plurality determined that the ''inherent ambiguity in defining where water ends and abutting ('adjacent') wetlands begin'' upon which *Riverside Bayview* rests does not apply to such features. *Id.* at 742 (''Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview,* and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*[.]''). The plurality supported this position by referring to the Court's treatment of certain isolated waters in *SWANCC* as non-jurisdictional. *Id.* 741–42 (''We held that 'nonnavigable, isolated, intrastate waters—which, unlike the wetlands at issue in *Riverside Bayview,* did not 'actually abu[t] on a navigable waterway,'—were not included as 'waters of the United States.' ''). The plurality found ''no support for the inclusion of physically unconnected wetlands as covered 'waters' '' based on *Riverside Bayview's* treatment of the Corps' definition of adjacent. *Id.* at 747; *see also id.* at 746 (''the Corps' definition of 'adjacent' . . . has been extended beyond reason.'').

Although ultimately concurring in judgment, Justice Kennedy focused on the ''significant nexus'' between adjacent wetlands and traditional navigable waters as the basis for determining whether a wetland is a water subject to CWA jurisdiction. He quotes the *SWANCC* decision, which explains, ''[i]t was the significant nexus between wetlands and navigable waters . . . that informed our reading of the [Act] in *Riverside Bayview Homes.*'' 531 U.S. at 167.

Justice Kennedy then notes that: ''Because such a nexus [in that case] was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps' action.'' 547 U.S. at 767. Justice Kennedy notes that the wetlands at issue in *Riverside Bayview* were ''adjacent to [a] navigable-in-fact waterway[ ]'' while the ''ponds and

[24] The agencies' *Rapanos* Guidance recognizes that the plurality's ''continuous surface connection'' does not refer to a continuous surface *water* connection. *See, e.g., Rapanos* Guidance at n.28 (''A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary.'')

mudflats'' considered in *SWANCC* ''were isolated in the sense of being unconnected to other waters covered by the Act.'' *Id.* at 765–66. ''Taken together, these cases establish that in some instances, as exemplified by *Riverside Bayview,* the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC,* there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.'' *Id.* at 767.

According to Justice Kennedy, whereas the isolated ponds and mudflats in *SWANCC* lacked a ''significant nexus'' to navigable waters, it is the ''conclusive standard for jurisdiction'' based on ''a reasonable inference of ecological interconnection'' between adjacent wetlands and navigable-in-fact waters that allows for their categorical inclusion as ''waters of the United States.'' *Id.* at 780 (''[T]he assertion of jurisdiction for those wetlands [adjacent to navigable-in-fact waters] is sustainable under the act by showing adjacency alone.''). Justice Kennedy surmised that it may be that the same rationale ''without any inquiry beyond adjacency . . . could apply equally to wetlands adjacent to certain major tributaries,'' noting that the Corps could establish by regulation categories of tributaries based on volume of flow, proximity to navigable waters, or other factors that ''are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.'' *Id.* at 780–81. However, ''[t]he Corps' existing standard for tributaries'' provided Justice Kennedy ''no such assurance'' to infer the categorical existence of a requisite nexus between waters traditionally understood as navigable and wetlands adjacent to nonnavigable tributaries. *Id.* at 781. That is because

> the breadth of the [tributary] standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases, wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC.*

Id. at 781–82.

To avoid this outcome, Justice Kennedy stated that, absent development of a more specific regulation and categorical inclusion of wetlands adjacent to ''certain major'' or even ''minor'' tributaries as was established in *Riverside Bayview, id.* at 780–81, the Corps ''must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute.'' *Id.* at 782. Justice Kennedy stated that adjacent ''wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' '' *Id.* at 780. ''Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.'' *Id.* at 782.

In establishing this significant nexus test, Justice Kennedy relied, in part, on the overall objective of the CWA to ''restore and maintain the chemical, physical and biological integrity of the Nation's waters.'' *Id.* at 779 (quoting 33 U.S.C. 1251(a)). However, Justice Kennedy also acknowledged that ''environmental concerns provide no reason to disregard limits in the statutory text.'' *Id.* at 778. With respect to wetlands adjacent to nonnavigable tributaries, Justice Kennedy therefore determined that ''mere adjacency . . . is insufficient. A more specific inquiry, based on the significant-nexus standard, is . . . necessary.'' *Id.* at 786. By not requiring adjacent wetlands to possess a significant nexus with navigable waters, Justice Kennedy noted that under the Corps' interpretation, federal regulation would be permitted ''whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters. The deference owed the Corps' interpretation of the statute does not extend so far.'' *Id* at 778–79.

Since the *Rapanos* decision, the Federal government has adopted a broad interpretation of Justice Kennedy's concurring opinion, arguing that his ''significant nexus'' test provides an independent basis for establishing jurisdiction over certain waters of the United States. And rather than limiting the application of Justice Kennedy's opinion to the specific facts and wetlands at issue in that case, the agencies have applied the rationale more broadly to include, for example, the application of the significant nexus test to determining jurisdiction over tributaries, not just wetlands. Many courts have agreed with this position and rely exclusively on Justice Kennedy's significant nexus test, or have held that jurisdiction can be established under either the plurality or concurring opinions. The agencies note that their historically broad interpretation and application of Justice Kennedy's opinion stands in contrast to their more narrow reading and application of the majority opinion in *SWANCC,* where the agencies have historically limited the decision's application to isolated ponds and mudflats used by migratory birds. The agencies therefore invite comment on their reliance on Justice Kennedy's opinion, particularly as compared to their treatment of the *SWANCC* decision. The agencies also solicit comment on whether they should revoke their 2008 *Rapanos* Guidance should the agencies finalize this proposal because existence of the final rule may mean that guidance on *Rapanos* may no longer be needed.

In summary, although the standards that the plurality and Justice Kennedy established are not identical, and each standard excludes some waters that the other standard does not, the standards contain substantial similarities. The plurality and Justice Kennedy agree in principle that the determination must be made using a basic two-step approach that considers: (1) The connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters. The plurality and Justice Kennedy also agree that the connection between the wetland and the tributary must be close. The plurality refers to that connection as a ''continuous surface connection'' or ''continuous physical connection,'' as demonstrated in *Riverside Bayview. Id.* at 742, 751 n.13. Justice Kennedy recognizes that ''the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act.'' *Id.* at 767. The second part of their common analytical framework is addressed in the next section.

b. Tributaries

The definition of tributary was not addressed in either *Riverside Bayview* or

SWANCC. And while the focus of *Rapanos* was on whether the Corps could regulate wetlands far removed from navigable-in-fact waters, the plurality and concurring opinions do provide some guidance as to the potential regulatory status of tributaries to navigable-in-fact waters.

The plurality and Justice Kennedy both recognize the jurisdictional scope of the CWA is not restricted to traditional navigable waters. *Rapanos,* 547 U.S. at 731 (Scalia, J., plurality) (''the Act's term 'navigable waters' includes something more than traditional navigable waters''); *id.* at 767 (Kennedy, J., concurring) (''Congress intended to regulate at least some waters that are not navigable in the traditional sense.''). Both also agree that federal authority under the Act is not without limit. *See id.* at 731–32 (plurality) (''the waters of the United States . . . cannot bear the expansive meaning that the Corps would give it''); *id.* at 778–79 (Kennedy, J., concurring) (''The deference owed to the Corps' interpretation of the statute does not extend'' to ''wetlands'' which ''lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters.'').

With respect to tributaries specifically, both the plurality and Justice Kennedy focus in part on a tributary's contribution of flow to and connection with traditional navigable waters. The plurality would include as ''waters of the United States'' ''only relatively permanent, standing or flowing bodies of water'' and would define such ''waters'' as including streams, rivers, oceans, lakes and other bodies of waters that form geographical features, noting that all such ''terms connote continuously present, fixed bodies of water . . . .'' *Id.* at 732–33, 739. The plurality would also require relatively permanent waters to be connected to traditional navigable waters in order to be jurisdictional. *See id.* at 742 (describing a '' 'wate[r] of the United States''' as ''*i.e.,* a relatively permanent body of water *connected to* traditional interstate navigable waters'') (emphasis added). The plurality would exclude ephemeral flows and related features, stating ''[n]one of these terms encompasses transitory puddles or ephemeral flows of water.'' *Id.* at 733; *see also id.* at 734 (''In applying the definition to 'ephemeral streams,' . . . the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction.''). Justice Kennedy would likely exclude some streams considered jurisdictional under the plurality's test, but he may include some that would be excluded by the plurality. *See id.* at 769 (noting that under the plurality's test, ''[t]he merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not'').

Both the plurality and Justice Kennedy would include some seasonal or intermittent streams as ''waters of the United States.'' *Id.* at 733 & n.5, 769. The plurality noted, for example, that its reference to ''relatively permanent'' waters did ''not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,'' or ''*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months . . . .'' *Id.* at 732 n.5 (emphasis in original). Neither the plurality nor Justice Kennedy, however, defined with precision where to draw the line. The plurality provides that ''navigable waters'' must have ''at a bare minimum, the ordinary presence of water,'' *id.* at 734, and Justice Kennedy notes that the Corps can identify by regulation categories of tributaries based on volume of flow, proximity to navigable waters, or other factors that ''are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.'' *Id.* at 780–81.

Both the plurality and Justice Kennedy also agreed that the Corps' existing treatment of tributaries raised significant jurisdictional concerns. For example, the plurality was concerned about the Corps' broad interpretation of tributaries themselves. *See id.* at 738 (plurality) (''Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.''). And Justice Kennedy objected to the categorical assertion of jurisdiction over wetlands adjacent to the Corps' existing standard for tributaries ''which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it'' *Id.* at 781 (Kennedy, J. concurring), *see also id.* at 781–82 (''[I]n many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC.*''). Thus, while the plurality and Justice Kennedy viewed the question of federal CWA jurisdiction differently, there are sufficient commonalities between these opinions to help instruct the agencies on where to draw the line between Federal and State waters.

3. Principles and Considerations

As discussed in the previous section, a few important principles emerge that can serve as the basis for the agencies' proposed regulatory definitions. As a threshold matter, the power conferred on the agencies under the CWA to regulate the ''waters of the United States'' is grounded in Congress' commerce power over navigation. The agencies can choose to regulate beyond waters more traditionally understood as navigable, including some tributaries to those traditional navigable waters, but must provide a reasonable basis grounded in the language and structure of the Act for determining the extent of jurisdiction. The agencies can also choose to regulate wetlands adjacent to the traditional navigable waters and some tributaries, if the wetlands are closely connected to the tributaries, such as in the transitional zone between open waters and dry land. The Supreme Court's opinion in *SWANCC,* however, calls into question the agencies' authority to regulate nonnavigable, isolated, intrastate waters that lack a sufficient connection to traditional navigable waters, and suggests that the agencies should avoid regulatory interpretations of the CWA that raise constitutional questions regarding the scope of their statutory authority. Finally, the agencies can regulate certain waters by category, which could improve regulatory predictability and certainty and ease administrative burden while still effectuating the purposes of the Act.

In developing a clear and predictable regulatory framework to support this proposed rule, the agencies also recognize and respect the primary responsibilities and rights of States and Tribes to regulate their land and water resources. *See* 33 U.S.C. 1251(b), 1370. The oft-quoted objective of the CWA to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' *id.* at 1251(a), must be implemented in a manner consistent with Congress' policy directives to the agencies. The Supreme Court long ago recognized the distinction between federal waters traditionally understood as navigable and waters ''subject to the control of the States.'' *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 564–65 (1870).

Over a century later, the Supreme Court in *SWANCC* reaffirmed the State's ''traditional and primary power over land and water use.'' 531 U.S. at 174; *accord Rapanos,* 547 U.S. at 738 (Scalia, J., plurality opinion).

Ensuring that States retain authority over their land and water resources pursuant to section 101(b) and section 510 helps carry out the overall objective of the CWA and ensures that the agencies are giving full effect and consideration to the entire structure and function of the Act. *See, e.g., id.* at 755–56 (Scalia, J., plurality opinion) (''[C]lean water is not the *only* purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions. 33 U.S.C. 1251(b).'') (original emphasis). That includes the dozens of non-regulatory grant, research, nonpoint source, groundwater, and watershed planning programs that were intended by Congress to assist the States in controlling pollution in the nation's waters, not just its navigable waters. These non-regulatory sections of the CWA reveal Congress' intent to restore and maintain the integrity of the nation's waters using federal assistance to support State and local partnerships to control pollution of in the nation's waters in addition to a federal regulatory prohibition on the discharge of pollutants into its navigable waters. Controlling all waters using the Act's federal regulatory mechanisms would significantly reduce the need for the more holistic planning provisions of the Act and the state partnerships they entail. Therefore, by recognizing the distinctions between the nation's waters and its navigable waters and between the overall objective and goals of the CWA and the specific policy directives from Congress, the agencies can fully implement the entire structure of the Act while respecting the specific word choices of Congress. *See, e.g., Nat'l Fed'n of Indep. Bus.* v. *Sebelius,* 567 U.S. at 544.

Further, the agencies are cognizant that the ''Clean Water Act imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit . . . .'' *U.S. Army Corps of Engineers* v. *Hawkes Co.,* 136 S. Ct. 1807, 1812 (2016); *see also Sackett* v. *EPA,* 132 S. Ct. 1367, 1374–75 (2012) (Alito, J., concurring) (''[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.''). As the Chief Justice observed in *Hawkes,* ''[i]t is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does.'' *Id.; see also id.* at 1816–17 (Kennedy, J., concurring) (''the reach and systemic consequences of the Clean Water Act remain a cause for concern'' and ''continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation''). Given the significant civil and criminal penalties associated with the CWA, the agencies seek to promote regulatory certainty while providing fair and predictable notice of the limits of federal jurisdiction. *See, e.g., Sessions* v. *Dimaya,* No. 15–1498, 2018 U.S. LEXIS 2497, at *39, 42–43 (Apr. 17, 2018) (Gorsuch, J., concurring in part and concurring in judgment) (characterizing fair notice as possibly the most fundamental of the protections provided by the Constitution's guarantee of due process, and stating that vague laws are an exercise of ''arbitrary power . . . leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up'').

Under this proposed rule, the agencies would not view the definition of ''waters of the United States'' as conclusively determining which of the nation's waters warrant environmental protection; rather, the agencies interpret the definition as drawing the boundary between those waters subject to federal requirements under the CWA and those waters that States and Tribes are free to manage under their independent authorities. The agencies are proposing this line-drawing based primarily on their interpretation of the language, structure, and legislative history of the statute and the policy choices of the executive branch agencies.

The agencies interpret their authority to include promulgation of a new regulatory definition of ''waters of the United States,'' consistent with the guidance in Executive Order 13778, so long as the new definition is authorized under the law and based on a reasoned explanation. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (''*Fox*''). A revised rulemaking based on a desired change in policy is well within an agency's discretion and ''[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal'' of its regulations and programs. *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox,* 556 U.S. at 514–15 (Rehnquist, J., concurring in part and dissenting in part)). In developing this proposed rule, the agencies have re-evaluated their legal authority and those policies that they deem most important in shaping the jurisdiction of the CWA: Prioritizing the text of the statute, adherence to constitutional limitations, including the autonomy of States, and providing clarity for the regulated community.

The agencies consider these proposed priorities to be reasonable, especially in light of the long history of controversy and confusion over this definition. In concurring with the *Rapanos* plurality decision, Chief Justice Roberts stated that ''[g]iven the broad, somewhat ambiguous, but clearly limiting terms Congress employed in the Clean Water Act, the [agencies] would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority'' under the CWA, and that the agencies' interpretations under the Act are ''afforded generous leeway by the courts.'' *Rapanos,* 547 U.S. at 758 (Roberts, C.J., concurring) (emphasis in original) (''Rather than refining its view of its authority in light of our decisions in *SWANCC,* . . . the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.''). In this proposed rule, as described in detail in Section III below, the agencies are proposing outer bounds for their authority under the Act that they consider objective and reasonable, and that are consistent with its text, structure, legislative history and applicable Supreme Court precedent. The agencies solicit comment on all aspects of the proposed definition and whether it would strike the proper balance between the regulatory authority of the Federal government and States, meets its obligation to provide fair notice to members of the regulated community, and adheres to the overall structure and function of the CWA by ensuring the protection of the nation's waters.

III. Proposed Definition of ''Waters of the United States''

Below is a summary of the key substantive provisions of this proposed rule. Each subsection describes what the agencies are proposing, why the agencies are proposing this approach, how the agencies might implement the approach, and specific issues upon which the agencies are seeking comment. To assist the reader, the longer subsections have internal headings.

As a threshold matter, in this proposal the agencies would interpret the term ''the waters'' in the phrase ''the waters

of the United States'' to encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific connection to traditional navigable waters, as well as wetlands abutting or having a direct hydrologic surface connection to those waters. As the plurality decision in *Rapanos* notes, the term ''the waters'' is most commonly understood to refer to ''streams and bodies forming geographical features such as oceans, rivers, lakes,'' or ''the flowing or moving masses, as of waves or floods, making up such streams or bodies.'' 547 U.S. at 732 (citing *Webster's New International Dictionary* 2882 (2d ed. 1954)); *see also Riverside Bayview,* 474 U.S. at 131 (characterizing ''waters of the United States'' as ''rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.' ''); *see also* 118 Cong. Rec. 33699 (Oct. 4, 1972) (statement of Sen. Muskie) (referring to ''navigable waters'' as ''water bodies''). According to the *Rapanos* plurality, however, the ordinary meaning of the term ''waters'' does not include areas that are dry most of the year, and which may occasionally contain ''transitory puddles or ephemeral flows of water.'' *See Rapanos,* 547 U.S. at 733.

The agencies are also proposing a definition of ''waters of the United States'' to align with the intent of Congress to broadly interpret the term ''navigable waters'' beyond just commercially navigable-in-fact waters. *See, e.g.,* S. Conf. Rep. No. 92–1236, p. 144 (1972). As proposed, this definition recognizes Congress' intent ''to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term,'' *Riverside Bayview,* 474 U.S. at 133, but at the same time acknowledges ''[t]he grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.'' *SWANCC,* 531 U.S. at 173. The definition also recognizes the constitutional underpinnings of the CWA, which was Congress exercising ''its commerce power over navigation.'' *Id.* at 168 n.3.

This proposal is intended to establish categorical bright lines that provide clarity and predictability for regulators and the regulated community by defining ''waters of the United States'' to include the following: Traditional navigable waters, including the territorial seas; tributaries of such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters. The agencies propose to eliminate the case-by-case application of Justice Kennedy's significant nexus test, proposing instead the establishment of clear categories of jurisdictional waters that adhere to the basic principles articulated in the *Riverside Bayview, SWANCC,* and *Rapanos* decisions while respecting the overall structure and function of the CWA.

A. Traditional Navigable Waters and Territorial Seas

The proposed definition of ''waters of the United States'' would encompass traditional navigable waters, including the territorial seas. Since the passage of the CWA, the first paragraph of the agencies' definition of ''waters of the United States'' has included all waters that are currently used, or 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. *See, e.g.,* 33 CFR 328.3(a)(1). This paragraph of the 1986 and 2015 regulations encompasses waters that are often referred to as waters more traditionally understood as navigable or ''traditional navigable waters.'' The second paragraph of the 1986 and 2015 regulations lists the territorial seas as jurisdictional. *See id.* To streamline and simplify the definition of ''waters of the United States,'' the agencies propose to include both traditional navigable waters and the territorial seas as a single category of jurisdictional waters. The agencies can think of no instance in which a territorial sea would not also be considered traditionally navigable, and thus the broader term should suffice. The agencies are proposing no other changes to these historically regulated categories of waters.

The agencies note that the term ''territorial seas'' is defined in CWA section 502(8), 33 U.S.C. 1362(8), as ''the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.'' The territorial seas establish the seaward limit of ''waters of the United States.'' The agencies are not proposing to replicate this definition in this proposed rule, but request comment on whether adding the definition would improve regulatory clarity.

The agencies interpret traditional navigable waters as all waters that are currently defined in 33 CFR part 329, which implements sections 9 and 10 of the Rivers and Harbors Act, and by numerous decisions of the federal courts, as well as all other waters that are navigable-in-fact. The definition of navigable-in-fact originates with the Supreme Court's decision in *The Daniel Ball,* 77 U.S. 557 (1870). In that case, the Supreme Court stated:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

In subsequent decisions, the Supreme Court clarified that waters that are navigable-in-fact include waters beyond those capable of navigation by large vessels, *The Montello,* 87 U.S. 430, 441–42 (1874); as well as waters that are not continuously navigable or are not navigable in all seasons, *Economy Light and Power Co.* v. *U.S.,* 256 U.S. 113, 122 (1921); and waters that have never been used in commerce, so long as they are susceptible for use in commerce. *U.S.* v. *Utah,* 283 U.S. 64 (1931); *U.S.* v. *Appalachian Elec. Power Co.,* 311 U.S. 377 (1940). The proposed rule does not modify the text that supports the agencies' longstanding interpretation of ''traditional navigable waters.'' Nonetheless, the pre-proposal recommendations docket received several comments on how to interpret ''traditional navigable waters,'' including comments about what constitutes navigability for purposes of that term and what it means to be ''susceptible to use'' in commerce.

Several pre-proposal commenters, for example, identified confusion in recent years associated with the agencies' interpretation and field implementation of the tests for determining navigability. Those commenters point out that determinations made by the agencies using the *Rapanos* Guidance, and in particular Appendix D to that guidance, may have allowed for the regulation of waters that are not navigable-in-fact within the legal construct established for such waters by the courts. The agencies therefore solicit comment on and request specific examples of where that may be the case. As the agencies consider whether Appendix D is sufficiently clear regarding the regulation of these foundational waters, the agencies solicit comment on whether the existing guidance regarding the scope of traditional navigable waters should be updated to help improve clarity and predictability of the agencies' regulatory program. The agencies also solicit comment on whether the regulation of this category of waters has been or can be clarified

through existing, modified, or new exclusions to the term ''waters of the United States,'' or other regulatory changes.

B. Interstate Waters

1. What are the agencies proposing?

The 1986 regulations define ''waters of the United States'' to include interstate waters, including interstate wetlands. In this proposal, the agencies would remove interstate waters and interstate wetlands as a separate category of ''waters of the United States'' to more closely align the definition to the constitutional and statutory authorities reflected in the CWA and judicial interpretations of the term ''navigable waters,'' while balancing the statute's policy directives to preserve and protect the rights and responsibilities of the States.

2. Why are the agencies proposing this approach?

The agencies have evaluated their earlier legal and policy rationales supporting the inclusion of interstate waters as a separate category of ''waters of the United States'' and are proposing to eliminate the category in this rulemaking. The agencies are concerned that the regulation of interstate waters is a relic of the original Water Pollution Control Act (WPCA) of 1948 and lacks foundation in statutory text. The WPCA stated that the ''pollution of interstate waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters) which endangers the health or welfare of persons in a State other than that in which the discharge originates, is declared to be a public nuisance and subject to abatement as provided by the Act.'' WPCA of 1948, 2(d)(1), (4), 62 Stat. 1155, 1156–57. The statute defined ''interstate waters'' as all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. *Id.* at 10, 62 Stat. 1161.

In 1961, Congress amended the statute to substitute the term ''interstate or navigable waters'' for ''interstate waters.'' *See* Public Law 87–88, 75 Stat. 208 (1961). In 1965, Congress amended the statute to require states to develop water quality standards for all ''interstate waters'' within their borders. *See* Public Law 89–234, 79 Stat. 908 (1965). In 1972, Congress amended the statute again and selected the term ''navigable waters'' as the operative term for the major regulatory programs established by the 1972 amendments, dropping the definition of interstate waters from the statute. *See, e.g.,* 33 U.S.C. 1362(7) (defining ''navigable waters'' as ''waters of the United States''). In doing so, however, Congress allowed the continued enforcement of water quality standards for interstate waters developed by the States under the pre-1972 statutory program. *See* 33 U.S.C. 1313(a).

The EPA promulgated its first regulatory definition for the term ''waters of the United States'' in 1973. 38 FR 13528 (May 22, 1973). In that regulation, the EPA administratively determined that ''interstate waters'' should be a separate category of waters of the United States, distinct from the traditional navigable waters category, and the agencies have retained it as a separate category ever since, including in the 2015 Rule.

The agencies have historically viewed navigable and interstate waters as having distinct and separate meanings because Congress in 1961 identified both in the statute. The agencies have explained their continuing interpretation in part through the doctrine of congressional acquiescence, in that Congress was aware of the EPA's retention of interstate waters as a separate category when amending the CWA in 1977 (making no amendments to remove the agencies' regulatory inclusion of interstate waters), and therefore acquiesced to its inclusion as a separate category. The agencies have also historically relied on two Supreme Court cases (*Illinois* v. *Milwaukee,* 406 U.S. 91 (1972) and *City of Milwaukee* v. *Illinois,* 451 U.S. 304 (1981)), addressing interstate water pollution to further support their position. In the 1972 case, which was decided prior to the date of the 1972 CWA amendments, the Supreme Court referred to the two categories in the disjunctive, implying that the Court viewed the pre-1972 statutory program as encompassing two separate categories. *See Illinois,* 406 U.S. at 102 (''it is federal, not state, law that in the end controls pollution of *interstate or navigable waters*'') (emphasis added). Finally, the agencies historically have referred to section 303(c) of the CWA as further evidence that Congress intended interstate waters to be retained as an independent category of jurisdictional waters because that provision allowed the continuing enforcement of water quality standards for ''interstate waters'' developed following the 1965 amendments. A summary of the agencies' prior legal position with respect to interstate waters was included in a Technical Support Document prepared in support of the 2015 Rule (''2015 Rule TSD'').[25]

The agencies note that when Congress enacted the 1972 CWA amendments, it selected the term ''navigable waters'' to frame the scope of federal regulatory jurisdiction under the Act. To the extent interstate waters were viewed by Congress as a separate and distinct category, the agencies now consider a more natural interpretation of the 1972 amendments to be an express rejection of that category as Congress had before it both options within the scope of the statute it was modifying. Congress specifically did not carry that term forward as the operative phrase for federal jurisdiction. Under basic canons of statutory construction, the agencies begin with the presumption that Congress did so intentionally. *See, e.g., Stone* v. *INS,* 514 U.S. 386, 397 (1995) (''When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'').

Congressional acquiescence is a doctrine of limited application and was specifically rejected as a basis for expansive federal jurisdiction in *SWANCC* in the context of analyzing the Corps' 1977 regulations. *SWANCC,* 531 U.S. at 170–71 (''Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care.''). Thus, the agencies are concerned about continuing to rely on congressional acquiescence to their regulatory definitions, *see, e.g.,* 2015 Rule TSD at 219–220, following *SWANCC.*

The legislative history of the 1972 amendments, in fact, suggest that Congress may not have considered interstate waters and navigable waters to be two separate and distinct categories, and instead referred to terms in the pre-1972 statutory regime conjunctively as ''interstate navigable waters.'' S. Rep. No. 92–414, 92nd Cong. 1st Sess., at 2 (Oct. 28, 1971) (''Each State was required by the 1965 Act to develop standards for water quality within its boundaries. These standards were to be applied to all *interstate navigable waters* flowing through the State; intrastate waters were not included.'') (emphasis added); *id.* at 4 (''The setting of water quality standards for *interstate navigable waters* . . . . is the keystone of the present program for control of water pollution'') (emphasis added); *id.*

[25] U.S. EPA and U.S. Army Corps of Engineers. Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 2015) (Docket ID: EPA–HQ–OW–2011–0880–20869), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20869.*

(''The States have first responsibility for enforcement of their standards. When approved by the [EPA], however, the standards for *interstate navigable waters* become Federal-State standards.'') (emphasis added). In 1976, the Supreme Court shared the same view of the pre-1972 statutory scheme: ''Before it was amended in 1972, the Federal Water Pollution Control Act employed ambient water quality standards specifying acceptable levels of pollution in a State's *interstate navigable waters* as the primary mechanism in its program for the control of water pollution.'' *EPA* v. *California,* 426 U.S. 200, 202 (1976) (emphasis added). This history suggests at a minimum that the section 303(a) provision relating to existing water quality standards for ''interstate waters'' may be referring to ''interstate navigable waters,'' not interstate waters more broadly, at least with respect to continuing federal enforcement authority over the pre-existing standards.

Neither Supreme Court case historically relied on by the agencies, as discussed in the 2015 Rule TSD, addressed the specific question of whether interstate waters and navigable waters are separate and distinct categories of jurisdictional waters under the CWA. They instead addressed interstate water pollution generally, and the water at issue in those cases was Lake Michigan, an interstate navigable-in-fact water. The 1981 decision, however, did recognize that the 1972 amendments ''were viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation considered in that case. *Milwaukee,* 451 U.S. at 317 (citing legislative history of the 1972 CWA amendments). This would support the notion that prior iterations of the statute, referring to both interstate waters and navigable waters, were replaced with a completely new program in 1972, not that certain aspects of that program continued through congressional acquiescence of a later regulatory determination.

The agencies therefore propose to eliminate ''interstate waters'' as a separate category of ''waters of the United States.'' Nothing in the legislative history of the 1972 CWA amendments ''signifies that Congress intended to exert anything more than its commerce power over navigation.'' *SWANCC,* 531 U.S. at 168 n.3. By proposing to eliminate a separate category for interstate waters, the proposed rule adheres to the agencies' legal principles discussed in Section II by including within the definition of ''waters of the United States'' traditional navigable waters, the territorial seas, and waters subject to the ebb and flow of the tide; tributaries to such waters; certain ditches that operate more like traditional navigable waters or were excavated in tributaries or adjacent wetlands; certain lakes and ponds; impoundments of otherwise jurisdiction waters; and wetlands adjacent to jurisdictional waters. Because the agencies' authority flows from Congress' use of the term ''navigable waters'' in the CWA, the agencies lack authority to regulate waters untethered from that term. Therefore, those interstate waters that would satisfy the definitions in this proposed rule would be jurisdictional; interstate waters without any connection to traditional navigable waters would be more appropriately regulated by the States and Tribes under their sovereign authorities.

The agencies recognize that this proposal marks a shift away from prior agency positions. In doing so, however, the agencies anticipate that most waters that would be deemed jurisdictional under the existing regulatory definition from the 1980s would likely remain jurisdictional under this proposal as they would likely fall within the proposed traditional navigable waters category or one of the other proposed categories, such as tributaries or lakes and ponds. The agencies note that this proposal likely would reduce the number of interstate waters that would be jurisdictional under the 2015 Rule given that rule's broad interpretation of the term ''neighboring'' within its ''adjacent'' definition and its inclusion of ephemeral streams and related features meeting its ''tributary'' definition. The agencies, however, are not aware of any database that identifies the jurisdictional status of interstate waters based solely on the fact that they cross state lines or any other resource that would identify these waters and therefore lack the analytical ability to perform a comparative analysis with precision.

3. What are specific issues upon which the agencies are seeking comment?

The agencies welcome comment on this proposed change, including the rationale for and against having interstate waters as a separate jurisdictional category. Alternatively, the agencies seek comment on an approach that would retain interstate waters as a separate category, reflecting longstanding agency practice. In the event the agencies were to pursue that alternate approach, the agencies solicit comment on which waters should remain jurisdictional and on what basis, and whether the term ''interstate'' should be interpreted as crossing between States, between States and tribal lands, between States and/or tribal lands and foreign countries, or other formulations. Finally, if a commenter believes that the agencies have in the past asserted jurisdiction over waters based solely on the fact that such waters were interstate and otherwise not connected to a traditional navigable water, the agencies solicit examples of such jurisdictional determinations or other available data that may allow the agencies to further analyze the differences between the 1986 and 2015 rules and this proposed rule.

C. Impoundments

The agencies do not propose to make any changes to the impoundment category of ''waters of the United States'' as it existed in the 1986 regulations. Impoundments have historically been determined by the agencies to be jurisdictional because impounding a ''water of the United States'' generally does not change the water body's status as a ''water of the United States.'' *See, e.g., S. D. Warren Co.* v. *Maine Board of Environmental Protection,* 547 U.S. 370, 379 n.5 (2006) (''[N]or can we agree that one can denationalize national waters by exerting private control over them.''). Under this proposal, alteration of a ''water of the United States'' by impounding it would not change the water's jurisdictional status, consistent with longstanding agency practice, unless jurisdiction has been affirmatively relinquished.

Most impoundments do not cut off a connection between upstream tributaries and a downstream traditional navigable water or territorial sea. As a result, the agencies would consider tributaries upstream of an impoundment to be tributaries to downstream jurisdictional waters even where the impoundment might impede the flow of water. Impoundments therefore may serve as one of the waters through which tributaries flow to a traditional navigable water or territorial sea. However, where discharge of dredged or fill material into a ''water of the United States'' transforms a water body into upland through a section 404 permitting action, the water would no longer be jurisdictional, consistent with longstanding agency practice.

During the agencies' pre-proposal outreach, most commenters supported a policy under which impoundments of waters of the United States remain jurisdictional, while some commenters argued that impoundments that do not remain hydrologically connected to a traditional navigable water should not

be jurisdictional. The agencies welcome comment on whether impoundments are needed as a separate category of ''waters of the United States,'' or whether the other categories of waters in this proposed rule effectively incorporate the impoundment of other jurisdictional waters, such as the lakes and ponds category. The agencies also seek comment on whether there are existing jurisdictional impoundments that would not be found jurisdictional under an alternate approach that would remove impoundments as a separate category of ''waters of the United States.'' The agencies also welcome comment on whether certain categories of impoundments should not be jurisdictional, such as certain types of impoundments that release water downstream only very infrequently or impede flow downstream such that the flow is less than intermittent. An impounded wetland frequently becomes a pond, and the agencies solicit comment as to whether that pond should remain jurisdictional even if, for example, it does not meet the elements of the lakes and ponds category under paragraph (a)(4) in this proposed rule, such as contributing perennial or intermittent flow to an (a)(1) water. The agencies solicit comment on these and any other aspects of the proposed impoundment category.

D. Tributaries

1. What are the agencies proposing?

In this proposed rule, the agencies would retain tributaries as a category of jurisdictional waters subject to CWA jurisdiction. This proposed rule defines ''tributary'' to mean a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other jurisdictional waters, such as other tributaries, impoundments, and adjacent wetlands or through water features identified in paragraph (b) of this proposal so long as those water features convey perennial or intermittent flow downstream. Excluded waters and features in this proposal are not tributaries, but certain excluded waters and features may convey perennial or intermittent flow from a tributary to traditional navigable waters or the territorial seas. For example, if a tributary flows into an excluded ditch or a waste treatment system and those excluded features convey perennial or intermittent flow to a tributary downstream, the tributary remains a jurisdictional tributary upstream and downstream of the excluded feature. However, certain excluded waters and features are incapable of providing perennial or intermittent flow as defined in this proposal (*e.g.,* ephemeral features) and therefore break jurisdiction upstream of the excluded feature. Under the proposed definition, a tributary does not lose its status as a jurisdictional tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary would not modify its status as a jurisdictional tributary as long as it continues to satisfy the elements of the tributary definition.

Regardless of the name they are given locally (*e.g.,* creek, bayou, branch, brook, run, etc.), or their size (*e.g.,* discharge volume, width, depth, stream order, etc.), waters that meet the definition of ''tributary'' would be jurisdictional under this proposed rule. However, tributaries as defined in this proposal do not include surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos, and similar features. These features lack the required perennial or intermittent flow regimes to satisfy the tributary definition under this proposal and therefore would not be jurisdictional.

Though ''perennial,'' ''intermittent,'' and ''ephemeral'' are commonly used scientific terms, the agencies are proposing to provide definitions of these terms for purposes of CWA jurisdiction to ensure that the regulation is clear. The agencies propose to define the term ''perennial'' to mean surface water flowing continuously year-round during a typical year. The proposed definition of ''intermittent'' is surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation, but when the groundwater table is elevated, for example, or when snowpack melts. Continuous surface flow during certain times of the year may occur seasonally such as in the spring when evapotranspiration is low and the groundwater table is elevated. Under these conditions, the groundwater table intersects the channel bed and groundwater provides continuous baseflow for weeks or months at a time even when it is not raining or has not very recently rained. The term ''snowpack'' in this definition is proposed as ''layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).'' Melting snowpack can be the sole or primary source of perennial or intermittent flow in tributaries. The agencies recognize that perennial or intermittent flow in certain mountain streams, for example, may result primarily from melting snowpack, not groundwater contributions to the channel.

The phrase ''certain times of a typical year'' is intended to include extended periods of predictable, continuous, seasonal surface flow occurring in the same geographic feature year after year. The agencies are not proposing a specific duration (*e.g.,* the number days, weeks, or months) of surface flow that constitutes intermittent flow as the agencies believe the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions. ''Typical year'' is defined in the proposed rule to mean within the normal range of precipitation over a rolling thirty-year period for a particular geographic area. Under this proposed definition, a typical year would generally not include times of drought or extreme flooding. The term ''ephemeral'' in the proposal means surface water flowing or pooling only in direct response to precipitation, such as rain or snow fall. The agencies intend to distinguish flow resulting from snow fall from sustained flow resulting from melting snowpack in these definitions.

Under the proposed rule a tributary must contribute perennial or intermittent flow to a traditional navigable water or territorial sea in typical year. Perennial or intermittent flow would require some form of discrete and confined flow (as opposed to diffuse overland flow) forming geographic features such as rivers, streams, or similar naturally occurring surface water channels. A tributary may contribute perennial or intermittent flow to downstream traditional navigable waters through, for example, lakes, impoundments, adjacent wetlands, or other tributaries. Under the proposed rule, when a tributary flows through a wetland and into another tributary (sometimes called a ''run-of-stream'' wetland), the tributary would remain jurisdictional even though it may be difficult to identify channelized flow through the wetland. Similarly, such a wetland would be considered ''adjacent'' and thus jurisdictional under this proposal given the wetland abuts (*i.e.,* touches at a point in this case) the tributary. In the case of a perennial or intermittent stream which flows through ditches excluded from this proposed definition of ''waters of the United

States,'' the non-jurisdictional ditches would not sever jurisdiction under the proposed rule as long as the ditches convey perennial or intermittent flow to tributaries or other jurisdictional waters at the downstream end of the ditch. However, a perennial or intermittent stream that flows into a non-jurisdictional ephemeral feature would not meet the definition of ''tributary'' if the perennial or intermittent flow does not reach a traditional navigable water or territorial sea; the ephemeral feature would sever jurisdiction for such perennial and intermittent streams as it does not convey surface water year-round or continuously for extended periods of time to a traditional navigable water or territorial sea.

Under the proposed rule, tributaries could have certain natural breaks (such as debris piles, boulder fields, or subterranean rivers) or man-made breaks (such as bridges, culverts, pipes, or dams) and remain a tributary. A tributary does not lose its status as a tributary according to this proposal if it flows through a natural or man-made break so long as the break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. To implement the proposed tributary definition, the agencies would consider the upstream extent of a tributary to be the point at which the feature ceases to contribute perennial or intermittent flow to a traditional navigable water or territorial sea.

The alteration or relocation of a tributary would not modify its status under the proposed definition of tributary as long as it continues to satisfy the elements of the definition. The agencies' longstanding interpretation of the CWA is that tributaries that are modified waters are jurisdictional, and the agencies are not proposing to change this interpretation. If a tributary is channelized, its bed and/or banks are altered in some way, or it is re-routed or its flow regime is modified, then it would remain jurisdictional under the proposed rule as long as it continues to meet the definition of ''tributary.'' For example, streams that have been channelized with hardened banks or otherwise modified may still meet the definition of ''tributary'' under the proposal.

2. Why are the agencies proposing this approach?

The agencies' proposed definition of ''tributary'' reflects the authority granted by Congress to regulate navigable waters, the interconnected nature of the tributary system, as well as the ordinary meaning of the term ''waters,'' an adherence to constitutional and statutory authority regarding the role of the Federal government and limits on its authority to regulate the use of land and waters within State and tribal boundaries, and the agencies' goal to establish a clear and easily implementable definition. In the proposed definition of ''tributary,'' the agencies would set boundaries to the scope of the regulation to ensure it is consistent with the role of the Federal government under the Constitution and the CWA. As the Supreme Court recognizes, States traditionally exercise ''primary power over land and water use,'' *SWANCC,* 531 U.S. at 174. The Federal government should avoid pressing against the outer limits of its authority when doing so would infringe upon the traditional rights and responsibilities of States to manage their own waters. *See SWANCC,* 531 U.S. at 172–73 and *supra* Section III.A.

Limiting the scope of the proposed ''tributary'' definition to perennial or intermittent fixed waterbodies that contribute flow to traditional navigable waters or the territorial seas, including through other jurisdictional waters and through certain excluded waters and features, would also provide clear and predictable jurisdictional boundaries to guide the agencies and the regulated community. By proposing to define perennial and intermittent tributaries of traditional navigable waters as jurisdictional and ephemeral features as non-jurisdictional, the agencies seek to balance Congress' intent to interpret the term ''navigable waters'' broadly, *see, e.g.,* S. Conf. Rep. No. 92–1236, p. 144 (1972), with the notion that nothing in the legislative history of the Act ''signifies that Congress intended to exert anything more than its commerce power over navigation.'' *SWANCC,* 531 U.S. at 168 n.3. The agencies believe that limiting jurisdiction to perennial and intermittent streams most appropriately balances the Federal government's interest in regulation the nation's navigable waters while respecting State land use authority over features that are only episodically wet following precipitation events.

By including rivers and streams that contribute perennial or intermittent flow to traditional navigable waters or the territorial seas, and excluding ephemeral features, the agencies are proposing a definition of ''tributary'' that is consistent with the *Rapanos* plurality's position that '' 'the waters of the United States' include only relatively permanent, standing, or flowing bodies of waters'' . . . ''as opposed to ordinarily dry channels'' . . . ''or ephemeral flows of water.'' *Id.* at 732–33 *see also id.* at 736 n.7 (''[R]elatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition'' (original emphasis)). Perennial waters, by definition, are permanent. And while the plurality did note that ''waters of the United States'' do not include ''ordinarily dry channels through which water occasionally or intermittently flows,'' *id.* at 733, the plurality would ''not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.'' *Id.* at 732 n.5 (original emphasis); *compare id.* at 770 (Kennedy, J., concurring) (''an intermittent flow can constitute a stream . . . while it is flowing . . . [i]t follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams''). Intermittent waters may occur seasonally, for example, during times when groundwater tables are elevated or when snowpack runoff produces relatively permanent flow, returning on an annual basis in known, fixed geographic locations.

Pre-proposal commenters provided various definitions for perennial flow, including streams which flow continually or which flow for twelve months of the year other than times of extreme drought. Several commenters recommended that the agencies only include tributaries with perennial flow, suggesting that they would broadly protect water quality and provide a clear line regarding federal jurisdiction without being overly expansive. Some stakeholders recommended the agencies include waters that receive water from a spring or other surface source, such as melting snow. Others recommended including ephemeral features and washes in the definition of ''tributary'' and relying on physical features of a stream (*e.g.,* bed and banks and ordinary high water mark) regardless of flow. Many pre-proposal commenters recommended the agencies propose a bright line to distinguish between intermittent and ephemeral flow regimes. A few commenters suggested specific timeframes for the flow requirement to be a tributary, such as 185 days, with most recommending three continuous months of the year. Several States submitted comments during the Federalism consultations recommending a regionalized approach to flow regime, whereby the agencies could provide regional manuals with examples of jurisdictional flow regimes in various parts of the country or some other mechanism to recognize regional differences in waters. The agencies have

considered these comments and have crafted proposed regulatory definitions designed to address a broad array of interests, while adhering to the legal principles articulated in this notice and while providing a predictable, implementable regulatory framework.

By proposing to define ''tributary'' as rivers and streams that contribute perennial or intermittent flow to traditional navigable waters or the territorial seas, the agencies would establish that a mere hydrologic connection cannot provide the basis for CWA jurisdiction; the bodies of water must be ''geographical features'' (*i.e.,* rivers and streams) that are ''relatively permanent'' (*i.e.,* perennial or intermittent) and that contribute perennial or intermittent flow to a traditional navigable water. *Id.* at 732. This proposed requirement is informed by *Rapanos* wherein the plurality determined that the phrase ''the waters of the United States'' ''cannot bear the expansive meaning that the Corps would give it,'' *id.* at 732, and challenged the notion that ''even the most insubstantial hydrologic connection may be held to constitute a 'significant nexus.' '' *Id.* at 728. Similarly, Justice Kennedy noted, ''mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.'' *Id.* at 784–85. On the other hand, Justice Kennedy challenged the plurality's requirement that a channel contain ''continuous flow,'' asserting ''[t]he merest trickle, if continuous, would count as a 'water' subject to federal regulation'' under the plurality's test.'' *Id.* at 769. The proposed requirement that a tributary be connected to a traditional navigable water by perennial or intermittent flow also reflects the plurality's description of a '' 'wate[r] of the United States' '' as ''*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters.'' *Id.* at 742.

The agencies acknowledge the proposed tributary definition contains no flow volume requirement, but only a flow duration requirement of perennial or intermittent flow. The agencies believe establishing a specific flow volume requirement for all tributaries would be inappropriate given the wide spatial and temporal variability of flow volume in rivers and streams across the country. While the proposed definition may in certain instances assert jurisdiction over bodies of water contributing ''the merest trickle'' to a traditional navigable water, the agencies believe that regardless of flow volume, such bodies are '' 'waters' in the ordinary sense of containing a relatively permanent flow.'' *Id.* at 757. As described in the agencies' *Rapanos* Guidance, the agencies currently conduct a significant nexus analysis for certain types of waters referred to as ''non-relatively permanent waters,'' which includes ephemeral features and some intermittent streams. *See Rapanos* Guidance at 7 (''[R]elatively permanent' waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard[.]''). This proposed definition of ''tributary'' would replace existing procedures that may depend on case-specific ''significant nexus'' analyses of the relationship between a particular stream with downstream waters. The agencies are proposing to eliminate this case-specific ''significant nexus'' analysis by providing a clear definition of ''tributary'' that is easier to implement. Indeed, Justice Kennedy's ''significant nexus'' test for wetlands adjacent to nonnavigable tributaries was only needed ''absent more specific regulations,'' *Rapanos,* 547 U.S. at 782, because ''the breadth of [the Corps' existing tributary] standard'' . . . ''seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it'' and thus ''precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.'' *Id.* at 781. In light of the ''more specific [tributary] regulations'' proposed today, the agencies propose to eliminate the case-specific significant nexus review through categorical treatment of all tributaries, as defined by this proposal, as ''waters of the United States.'' In doing so, the agencies believe they avoid interpretation of the CWA that raise significant constitutional questions. *See Rapanos* 547 U.S. at 738 (plurality) (''Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.'').

The agencies recognize that this is a departure from prior positions of the Federal government. The agencies also recognize that some courts apply the significant nexus standard articulated in Justice Kennedy's opinion as the exclusive test of CWA jurisdiction over certain waters. But the agencies believe that this proposed definition incorporates the important aspects of Justice Kennedy's opinion, together with the plurality, to craft a clear and implementable definition that stays within our statutory and constitutional mandates. The agencies request comment on this interpretation, and on whether the agencies have previously overread Justice Kennedy's opinion to mandate the significant nexus test outside the actual holding of Justice Kennedy's opinion, which was limited to the wetlands at issue in that case.

The proposed definition of ''waters of the United States'' is a legal and policy decision informed by the statute, its legislative history, Supreme Court interpretations, and the agencies' respect for the traditional power of States to regulate their land and water resources. This proposed definition is also informed by the science. As part of the rulemaking effort leading up to the promulgation of the 2015 Rule, the EPA's Office of Research and Development developed a report entitled ''Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence'' (''Connectivity Report'').[26] The report reviews more than 1,200 peer-reviewed publications and summarizes the current scientific understanding about the connectivity and mechanisms by which streams and wetlands affect the physical, chemical, and biological integrity of downstream waters. Before the Connectivity Report was finalized, the EPA released a draft version of it in September 2013 (''Draft Connectivity Report'').[27] The Draft Connectivity Report was reviewed by the EPA's Science Advisory Board (''SAB''), a public advisory group tasked with providing scientific information and advice to EPA. In October 2014, the SAB completed its peer review (''SAB Review'') of the Draft Connectivity Report. While the SAB found that ''[t]he literature review provides strong

[26] U.S. EPA. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–14/475F, 2015.

[27] U.S. EPA. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft).* U.S. Environmental Protection Agency, Washington, DC, EPA/600/R11/098B, September 2013.

scientific support for the conclusion that ephemeral, intermittent, and perennial streams exert a strong influence on the character and functioning of downstream waters and that tributary streams are connected to downstream waters,'' at the same time the SAB stressed that ''the EPA should recognize that there is a gradient of connectivity.'' [28] The SAB recommended that ''the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and *consequences* of physical, chemical, and biological connections.'' [29]

To describe the ''connectivity gradient'' and the probability that impacts occurring along the gradient will be transmitted downstream, the SAB developed a figure as part of its review of the Draft Connectivity Report. *See* SAB Review fig. 3 at 54. The figure illustrates the connectivity gradient and potential consequences between perennial, intermittent, and ephemeral streams and downstream waters and depicts a decreased ''probability that changes . . . . will be transmitted to downstream waters'' at flow regimes less than perennial and intermittent. In other words, the SAB found perennial and intermittent streams have a greater probability to impact downstream waters compared to ephemeral streams. While the SAB stated that ''at sufficiently large spatial and temporal scales, all waters and wetlands are connected,'' it found that ''[m]ore important are the degree of connection (*e.g.,* frequency, magnitude, timing, duration) and the extent to which those connections affect the chemical, physical, and biological integrity of downstream waters.'' *Id.* at 17.

At the same time, the SAB recognized that ''[t]he Report is a science, not policy, document that was written to summarize the current understanding of connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans.'' *Id.* at 2. ''The SAB also recommended that the agencies clarify in the preamble to the final rule that 'significant nexus' is a legal term, not a scientific one.'' 80 FR 37065. And in issuing the 2015 Rule, the agencies stated, ''the science does not provide a precise point along the continuum at which waters provide only speculative or insubstantial functions to downstream waters.'' *Id.* at 37090. Thus, the agencies use the Connectivity Report to inform certain aspects of this proposed definition of ''waters of the United States,'' such as recognizing the ''connectivity gradient'' and potential consequences between perennial, intermittent, and ephemeral streams and downstream waters within a tributary system, but acknowledge that science cannot be used to draw the line between Federal and State waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA.

This proposed tributary definition identifies a category of perennial and intermittent rivers and streams that due to their relatively permanent flow regime and their contribution of flow to navigable waters should be federally regulated. Through this proposed definition of ''tributary,'' the agencies would also acknowledge the policy direction from Congress to ''recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan for the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .'' 33 U.S.C. 1251(b); *see also Rapanos,* 547 U.S. at 737 (Scalia, J., plurality). The proposed approach to defining ''tributary'' is also intended to limit federal jurisdiction over ephemeral flows and other ordinarily dry land features in order to ''preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land . . . resources.'' *See id.* at 738 (Scalia, J., plurality) (''Regulation of land use, as through the issuance of the development permits sought by petitioners in both [*Rapanos* and *Carabell*], is a quintessential state and local power.''). With the proposed definition, the agencies seek to avoid ''impairing or in any manner affecting any right or jurisdiction of the States with respect to waters (including boundary waters) of such States.'' 33 U.S.C. 1370. In addition, the agencies are drawing a line between intermittent and ephemeral flows for administrative efficiency as they balance the law, science, and stakeholder feedback. Therefore, ephemeral features, such as dry washes and arroyos, that lack the required perennial or intermittent flow regime necessary to satisfy the tributary definition under this proposed rule are excluded from the definition. However, an ephemeral feature may constitute a point source that discharges pollutants to a ''water of the United States.'' *See Rapanos,* 547 U.S. at 743–44 (Scalia, J., plurality). States and Tribes may also address ephemeral features as ''waters of the State'' or ''waters of the Tribe'' under their own laws to the extent they deem appropriate.

3. How might the agencies implement this approach?

The agencies and our co-regulators have significant experience identifying flow regime in perennial and intermittent waters and expect that landowners will have also sufficient knowledge to understand how water moves throughout their properties. Moreover, the technical consultants that support the permitting and development community will be familiar with the basic concept of perennial and intermittent flow regimes. The agencies, however, have identified several potential implementation methods and tools that could be used to identify and distinguish perennial and intermittent flow regimes from ephemeral flow regimes as defined in this proposal. In conjunction with a field visit, such methods could include remote and field-based tools, such as visual observations, photographs, data collection on flow, trapezoidal flumes and pressure transducers for measuring surface flow and comparing that to rainfall, StreamStats by the U.S. Geological Survey (USGS) (available at *https://streamstats.usgs.gov/ss/*), Natural Resources Conservation Service (NRCS) hydrologic tools and soil maps, desktop tools that provide for the hydrologic estimation of a discharge sufficient to generate intermittent or perennial flow, such as a regional regression analysis or hydrologic modeling, USGS topographic data, or modeling tools using drainage area, precipitation data, climate, topography, land use, vegetation cover, geology, and other publicly available information. There may be other methods which could be researched and developed by the agencies over time, including the identification of field indicators, such as vegetation and macroinvertebrates, which could be regionalized (for example, the Streamflow Duration Assessment Method for the Pacific Northwest, at *http://www.epa.gov/measurements/streamflow-duration-assessment-method-pacific-northwest,* which could be expanded to other regions).

During the agencies' Federalism consultation, a few States recommended the agencies identify a variety of methods which may be employed to identify flow regimes, and that such methods involve tools readily available to a typical landowner. Some other States recommended not using the

[28] Letter to Gina McCarthy. October 17, 2014. SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence. Page 3.

[29] *Id.* at 2 (emphasis added).

National Hydrography Dataset (NHD) because they commented that it has been shown to overestimate flow in certain areas. Some States recommended using local flow data collected and maps developed by government agencies, where available. Climatic conditions and precipitation data are important elements to consider when determining flow regime given the dependent relationship in many systems between surface flow and groundwater tables. For example, observing flow directly after a large rainfall may not be a good indicator of a stream's typical flow regime, while observing flow in a stream in the middle of summer in the arid West when no recent rainfall has occurred may be a good indication that it flows more than ephemerally. Often multiple data points and multiple sources of information could be used to determine flow regime.

The same tools discussed above can also be helpful in establishing the presence of a tributary. For example, where a USGS topographic map and/or NHD data display a ''blue line stream,'' there is an indication of a potential tributary. Combining this information with stream order can yield greater certainty. For example, higher order streams will generally be more likely to exhibit relatively permanent flow compared to lower order streams. This information will vary in validity in different parts of the country, so care would be taken to evaluate additional information prior to reasonably concluding a tributary is present. Supporting information, as well as field work, should also be used to conclude the presence of a tributary. Other reliable methods that can indicate existence of a tributary include stream gage data, elevation data, spillway height, historic water flow records, flood predictions, statistical evidence, and direct observation. Also, the agencies recognize that States may have specific, validated tools they employ to identify perennial or intermittent streams or flow regimes and are soliciting comment on those approaches which may be useful for application in this proposed rule. The agencies also solicit comment on other implementation tools available to determine the flow regime of a river or stream and its contribution of flow to a traditional navigable water.

To determine whether the year in question is a ''typical year,'' the agencies presently use observed rainfall amount and compare it to tables developed by the Corps using data from the National Oceanic and Atmospheric Administration (NOAA). The agencies consider a year to be ''typical'' when the observed rainfall from the previous three months falls within the 30th and 70th percentiles established by a 30-year rainfall average generated at NOAA weather stations. A typical year would generally not include times of drought or extreme floods. A rolling 30-year period would account for variability to provide a reliable indicator of the climate in a given geographic area without being confounded by a year or two of unusual climate data for the given area. The geographic area proposed to be used by the agencies would be on a watershed-scale basis to ensure specific climatic data are representative of the landscape in relation to the feature under consideration for meeting the tributary definition.

Other potential data sources for obtaining relevant information to determine typical year could include one or several of the following: the Web-based Water-Budget Interactive Modeling Program (WebWIMP) for approximate dates of wet and dry seasons for any terrestrial location based on average monthly precipitation and estimated evapotranspiration (*http://climate.geog.udel.edu/~wimp/*); WETS tables (or similar tools) which are provided by the NRCS National Water and Climate Center (*http://www.wcc.nrcs.usda.gov/climate/wetlands.html*) and are calculated from long-term (30-year) weather records gathered at National Weather Service; meteorological stations; or by examining trends in drought indices, such as the Palmer Drought Severity Index (PDSI) (Sprecher and Warne 2000), where time-series plots of PDSI values by month or year are available from the National Climatic Data Center (*http://www.ncdc.noaa.gov/oa/climate/onlineprod/drought/xmgr.html#ds*). The agencies are not proposing to codify specific tools or resources in the regulation to determine a ''typical year.''

Sources of information on ''snowpack'' can be found in the NOAA national snow analyses maps (*https://www.nohrsc.noaa.gov/nsa/*), Natural Resources Conservation Service sources (*https://www.wcc.nrcs.usda.gov/snow/*), or by using hydrographs of subject locations as a potential guide to alert the regulated public and regulators as to which regions of the country have to consider snowpack scenarios. In these regions, for example, a hydrograph could indicate a large increase in discharge volume due to the late spring/early summer thaws of melting snowpack. Such indications are a regular, predictable, seasonal occurrence of flow. The large water contribution source for those northern and mountainous geographic regions which do not have significant elevation changes but which do have a consistent, predictable snowfall that accumulates on the ground for extended periods of time would be covered in a proposed definition of ''snowpack.''

4. What are specific issues upon which the agencies are seeking comment?

While the public may comment on all aspects of the agencies' proposed rule, the agencies have identified several specific areas related to the proposed tributary definition for which they seek comment. As a threshold matter, the agencies solicit comment on their interpretation of the *Rapanos* opinions and whether the significant nexus standard, articulated by a single justice, must be a mandatory component of any future definition of ''waters of the United States.'' Or, may the agencies apply the principles and rationale of the plurality and concurring opinions to craft a new standard established by rule?

The agencies also solicit comment on whether the definition of ''tributary'' should be limited to perennial waters only. The agencies also request comment whether the definition of ''tributary'' as proposed should indicate that the flow originate from a particular source, such as a requirement for groundwater interface, snowpack, or lower stream orders that contribute flow. The agencies also solicit comment on how effluent-dependent streams (*e.g.,* streams that flow year-round based on wastewater treatment plant discharges) should be treated under the tributary definition. As proposed, effluent-dependent streams would be included in the definition of ''tributary'' as long as they contribute perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year.

The agencies also solicit comment on whether the tributary definition should include streams that contribute less than intermittent flow to a traditional navigable water or territorial sea in a typical year. Additionally, the agencies request comment on whether less than intermittent flow in a channel breaks jurisdiction of upstream perennial or intermittent flow and under what conditions that may happen. The agencies recognize that the proposed definition may present a challenge for certain landowners upstream of an ephemeral feature. For example, landowners may find it difficult to determine whether there is a jurisdictional break downstream of a feature on their property. The agencies therefore solicit comment on this issue.

The agencies also seek comment on the proposed treatment of natural and man-made breaks regarding the jurisdictional status of upstream waters, including whether these features can convey perennial or intermittent flow to downstream jurisdictional waters. The agencies also seek comment on the jurisdictional status of the breaks themselves.

The agencies are also soliciting comment on an alternate definition that would change the focus of the proposed definition from intermittent flow occurring during certain times of the year to ''seasonal flow.'' Under this alternative definition, a tributary would be a river, stream, or similar naturally occurring surface water channel that contributes flow at least seasonally to a traditional navigable water or territorial sea in a typical year. The alternate definition could add that ''seasonal flow is predictable, continuous surface flow that generally occurs at the same time in a typical year.'' The agencies welcome comments on the concept of a ''seasonal'' flow regime, what that term may include, and how it may be implemented, including tools to identify ''seasonal'' flow.

As an alternative to the proposed definition of ''intermittent,'' the agencies are soliciting comment on whether the term could instead mean ''water flowing continuously during certain times of a typical year as a result of melting snowpack or when the channel bed intersects the groundwater table.'' Although the identification of groundwater input is found in most definitions for intermittent flow,[30] the agencies note that identifying whether the channel bed intersects the groundwater table may be challenging to accomplish in the field, that gathering the relevant data could be time consuming, and could require new tools and training of field staff and the regulated public. Some options for identifying whether groundwater is providing a source of water to the tributary may involve the installation of monitoring wells or staff gauges to identify the presence of the water table and/or to estimate the base flow using a hydrograph. Identifying the appropriate depth of installation for a monitoring well can be challenging, especially in the case of intermittent streams that have seasonally fluctuating water tables. Installing these devices in certain substrates, such as rocky substrates, can also be challenging. There may be other methods which could be researched and developed by the agencies over time, including the identification of field indicators, which could be regionalized, as well as the development of modeling tools. However, both of these methods (field indicators and modeling tools) would only provide an indication of groundwater generated base flow and would not directly measure its presence. The agencies are soliciting comment on whether these or other methods may be most appropriately used to identify groundwater in the field.

The agencies are also soliciting comment on whether the definition of ''intermittent'' should contain the requirement of continuous flow for a specific duration, such as ''at least one month of the calendar year,'' instead of the phrase ''during certain times of a typical year.'' *See, e.g.,* 30 CFR 710.5 (definition of ''intermittent'' used in a U.S. Department of the Interior regulation). The agencies note that such an approach would provide for national consistency but may not offer a more regionalized implementation of intermittent tributaries as some States recommended (*i.e.,* intermittent would be viewed the same across the country, from the arid West to the Southeast). Some pre-proposal commenters recommended this approach to provide certainty for determining flow regime. The agencies are also soliciting comment on whether the seasonal continuous surface flow consideration (*e.g.,* typically three months) from the *Rapanos* Guidance could be used as a definitional flow regime in the regulation. *Rapanos* Guidance at 6. Several commenters recommended this approach be used to define tributaries. The seasonal ''typically three month'' approach is current practice, subject to case-by-case analysis, and is therefore familiar to agency staff and the regulated public, but like a one-month limitation, it may not provide for regional variation in the implementation of flow regime.

The agencies therefore seek comment as to whether the tributary definition should include specific flow characteristics (*e.g.,* timing, duration, frequency, or magnitude), and if so, what flow values or ranges of values (including supporting rationale) would satisfy the tributary definition and what methods, tools, or data could be used to determine such values. Certain flow requirements might include, for example, an average annual flow volume of five or more cubic feet per second in a typical year and/or that a river or stream flow continuously for a certain number of days (*e.g.,* 30, 60, or 90 days) in a typical year.

The agencies are also soliciting comment on whether the concepts of bed and banks and ordinary high water mark should be added to the definition of tributary, and if so, how. Several commenters recommended including these characteristics in the proposed definition of ''tributary,'' similar to the definition of tributary in the 2015 Rule, while others opposed the addition, stating that it would inappropriately result in regulation over certain waters that should not be jurisdictional under the CWA, such as ephemeral features.

The lateral jurisdictional limit of a tributary currently is established by a tributary's ordinary high water mark. The agencies solicit comment on the usefulness of incorporating into the tributary definition the following sentence: ''the lateral extent of a tributary is established by its ordinary high water mark.'' The agencies note that the Corps has existing regulations at 33 CFR 328.4 regarding the limits of jurisdiction for categories of ''waters of the United States.'' The agencies solicit comment on including these Corps regulations in the EPA's regulations or simply cross-referencing the Corps regulations in EPA's to apply to the definition of ''waters of the United States.''

The agencies are proposing to define a typical year as ''within the normal range of precipitation over a rolling 30-year period for a particular geographic area.'' The agencies solicit comment on whether it is necessary to define ''typical year'' given the agencies' understanding that it is a commonly understood term in field application. Alternatively, the agencies seek comment on whether they should provide additional details in the rule text about what constitutes a typical year or provide further guidance in a final preamble about appropriate tools for determining whether a year is ''typical.'' Finally, the agencies solicit comment on alternative approaches in the rule text to convey that times of drought or extreme floods would not be a factor when determining if a river or stream meets the conditions of the definition of ''tributary.''

The agencies are also soliciting comment on implementation methods and tools that could be used to identify and distinguish perennial and intermittent flow regimes from ephemeral flow regimes as defined in this proposal. As mentioned above, such tools could include field-based tools, such as visual observations, or remote desktop tools, such as aerial photos. The agencies are also soliciting comment on

[30] *See, e.g.,* 82 FR 2006 (Jan. 6, 2017) (Corps nationwide permit program); National Research Council. 2002. Riparian Areas: Functions and Strategies for Management. Washington, DC: The National Academies Press. *https://doi.org/10.17226/10327.*

the appropriate watershed scale for use in the geographic area as defined in a ''typical year'' of the proposed rule, for example, hydrologic units at the level of Hydrological Unit Code (HUC)–8s, HUC–10s, or HUC–12s could be used. A broad geographic area may include multiple micro-climates and may not be representative of precipitation conditions on the ground for the subject tributary. The agencies are soliciting comment on other approaches to determine the geographic area.

E. Ditches

1. What are the agencies proposing?

The agencies propose to add a new category to the definition of ''waters of the United States'' to provide regulatory clarity and predictability regarding the regulation of ditches and similar artificial features. The regulatory status of ditches has long created confusion for farmers, ranchers, irrigation districts, municipalities, water supply and stormwater management agencies, and the transportation sector, among others. In an effort to reduce that confusion, the agencies propose to delineate the categories of ditches that would be ''waters of the United States,'' and are proposing to exclude all other ditches from that definition.

The agencies also propose to define ditches for purposes of this proposed rule as simply artificial channels used to convey water. Ditches perform a variety of functions including conveying irrigation water, draining water from farm fields, capturing runoff from roads, or use for transporting goods and services in interstate or foreign commerce, such as the Erie Canal and the Great Lakes Waterway. The status of ditches as ''point sources'' under the CWA, 33 U.S.C. 1362(14), would not be affected by this proposed rule. One of the goals of this proposal is to address the confusion regarding whether ditches are point sources or ''waters of the United States'' more generally, and to provide clear categories for regulators and the regulated community for distinguishing between the two.

The agencies propose to include ditches as ''waters of the United States'' if they (1) satisfy any of the conditions identified in paragraph (a)(1) of this proposed rule; (2) are ditches constructed in a tributary as defined in paragraph (c)(11) of the proposal as long as those ditches also satisfy the conditions of the tributary definition; or (3) are ditches constructed in an adjacent wetland as defined in paragraph (c)(1) of the proposal as long as those ditches also satisfy the conditions of the tributary definition. The agencies propose to exclude all other ditches from the definition of ''waters of the United States.'' Ditches not covered by this proposed category could still be regulated by States and Tribes and would be subject to CWA permitting if they meet the definition of ''point source'' in CWA section 502(14).

2. Why are the agencies proposing this approach?

During the 1970s, the Corps interpreted its authorities under the CWA as not including drainage and irrigation ditches in the definition of ''waters of the United States.'' *See, e.g.,* 40 FR 31320, 31321 (July 25, 1975) (''Drainage and irrigation ditches have been excluded.''). The ditch exclusion was expressly stated in regulatory text in the Corps' 1977 regulations and clarified as applying to ditches excavated in dry land. 33 CFR 323.2(a)(3); 42 FR 37122, 37144 (July 19, 1977) (''manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition''). As the Corps explained in 1977: ''nontidal drainage and irrigation ditches that feed into navigable waters will not be considered 'waters of the United States' under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Section 208 and 402.'' 42 FR at 37127 (July 19, 1977). Similar statements in proposed rules from the early 1980s confirmed this interpretation: ''man-made, non-tidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States.'' 45 FR 62732, 62747 (September 19, 1980); *see also* 48 FR 21466, 21474 (May 12, 1983) (''Waters of the United States do not include the following man-made waters: (1) Non-tidal drainage and irrigation ditches excavated on dry land, (2) Irrigated areas which would revert to upland if the irrigation ceased.'').

The general exclusion for non-tidal drainage and irrigation ditches excavated in dry land continued through 1986, although the Corps modified its earlier statements that year by noting in preamble text that ''we generally do not consider'' such features to be ''waters of the United States,'' and indicating that the agency would evaluate certain ditches on a case-by-case basis. 51 FR 41206, 41217 (November 13, 1986).[31] The Corps further clarified the regulation of ditches in its nationwide permit regulation in March 2000, stating that ''non-tidal drainage ditches are waters of the United States if they extend the [ordinary high water mark] of an existing water of the United States.'' 65 FR 12818, 12823–24 (March 9, 2000). In other words, if flow or flooding from a jurisdictional non-tidal river or stream inundated an upland ditch, the agencies would assert jurisdiction over that upland ditch because the ordinary high water mark of the river or stream extends into the ditch, and the agencies would then assert jurisdiction over the entire reach of that ditch. Essentially, the agencies have found that a ditch becomes part of the tributary network because of the presence of the ordinary high water mark in the ditch.

In the 2015 Rule, the agencies promulgated a definition of ''waters of the United States'' that expressly included man-made features such as ditches and canals in the definition of tributaries, but excluded ditches with ephemeral flow if those ditches are not a relocated tributary or were not constructed in a tributary. 80 FR 37105 (June 29, 2015). That definition also excluded ditches with intermittent flow, as long as those ditches are not a relocated tributary, are not constructed in a tributary, or do not drain wetlands. *Id.* Ditches that do not contribute flow, either directly or through another ''water of the United States,'' are also excluded from the definition of ''waters of the United States'' under the 2015 Rule. *Id.*

The agencies today propose to clarify the regulatory status of ditches in a manner that would be more consistent with the Corps' regulations following the 1972 and 1977 CWA amendments, with some modifications to provide a clear definition that also falls within scope of the agencies' authority under the CWA.

When Congress enacted the 1972 amendments, it specifically included ditches and related artificial features as ''point sources,'' declaring them to be ''discernible, confined, and discrete conveyances . . . from which pollutants are or may be discharged.'' 33 U.S.C. 1362(16). Congress envisioned protecting the quality of the navigable waters, defined as ''waters of the United States'' at that time, by regulating the discharge of pollutants from conveyances like pipes, ditches, channels, tunnels and similar features into ''waters of the United States.'' *Id.* (defining ''discharge of pollutants'' as ''any addition of any pollutant to navigable waters from any point source''). The agencies today propose to

[31] The Corps also moved the ditch exclusion from rule text to preamble language in 1986 but stated that this was not a substantive change and that jurisdiction was not expanded. 51 FR 41206, 41216–17 (November 13, 1986).

better demarcate navigable waters and point sources that can discharge pollutants into those waters, as established by Congress in 1972. *See, e.g., Rapanos,* 547 U.S. at 735–36 (Scalia, J., concurring) (''The definition of 'discharge' would make little sense if the two categories were significantly overlapping''). To do so, the agencies evaluated the treatment of ditches in the CWA to discern whether Congress intended ditches to be point sources, navigable waters, or both. For example, Congress exempted the discharge of dredged or fill material into ''waters of the United States'' when that discharge occurs as a result of the construction or maintenance of irrigation ditches, the maintenance of drainage ditches, or minor drainage associated with normal farming activities. 33 U.S.C. 1344(f)(1)(A), (C). One possible interpretation of these exemptions is an implicit acknowledgement that there may be some irrigation or drainage ditches that are ''waters of the United States,'' thus the need to exempt common agricultural and related practices in those waters from section 404 permitting. Another interpretation, and one that may more closely align with the pre-existing CWA definition of ''point source,'' is that dredged or fill material is not subject to federal permitting if those materials get washed down the ditch into a connected ''water of the United States.''

For irrigation ditches, which typically are constructed in upland but frequently must connect to a ''water of the United States'' to either capture or return flow, Congress exempted both the construction and maintenance of such facilities. 33 U.S.C. 1344(f)(1)(C); *see also* 33 U.S.C. 1362(14) (excluding agricultural stormwater discharges and irrigation return flows from the definition of point source).[32] The construction activities performed in upland areas are beyond the reach of the CWA, but the permitting exemption applies to the diversion structures, weirs, headgates, and other related facilities that connect the irrigation ditches to jurisdictional waters. *See, e.g.,* Corps, *Regulatory Guidance Letter No. 07–02,* at 1–2 (July 4, 2007).

[32] The agencies also note that Congress exempted the discharge of irrigation return flows into waters of the United States from the section 402 permit program. 33 U.S.C. 1342(l). This exemption potentially would not be needed if agricultural drainage ditches carrying irrigation return flow were themselves waters of the United States, as the entry point of the irrigation return flow into the drainage ditch might then lack the requisite point source discharging mechanism given the diffuse overland flow entry point from the field to ditch in most circumstances.

The permitting exemption for drainage ditches, by contrast, is limited to the maintenance of such ditches. 33 U.S.C. 1344(f)(1)(C). That is because an alternate formulation would have allowed the drainage of wetlands subject to CWA jurisdiction without a permit. Congress' concern for such a result is evident in the ''recapture'' provision of 33 U.S.C. 1344(f)(2). *See, e.g.,* Sen. Rpt. 95–370, 95th Cong. 1st Sess., at 76–77 (July 19, 1977) (noting that exempted ''activities should have no serious adverse impact on water quality if performed in a manner that will not impair the flow and circulation patterns and the chemical and biological characteristics of the affected waterbody'' and noting that the ''exemption for minor drainage does not apply to the drainage of swampland or other wetlands'').

Thus, Congress may have envisioned the interconnection between the irrigation and drainage ditches and down-gradient ''waters of the United States'' as creating the need for the section 404(f) permitting exemptions, not necessarily that those ditches themselves are ''waters of the United States.'' The agencies have not been able to identify any legislative history, however, that signals the clear intent of Congress on this complex topic. The agencies also recognize that this interpretation of the statutory structure has not been articulated previously, and solicit comment on which this formulation adheres more closely to the language of the Act and the positions articulated by the plurality opinion in *Rapanos. See, e.g.,* 547 U.S. at 735–36 and n.7. To be clear, the agencies are not saying that in all circumstances a ditch may be a water of the United States or a point source, but not both. The agencies are, however, attempting to more clearly establish demarcations between the two to reduce regulatory uncertainty.

The agencies today propose to limit the term ''waters of the United States'' to apply to clearly defined categories of ditches and related features. The agencies propose to include their longstanding interpretation that ditches that satisfy any of the conditions of a category (a)(1) water are ''waters of the United States.'' This also includes tidal ditches and ditches that transport goods and services in interstate and foreign commerce, as those ditches—more commonly referred to as ''canals''—provide important commercial navigation services to the nation and operate more like natural waters traditionally understood as navigable. *See, e.g., id.* at 736 (Scalia, J., plurality) (''a permanently flooded man-made ditch used for navigation is normally described, not as a 'ditch,' but a 'canal' ''). The Los Angeles River, for example, is a ''water of the United States'' (having been determined to be a traditional navigable water) and would not be excluded under paragraph (b) even where it has been channelized or concreted. Other examples include the St. Lawrence Seaway, the Sturgeon Bay Ship Canal, and the Chesapeake and Delaware Canal.

In addition, the agencies propose to include ditches that were constructed in a water that meets the proposed definition of ''tributary'' and continues to meet the definition of ''tributary.'' This provision is consistent with the agencies' longstanding, historic position that non-tidal ditches excavated in upland (and historically described as ''dry land'') are not jurisdictional. Features, including ditches, that are not waters under paragraph (a)(1) and that are constructed in upland are not ''waters of the United States'' because areas that are naturally dry land do not meet the ordinary meaning of the term. As discussed in the introduction to Section III, ''waters of the United States'' are waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes, ponds, and wetlands; ditches artificially excavated in upland do not fit into this category. This proposal would also align the treatment of ditches to that of tributaries in this proposal, which retains the agencies' longstanding position that the alteration or relocation of a ''water of the United States'' does not modify the jurisdictional status of that water, and as such, ditches that alter or relocate a water of the United States would be jurisdictional.

The agencies also propose to include ditches as ''waters of the United States'' if they were constructed in a wetland that meets this proposed definition of ''adjacent wetland,'' as long as the ditch also satisfies the conditions of the tributary definition in this proposed rule. Such an approach would align the proposed rule with the section 404(f) permitting exemption for the maintenance but not construction of drainage ditches, and the associated concern expressed during the legislative process for the 1977 amendments related to draining swamps and wetlands. The provision would also be restricted to ditches that satisfy this proposed definition of ''tributary,'' as such ditches likely functionally maintain some of the same interconnected relationship between the drained wetland and navigable water that supported federal jurisdiction over

the adjacent wetland in the first instance.

Ditches used to drain surface and shallow subsurface water from cropland are a quintessential example of the interconnected relationship between land and water resource management, as is managing water resources in the Western United States, conveying irrigation water to and from fields, and managing surface water runoff from lands and roads following precipitation events—all activities that rely on ditches. *See, e.g., FERC* v. *Mississippi,* 456 U.S. 742, 768 n.30 (1982) (characterizing ''regulation of land use [as] perhaps the quintessential state activity''). This proposal therefore effectuates the clear policy directive from Congress to preserve and protect the primary authority of States over land and water resources within their borders. *See* 33 U.S.C. 1251(b), 1370.

3. How might the agencies implement this approach?

In order to be a jurisdictional ditch under this proposed rule, a feature would first need to meet the definition of ''ditch'' as proposed (*i.e.,* an artificial channel used to convey water). An ''artificial'' channel is not a natural feature, rather it has been constructed in some manner. Also, to meet the proposed definition of ''ditch,'' the artificial channel must be used to convey water. Once a feature has been determined to meet the proposed definition of ''ditch,'' a ditch would be considered ''waters of the United States'' if it meets any of the conditions in paragraph (a)(1). This would include ditches which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, as well as ditches which are subject to the ebb and flow of the tide. This may include waters such as navigable canals and tidal drainage ditches. See Section III.A for further discussion on paragraph (a)(1) waters.

A ditch would also be considered a ''water of the United States'' if it was constructed in a tributary as defined in paragraph (c)(11) and also satisfies the conditions of the tributary definition. A tributary that was channelized or straightened because its natural sinuosity has been altered, cutting off the meanders, may or may not meet the definition of ''ditch'' but nonetheless would remain a tributary as long as it meets the conditions of the tributary definition provided in this proposed rule. If these ditches were tributaries prior to their construction and continue to meet the conditions of the tributary definition after construction, they would remain jurisdictional under the proposed rule. However, if the evidence does not demonstrate whether a ditch was constructed in a tributary as defined in the proposed rule, that ditch would be considered to be non-jurisdictional by the agencies under this proposal.

For example, if the agencies are not sure whether a ditch was constructed in a tributary given the physical appearance and functionality of the current ditch, the agencies would look at the available evidence to attempt to discern when the ditch was constructed and the nature of the landscape before and after construction. If the evidence does not demonstrate that the ditch was located in a natural waterway, the agencies would consider the ditch non-jurisdictional under this proposed rule. If the evidence suggests that the ditch may have been constructed in a natural waterway, the agencies would review the available evidence to attempt to discern whether that natural waterway would qualify as a tributary under this proposed rule. Absent such evidence, the agencies would determine the ditch is non-jurisdictional. If the evidence demonstrates that a ditch was constructed in a tributary, then the ditch would be a ''water of the United States'' as long as it still satisfies the conditions of the proposed definition of ''tributary.'' *See* Section III.D for further information about tributaries under this proposed rule.

A ditch would be considered a ''water of the United States'' if it was constructed in an adjacent wetland as defined in this proposed rule (see Section III.G for a discussion of adjacent wetlands under this proposed rule), but only if that ditch also satisfies the conditions of the proposed definition of ''tributary.'' The same scenarios above for ditches constructed in a tributary would apply when determining the jurisdictional status of a ditch constructed in an adjacent wetland. If there is evidence to indicate that a ditch was constructed in an adjacent wetland as defined in the proposal, the agencies would consider the ditch to be jurisdictional if it also satisfies the conditions of the tributary definition as proposed. Absent such evidence, the agencies would determine the ditch is non-jurisdictional.

Along with field data and current information on the subject water, historic tools and resources may also be used to determine the presence of a tributary or adjacent wetland at the time of ditch construction, and several sources of information may be required to make such determination. This may include historic topographic maps, historic aerial photographs, local and state records and surface water management plans, agricultural records, street maintenance data, precipitation records, historic permitting and jurisdictional determination records, certain hydrogeomorphological or soil indicators, wetlands and conservation programs and plans, and functional assessments and monitoring efforts. For example, when a USGS topographic map displays a tributary located upstream and downstream of a ditch, this may indicate that the ditch was constructed in a tributary.

In addition, high resolution aerial photographs may be used to identify whether there are or were characteristics of a tributary upstream or downstream of a ditch, indicating that a ditch may have been constructed in a tributary. In some cases, stream channel morphology is visible on the aerial photograph along with visible persistent water (*e.g.,* multiple dates of aerial photography showing visible water) providing evidence of the flow regime necessary to identify a tributary under this proposed rule at the time of ditch construction. However, characteristics of tributaries may not be visible in aerial photographs taken in areas with high shrub or tree cover, in which case aerial photographs taken during ''leaf off'' may provide the most beneficial information. National Wetlands Inventory maps may indicate the presence of a ditch constructed in an adjacent wetland; however, it may be challenging to identify the historic status of a wetland where a ditch has drained the wetland such that it would no longer meet the definition of ''adjacent wetland'' under this proposed rule. In general, the burden of proof would be on the agencies to determine the historic status of the ditch construction, and if field and remote-based resources do not provide sufficient evidence to show that the ditch was constructed in a tributary or an adjacent wetland then a determination would be made that the ditch is not jurisdictional under this proposed rule.

4. What are the specific issues upon which the agencies are seeking comment?

While the public may comment on all aspects of the agencies' proposed rule, the agencies are proposing a number of ways to address and clarify jurisdiction over ditches as described above and are seeking comment. The agencies seek comment on the utility and clarity of proposing a separate category of jurisdictional ditches and how the agencies have delineated those ditches that would be ''waters of the United States'' and those that would be

excluded. In the alternative, the agencies seek public comment on whether the agencies should retain the historical treatment of jurisdictional ditches within the definition of ''tributary'' and not in a separate category. The agencies also seek comment on their proposed definition of ''ditch.''

As the agencies consider how to implement this provision, the agencies seek comment on whether they should add a temporal component to distinguish jurisdictional ditches when evaluating ditches that may have been constructed in tributaries or adjacent wetlands. For example, the agencies could consider a ditch that appears to have been constructed in upland to be non-jurisdictional unless there is evidence that the ditch was in fact constructed in a natural waterway prior to the adoption of the 1972 CWA amendments. The agencies also solicit comment as to what tools can be used to help identify whether a ditch is constructed in upland or whether it was constructed in a tributary or adjacent wetland that meets the respective proposed definitions, and in particular what sort of showing would constitute evidence that a ditch was constructed in upland or in a jurisdictional tributary or adjacent wetland. The agencies seek comment as to whether there are other approaches for addressing the evidentiary concerns that may arise in a permitting context for historic ditches. For example, the agencies solicit comment on the role of historic photographs and records, in determining whether a ditch was built in a tributary and more generally what constitutes evidence that a ditch was constructed in a tributary or an adjacent wetland.

In addition, the agencies solicit comment on the exclusion of all ditches constructed in upland, regardless of flow regime, and whether that is consistent with the plurality and concurring opinions in *Rapanos.* For example, ditches constructed in upland that flow perennially would be presumed non-jurisdictional under this proposal, even if they would also satisfy the conditions of the proposed tributary definition. Finally, the agencies solicit comment on whether a ditch can be both a point source and a ''water of the United States,'' or whether these two categories as established by Congress are mutually exclusive.

F. Lakes and Ponds

1. What are the agencies proposing?

The agencies are proposing a separate category of waters of the United States to include certain lakes and ponds. The agencies are proposing three instances where lakes and ponds would meet the definition of ''waters of the United States.'' First, lakes and ponds that satisfy any of the conditions in paragraph (a)(1) are proposed to be included. Such lakes and ponds would be jurisdictional as an (a)(1) water, as well as an (a)(4) water.

Second, lakes and ponds that contribute perennial or intermittent flow to an (a)(1) water in a typical year through an (a)(2)–(6) water would also be considered waters of the United States. This second category of lakes and ponds can contribute flow to an (a)(1) water either directly or through a tributary, jurisdictional ditch, another jurisdictional lake or pond, an impoundment, an adjacent wetland, or through a combination of these waters. The contribution of perennial or intermittent flow to an (a)(1) water from such lakes and ponds may also occur through water features identified in paragraph (b) of this proposal so long as those water features convey perennial or intermittent flow downstream and ultimately to an (a)(1) water. The term ''typical year'' as used in the proposed lakes and ponds category of ''waters of the United States'' would be implemented using the proposed definition of the term in paragraph (c)(12).

Third, the agencies propose that lakes and ponds flooded by an (a)(1)–(5) water in a typical year would be waters of the United States. These lakes and ponds would receive flood waters from (a)(1)–(5) waters via overtopping in a typical year.

2. Why are the agencies proposing this approach?

The agencies propose to include certain lakes and ponds as waters of the United States because lakes and ponds are waters within the ordinary meaning of the term. As discussed in Section II, the plurality decision in *Rapanos* explains that the term ''the waters'' is most commonly understood to refer to ''streams and bodies forming geographical features such as oceans, rivers, lakes,'' or ''the flowing or moving masses, as of waves or floods, making up such streams or bodies.'' 547 U.S. at 732. The plurality also noted that its reference to ''relatively permanent'' waters did ''not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,'' *Id.* at 732 n.5. The agencies focus in large part on the lake or pond's contribution of flow to and connection with traditional navigable waters to remain consistent with the overall structure and function of the CWA. *See, e.g., SWANCC,* 531 U.S. at 168 n.3.

Many commenters in the Federalism consultation with the agencies stated that the rule should include permanent lakes. Some commenters also stated that the rule should not include isolated lakes, which this proposal does not unless the lake satisfies the conditions in paragraph (a)(1). The agencies are proposing a distinct category for lakes and ponds because they are distinct water features; they are lentic systems (*i.e.,* still waters) as opposed to tributaries, which are typically lotic features (*i.e.,* flowing waters). In addition, the agencies view the establishment of a separate category for lakes and ponds as providing greater clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public, rather than including these waters in the definition of ''tributaries'' or with adjacent wetlands.

As discussed in Section II, the agencies' authority to regulate ''the waters of the United States'' is grounded in Congress' commerce power over navigation. The agencies can choose to regulate beyond waters more traditionally understood as navigable given the broad purposes of the CWA, but must provide a reasonable basis for doing so. The agencies are proposing that lakes and ponds that contribute perennial or intermittent flow to those traditional navigable waters, in any of the manners described above, fall within Congress' commerce power and are consistent with the ordinary meaning of ''waters of the United States,'' and that regulating them effectuates the goals and policies of the CWA.

Lakes and ponds that satisfy any of the conditions in paragraph (a)(1) are traditionally navigable waters and as such should be considered waters of the United States for the same reasons discussed under the rationale for (a)(1) waters in this proposal. Lakes and ponds that contribute perennial or intermittent flow to an (a)(1) water in a typical year either directly or indirectly through an (a)(2)–(6) water or through water features identified in paragraph (b) of this proposal so long as those water features convey perennial or intermittent flow would also be considered waters of the United States. Such lakes and ponds would contribute flow in a manner similar to a tributary and would be jurisdictional for the same reasons that a tributary would be jurisdictional. Lakes and ponds that contribute flow to traditional navigable waters through ephemeral flow would be excluded for the same reasons that

ephemeral features are proposed to be not jurisdictional. The agencies believe that this proposed category of lakes and ponds better reflects the limits to the agencies' authority that the plurality and concurring opinions recognized in *Rapanos.*

By requiring that a contribution of flow exists as perennial or intermittent flow between lakes and ponds and traditional navigable waters, including the territorial seas, in the proposed definition, the agencies would establish that a mere hydrologic connection cannot provide the basis for CWA jurisdiction; the connection must be perennial or intermittent flow from the lake or pond. This proposed requirement is informed by *Rapanos* wherein the plurality rejected the Federal government's hydrologic connection theory in deciding that the phrase ''the waters of the United States'' ''cannot bear the expansive meaning that the Corps would give it,'' *id.* at 732, and challenged the notion that ''even the most insubstantial hydrologic connection may be held to constitute a 'significant nexus.' '' *Id.* at 728. It also reflects the plurality's description of a '' 'wate[r] of the United States' '' as ''*i.e.,* a relatively permanent body of water *connected to* traditional interstate navigable waters.'' *Id.* at 742 (emphasis added).

Lakes and ponds that are flooded by an (a)(1)–(5) water in a typical year would be considered waters of the United States under this proposal. *See Rapanos,* 474 U.S. at 732 (Scalia, J., plurality) (recognizing that the term ''the waters'' within ''the waters of the United States'' includes ''the flowing or moving masses, as of waves or *floods,* making up . . . streams or bodies,'') (emphasis added) (internal quotations omitted); *id.* at 770 (Kennedy, J., concurring) (''the term 'waters' may mean '*flood* or inundation' events that are impermanent by definition'') (emphasis added) (internal citations omitted). During times of inundation occurring from a jurisdictional water to a lake or pond in a typical year, such lake or pond is indistinguishable from and inseparably bound up with other waters of the United States.

Flooding from a water of the United States to a jurisdictional lake or pond can occur as a result of seasonal or permanent flooding, for example, so long as flood waters connect such lakes or ponds to other waters of the United States in a typical year and have as their source a jurisdictional water. A mere hydrologic connection between a nonnavigable, isolated, intrastate lake or pond and a jurisdictional water, however, may be insufficient to establish jurisdiction under the proposed rule. For instance, a lake or pond that may be connected to a ''water of the United States'' by flooding, on average, once every 100 years would not be jurisdictional under this proposal. To be jurisdictional, a lake or pond that is otherwise physically separated from a ''water of the United States'' would need to be flooded by a jurisdictional water *during a typical year;* ecological connections between physically separated lakes and ponds and otherwise jurisdictional waters cannot be used to assert jurisdiction according to this proposal. *See* 547 U.S. at 741–42 (Scalia, J., plurality) (''*SWANCC* found such ecological consideration irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction.'').

The proposed lakes and ponds category would replace existing procedures that may depend on case-specific ''significant nexus'' analyses of the relationship between a particular lake or pond with downstream waters. The agencies are proposing to eliminate this case-specific ''significant nexus'' analysis by providing a clear category of ''waters of the United States'' that is easier for members of the public and regulatory agencies to implement. In light of the clearer lakes and ponds category proposed today, the agencies propose to eliminate the case-specific significant nexus review through categorical treatment of certain lakes and ponds as ''waters of the United States.''

This proposed rule identifies a category of certain lakes and ponds that due to their contribution of perennial or intermittent flow to navigable waters should be federally regulated. Through this proposed category, the agencies would also acknowledge the policy direction from Congress to ''recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan for the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .'' 33 U.S.C. 1251(b); *see also Rapanos,* 547 U.S. at 737 (Scalia, J., plurality). The proposed approach to lakes and ponds is also intended to avoid ''impairing or in any manner affecting any right or jurisdiction of the States with respect to waters (including boundary waters) of such States.'' 33 U.S.C. 1370. For example, lakes and ponds which contribute ephemeral flow, such as through dry washes and arroyos, that lack the required perennial or intermittent flow regime necessary to satisfy the conditions of jurisdictional lakes and ponds under this proposed rule would not be ''waters of the United States.'' Those features are, however, water resources of the States, and therefore, States have an inherent interest in regulating such features pursuant to the powers reserved to the States under the Constitution. *See., e.g., North Dakota,* 127 F. Supp. 3d at 1059. States and Tribes may therefore address such features under their own laws to the extent they deem appropriate. Lakes and ponds that contribute flow through ephemeral features may also constitute point sources that discharge pollutants to a ''water of the United States.'' See *Rapanos,* 547 U.S. at 743–44 (Scalia, J., plurality). In those instances, authority to regulate water quality in downstream waters under the CWA is not lost to either Federal or State governments.

3. How might the agencies implement this approach?

Most lakes and ponds are formed through a variety of events, including glacial, tectonic, and volcanic activity. Lakes and ponds can also be man-made features for industrial and agricultural uses, power generation, domestic water supply, or for aesthetic or recreational purposes. Most lakes and ponds have at least one natural outflow in the form of a river or stream, which maintain a lake's average level by allowing the drainage of excess water. Some lakes do not have a natural outflow and lose water solely by evaporation or underground seepage or both. Individual lakes and ponds range in size. Ponds are generally smaller in size than lakes but regional naming conventions vary. Lakes are also generally deeper than ponds.

The tools and guidance which are described in Section III.A can be used to determine whether a lake or pond meets the terms of an (a)(1) water and as such would be jurisdictional under this proposed rule as an (a)(1) water, as well as an (a)(5) water. The same tools discussed in Section III.C can also be helpful in establishing the presence of a lake or pond. For example, where an enclosed body of water is displayed on a USGS topographic map or in NHD data it may indicate a lake or pond is present. USGS maps often include different symbols to indicate perennial or intermittent lakes and ponds and even a different symbol to indicate dry lakes and ponds, which may be helpful in determining whether such lakes and ponds satisfy the proposed definition of ''waters of the United States.'' Waterbodies such as lake and pond features are also represented in NHDWaterbody. The NHD portrays the spatial geometry and the attributes of the feature. These water polygons may

also have NHDFlowline artificial paths drawn through them to allow the representation of water flow direction. Combining this information with climate and surrounding hydrology information can yield greater certainty as to the presence of a lake or pond and the flow regime the lake or pond contributes downstream. These tools may also be helpful in indicating whether the lake or pond is part of the ''waters of the United States'' network because they may identify whether it contributes perennial or intermittent flow downstream. For example, the presence of a ''blue line stream'' on USGS topographic or NHD maps which extends from the lake or pond may indicate the lake or pond contributes perennial or intermittent flow, directly or indirectly through an (a)(2)–(6) water, to the (a)(1) water in a typical year, which may indicate that the lake or pond is jurisdictional. Other reliable methods that can indicate existence of a lake or pond and potential jurisdictional status include gage data, bathymetry data, elevation data, spillway height, historic water flow records, flood predictions, statistical evidence, and direct observation.

The agencies are proposing that lakes and ponds that are flooded by a water identified in paragraphs (a)(1)–(5) in a typical year would also be waters of the United States. The agencies propose to use flood records, precipitation data, elevation data, aerial photography, and field observations to help identify when a lake or pond may be flooded by an (a)(1)–(5) water in a typical year. Oxbows may be jurisdictional under this category.

The information provided by the tools described above will vary in validity in different parts of the country, so care would be taken to evaluate the information prior to reasonably concluding a lake or pond is jurisdictional. Supporting information, as well as field work, may also be used to conclude the presence of a jurisdictional lake or pond.

4. What are specific issues upon which the agencies are seeking comment?

The agencies welcome comment on the proposal to establish a distinct jurisdictional category for lakes and ponds and whether this provides additional clarity and regulatory certainty. In the alternative, the agencies solicit comment on incorporating jurisdictional lakes and ponds into another category, such as tributaries. The agencies note that there is considerable uncertainty about defining the difference between lakes and ponds, and no current accepted definition of either term across scientific disciplines exists. The agencies are soliciting comment on whether a specific definition of lakes and ponds should be provided in the rule language or whether any such definition is necessary. For example, the Corps has a definition of ''lake'' provided at 33 CFR 323.2, which includes, ''The term *lake* means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. . . .'' Alternatively, other definitions could be used to define lakes and ponds, such as the Cowardin classification system developed by the U.S. Fish and Wildlife Service which could use the permanently flooded and semi-permanently flooded for non-tidal waters categories. Such definition could be, ''Lakes and ponds are either semi-permanently or permanently flooded during a typical year and may or may not exhibit hydrophytic vegetation.'' There may also be other parameters used to define lakes and ponds, such as size and depth. For example, in the 1975 regulations, the Corps had proposed a minimum size requirement on lakes of five acres to be waters of the United States. *See* 40 FR 31321. However, such size requirement received many negative comments that the size was too small or too large or did not account for seasonal changes in sizes of lakes, while others commented on the legality of imposing size limitations on lakes. *See* 42 FR 37129. Also, the agencies recognize that States and Tribes may have specific, validated tools they employ to identify lakes or ponds and are soliciting comment on those approaches which may be useful for application in this proposed rule.

The agencies solicit comment on whether more specific parameters should be included for the type of flooding that should be included for lakes and ponds when flooded by an (a)(1)–(5) water in a typical year. For example, the agencies request comment as to whether to establish a specific flooding periodicity or magnitude or frequency. The agencies also solicit comment on other implementation tools available to determine the presence of a contribution of perennial or intermittent flow from the lake or pond in a typical year. Additionally, the agencies request comment on whether less than intermittent flow from lakes and ponds to an (a)(1) water in a typical year could be sufficient to extend jurisdiction to such lakes and ponds.

G. Wetlands

1. What are the agencies proposing?

The agencies propose a category of ''waters of the United States'' to include all adjacent wetlands to: Traditional navigable waters, including the territorial seas; tributaries to those waters; jurisdictional ditches; jurisdictional lakes and ponds; and impoundments of otherwise jurisdictional waters. The agencies propose to maintain their longstanding regulatory definition of ''wetlands'' to mean ''those areas that are inundated or saturated by surface or ground water 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.'' The presence and boundaries of wetlands are determined based upon an area satisfying all three of the definition's criteria (*i.e.,* hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances.

The agencies propose to define the term ''adjacent wetlands'' to mean wetlands that abut or have a direct hydrologic surface connection to other ''waters of the United States'' in a typical year. ''Abut'' is proposed to mean when a wetland touches a water of the United States at either a point or side. A ''direct hydrologic surface connection'' as proposed occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water.

The agencies propose that when wetlands are physically separated from jurisdictional waters by upland or by dikes, barriers, or similar structures and also lack a direct hydrologic surface connection to jurisdictional waters, those wetlands are not adjacent. ''Upland'' in the proposed rule refers to any land area above the ordinary high water mark or high tide line that does not satisfy all three wetland delineation factors (*i.e.,* hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances, as described in the Corps' 1987 Wetland Delineation Manual. Features that were once wetlands but have been naturally transformed or lawfully converted to upland (*e.g.,* in compliance with a section 404 permit) would be

considered upland. A ''typical year'' means within the normal range of precipitation over a rolling 30-year period for a particular geographic area. For convenience, the agencies propose to include the existing Corps definitions for ''ordinary high water mark'' and ''high tide line'' from 33 CFR 328.3, as those terms are used in the proposed definition of ''upland.''

Wetlands that have a direct hydrologic surface connection to a ''water of the United States'' via inundation by a jurisdictional water during a typical year would be adjacent wetlands under the proposal. Similarly, a wetland has a direct hydrologic surface connection to a jurisdictional water and is an adjacent wetland if the wetland and jurisdictional water are connected via perennial or intermittent flow in a typical year. The perennial or intermittent flow constituting the direct hydrologic surface connection may occur in either direction (*i.e.,* jurisdictional water to wetland or wetland to jurisdictional water). Perennial or intermittent flow between a wetland and jurisdictional water may occur through upland or through a dike, barrier, or similar structure via a culvert, tide gate, or other feature. Perennial or intermittent flow between a wetland and jurisdictional water may also occur as a result of a wetland overtopping upland or overtopping a dike, barrier, or similar structure and flowing directly into a jurisdictional water.

2. Why are the agencies proposing this approach?

The agencies are proposing the definition of ''adjacent wetlands'' based on the core principles and concepts set forth in the three major Supreme Court cases addressing the scope of the phrase ''the waters of the United States,'' as discussed at length in Section II.E.2. In summary, adjacent wetlands as proposed form part of the ''waters of the United States''; otherwise they are isolated from ''waters of the United States'' and not jurisdictional. The agencies' proposed definition is consistent with the ordinary meaning of the term ''waters'' described in those cases and is intended to implement the CWA policy directive of preserving the ability of the States to regulate land and waters within their boundaries. The agencies view the proposed definition as establishing a clear, predictable regulatory framework that can be efficiently implemented in the field.

This proposed definition of ''adjacent wetlands'' as wetlands abutting or having a direct hydrologic surface connection to other jurisdictional waters in a typical year rests on several key factors and considerations. As a threshold matter, the proposed definition is informed by the Supreme Court decisions in *Riverside Bayview, SWANCC,* and *Rapanos.* For example, the agencies considered the holding in *Riverside Bayview* ''that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.'' 474 U.S. at 135. The proposed definition is consistent with the holding in *Riverside Bayview* and with the Supreme Court's subsequent interpretation of *Riverside Bayview* and the scope of CWA jurisdiction over wetlands in *Rapanos,* in which both the plurality and concurring opinions agreed that waters of the United States encompass wetlands closely connected to navigable waters. As discussed in Section II.E.2, the plurality characterized the scope of CWA jurisdiction over wetlands as encompassing wetlands, like those at issue in *Riverside Bayview,* with a ''continuous surface connection'' or a ''continuous physical connection'' to a navigable water, *Rapanos,* 547 U.S. at 742, 751 n.13. Justice Kennedy's concurrence recognized that ''the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act.'' *Id.* at 767. The concepts of ''abutting'' and a ''direct hydrologic surface connection'' in this proposal are consistent with the *Rapanos* plurality's continuous surface connection requirement. Because the concept of ''abutting'' in this proposal does not require the existence of a hydrologic connection between wetlands that physically touch jurisdictional waters, this concept is also consistent with Justice Kennedy's statement that ''[g]iven the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system.'' *Id.* at 786. The agencies acknowledge, however, that non-abutting wetlands may also lack a hydrologic connection. Those non-abutting wetlands would not be considered adjacent under this proposal because the agencies believe they do not implicate the line-drawing concerns articulated in *Riverside Bayview, SWANCC,* and the *Rapanos* plurality, and because this proposed definition will provide clear, understandable delineation between Federal waters and state land and water resources.

The limits to this proposed definition, *i.e.,* the categories of wetlands that the proposed definition would not encompass, are consistent with the principles articulated in the three key Supreme Court decisions. The inquiry as to where to draw the line between jurisdictional and non-jurisdictional wetlands is laid out in *Riverside Bayview:* ''[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins . . . . Where on this continuum to find the limit of 'waters' is far from obvious.'' 474 U.S. at 132. While the Court in *Riverside Bayview* identified this inquiry as a task for the Corps and deferred to the Corps' judgment under *Chevron* principles, the Supreme Court has subsequently recognized outer bounds for the scope of ''waters of the United States.''

In *SWANCC,* the Supreme Court held that the agencies do not have authority to regulate nonnavigable, isolated, intrastate waters that lack a sufficient connection to a traditional navigable water, as regulation of those waters would raise constitutional questions regarding the scope of CWA authority. 531 U.S. at 172. The plurality opinion in *Rapanos* elaborated further on the wetlands that it did not consider jurisdictional under the Act, specifically, wetlands with only an ''intermittent, physically remote hydrologic connection to 'waters of the United States,' '' as those ''do not implicate the boundary-drawing problem of *Riverside Bayview.*'' 531 U.S. at 742. The proposed definition also reflects Justice Kennedy's concurring opinion in *Rapanos* that in some instances, as exemplified by the ''ponds and mudflats that were isolated in the sense of being unconnected to other waters covered by the Act,'' ''there may be little or no connection'' ''between a nonnavigable water or wetland and a navigable water.'' *Id.* at 766–67. The proposal is consistent with *SWANCC* and the *Rapanos* plurality opinion in that it would exclude isolated wetlands with only physically remote hydrologic connections to jurisdictional waters. Under the proposed definition, ecological connections alone would not provide a basis for including physically isolated wetlands within the phrase ''the waters of the United States.'' *See, e.g., id.* at 741–42 (Scalia, J., plurality) (''*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview*—and upon which the dissent repeatedly relies today . . .—provided an

independent basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.' *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction.'' (original emphasis)).

In assessing the appropriate ''limits of 'waters' '' on the continuum between water and land, the proposed definition balances the inclusion of wetlands that have a direct hydrologic surface connection to otherwise jurisdictional waters during a typical year with the fact that ''a mere hydrologic connection should not suffice in all cases.'' *Id.* at 784 (Kennedy, J., concurring). For example, the *Rapanos* plurality questioned the Corps' broad interpretation of its regulatory authority to ''conclude that wetlands are 'adjacent' to covered waters if they are hydrologically connected through directional sheet flow during storm events or if they lie within the 100-year floodplain of a body of water.'' *Id.* at 728 (internal citations and quotations omitted). Similarly, Justice Kennedy believed that ''possible flooding'' was an unduly speculative basis for a jurisdictional connection between wetlands and other jurisdictional waters as applied to the facts of *Carabell.* 547 U.S. at 786. In other words, wetlands separated from otherwise jurisdictional waters by upland or by dikes, barriers, or other similar structures are not adjacent simply because a surface water connection between the two is possible or if, for example, wetlands ''are connected to the navigable water by flooding, on average, once every 100 years'' or by directional sheet flow during an individual storm event. *Id.* In order to satisfy this proposed ''adjacent wetlands'' definition, a wetland separated from other waters of the United States by upland or by dikes, barriers, or other similar structures would have to have a direct hydrologic surface connection to an otherwise jurisdictional water in a typical year.

As proposed, a direct hydrologic surface connection occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water. Inundation can occur as a result of seasonal or permanent flooding, for example, so long as inundation occurs in a typical year and has as its source a jurisdictional water. A direct hydrologic surface connection that occurs as a result of perennial or intermittent flow between a wetland and a jurisdictional water must satisfy the definitions of ''perennial'' or ''intermittent'' in this proposal and can occur either from a jurisdictional water to a wetland or from a wetland to a jurisdictional water. Ephemeral flow or ephemeral pooling occurring only in direct response to precipitation and connecting a wetland to a jurisdictional water does not constitute a direct hydrologic surface connection according to the proposal.

Under current practice and in this proposal, wetlands adjacent to traditional navigable waters would be categorically jurisdictional. The agencies propose to adopt this position based on the rationale that an adjacent wetland is ''inseparably bound up with'' the jurisdictional water; if the water is jurisdictional, so is the adjacent wetland. *Riverside Bayview,* 474 U.S. at 134; *Rapanos,* 547 U.S. at 740 (plurality quoting *Riverside Bayview*) (' 'Faced with such a problem of defining the bounds of its regulatory authority,' we held, the agency could reasonably conclude that a wetland that 'adjoin[ed]' waters of the United States is itself a part of those waters.'') (internal citations omitted). This position is consistent with *Riverside Bayview,* about which Justice Kennedy noted in *Rapanos* that ''the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.'' 547 U.S. at 780.

In addition, this proposed definition would end the current practice of conducting case-specific significant nexus evaluations for non-abutting wetlands to relatively permanent and non-relatively permanent waters. Under the agencies' *Rapanos* Guidance, this evaluation requires individual analyses of the relationship between a particular wetland with traditional navigable waters. Importantly, Justice Kennedy's ''significant nexus'' test for wetlands adjacent to nonnavigable tributaries was only needed ''absent more specific regulations,'' *id.* at 782, because ''the breadth of [the existing tributary] standard'' . . . ''seems to leave wide room for regulations of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it'' and thus ''precludes its adoption as a determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.'' *Id.* at 781. In light of the ''more specific [tributary] regulations'' proposed today, the agencies propose to eliminate the case-specific significant nexus analysis through categorical treatment of all adjacent wetlands, as defined by this proposal, as waters of the United States. The agencies recognize that this is a new position and modification of prior agency positions on Justice Kennedy's concurring opinion in *Rapanos.* The agencies also recognize that several courts have adopted the significant nexus standard as a test for jurisdiction for both adjacent wetlands and tributaries. The agencies believe, however, that this proposal provides better clarity for the regulators and the regulated community alike while adhering to the basic principles articulated in all three Supreme Court cases on point.

The proposed categorical inclusion of adjacent wetlands beyond the wetlands that ''actually abut[ ]'' navigable-in-fact waters addressed in *Riverside Bayview,* 474 U.S. at 135, the agencies recognize, is dependent on the relationship between the other categories of ''waters of the United States'' and waters more traditionally understood as navigable. The agencies believe that the proposed definition of ''tributary,'' as described in Section III.D, would appropriately limit federal jurisdiction to those rivers and streams that due to their relatively permanent flow regime and contribution of flow to navigable waters are ''significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.'' *Rapanos,* 547 U.S. at 781 (Kennedy, J., concurring). Because the tributary definition as proposed today ''rests upon a reasonable inference of ecological interconnection'' with navigable waters, and adjacent wetlands as proposed must be ''directly abutting'' or have a direct hydrologic surface connection to tributaries and are thus ''inseparably bound up with'' tributaries, the assertion of jurisdiction over wetlands adjacent to tributaries ''is sustainable under the Act by showing adjacency alone.'' *Id.* at 780 (citing *Riverside Bayview,* 474 U.S. at 134). The proposed ''tributary'' definition—which addresses the ''breadth of [the] standard'' about which Justice Kennedy was concerned in *Rapanos*—would provide support for the Court's conclusion in *Riverside Bayview* ''that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.'' *Id.* at 135. To be clear, there is no requirement under this proposal to prove the existence of nor the significance of ''ecological interconnection'' between an adjacent wetland and navigable waters. If a wetland meets the proposed ''adjacent

wetland'' definition, it would be jurisdictional.

The proposed definition of ''adjacent wetlands,'' which includes the term ''abut,'' also captures the common understanding of that term, meaning ''touching.'' *See Webster's II, New Riverside University Dictionary* (1994) (defining ''abut'' to mean ''to touch at one end or side of something''). This definition is also consistent with the common understanding of the term ''adjacent,'' which means ''next to,'' ''adjoining,'' ''to lie near,'' or ''close to,'' *see id.,* and is consistent with the *Rapanos* plurality's ''physical-connection requirement,'' 547 U.S. at 751 n.13.

By retaining the term ''adjacent'' in the proposed definition from the longstanding regulations, the agencies would continue to use terminology that is familiar to the agencies and the regulated public. But the agencies are proposing not to include the terms ''bordering, contiguous, or neighboring'' from the 1986 regulations, as the agencies consider the term ''abut'' and the concept of a ''direct hydrologic surface connection'' as reducing the potential confusion associated with using three seemingly similar terms in the same definition. *See, e.g.,* U.S. General Accounting Office, *Waters and Wetlands,* GAO–04–297, at 10 (Feb. 2004) (''The regulations specify that adjacent means 'bordering, contiguous, or neighboring'. . . . This definition of adjacency leaves some degree of interpretation to the Corps districts''); *see also id.* at 3 (''Districts apply different approaches to identify wetlands that are adjacent to other waters of the United States and are subject to federal regulation.'').

The term ''abut'' in the proposed definition, meaning ''to touch at least at one point or side of'' a jurisdictional water, would provide members of the regulated community with fair notice as to whether wetlands are subject to CWA jurisdiction. The agencies consider wetlands that abut or have a direct hydrologic surface connection to otherwise jurisdictional waters in a typical year to better meet the ordinary meaning of the term ''waters'' more clearly than wetlands separated from such waters by dry land and lacking a direct hydrologic surface connection or located a specified distance from those waters. *See, e.g.,* 547 U.S. at 740 quoting *Riverside Bayview,* 474 U.S. at 132, 135, and n. 9 (''[W]e held, the agency could reasonably conclude that a wetland that 'adjoin[ed]' waters of the United States is itself a part of those waters.'').

This proposed categorical treatment of adjacent wetlands would also effectuate the clear policy direction from Congress to ''recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan for the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .'' 33 U.S.C. 1251(b); *see also Rapanos,* 547 U.S. at 737 (Scalia, J., plurality). The agencies believe that this approach avoids ''impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.'' *Id.* at 1370. Wetlands that do not abut or have a direct hydrologic surface connection to other waters of the United States in a typical year are not inseparably bound up with the waters of the United States and are more appropriately regulated as land and water resources of the States and Tribes pursuant to their own authorities.

The agencies also note that the proposed definition of ''adjacent wetlands'' and the categorical treatment of jurisdiction over wetlands adjacent to tributaries as proposed is informed by, though not dictated by, science. For example, the EPA's Science Advisory Board noted when reviewing the Draft Connectivity Report in 2014, ''[s]patial proximity is one important determinant of the magnitude, frequency and duration of connections between wetlands and streams that will ultimately influence the fluxes of water, materials and biota between wetlands and downstream waters.'' SAB Review at 60. ''Wetlands that are situated *alongside* rivers and their tributaries are likely to be connected to those waters through the exchange of water, biota and chemicals. As the distance between a wetland and a flowing water system increases, these connections become less obvious.'' *Id.* at 55 (emphasis added). The Connectivity Report also recognizes that ''areas that are closer to rivers and streams have a higher probability of being connected than areas farther away.'' Connectivity Report at ES–4. As discussed above, however, the line between Federal and State waters is a legal distinction, not a scientific one, that reflects the overall framework and construct of the CWA. This proposed definition would draw the legal limit of federal jurisdiction as those wetlands that abut or have a direct hydrologic surface connection to otherwise jurisdictional waters, including tributaries as defined in this proposal, in a clear and implementable way that adheres to established legal principles while being informed by the policy choices and expertise of the executive branch agencies charged with administering the CWA.

3. How might the agencies implement this approach?

Under this proposal, wetlands would be considered indistinguishable from other jurisdictional waters, and therefore adjacent, when they abut such waters, even in the absence of a surface hydrological connection occurring between the two. Alternatively, when wetlands are not abutting jurisdictional waters, for example where wetlands are separated from jurisdictional by upland or dikes, barriers, or other similar structures, those wetlands would not be adjacent wetlands unless they have a direct hydrologic surface connection to a jurisdictional water during a typical year. If a wetland satisfies this proposed definition it would be considered a ''water of the United States'' without need for further case-specific significant nexus analysis. This categorical inclusion, however, does not alleviate the need for site-specific verification of jurisdiction, such as confirmation of wetland characteristics, whether the wetlands abut another jurisdictional water and other issues typically addressed during a jurisdictional determination process.

The proposed definition of ''adjacent wetlands'' would not require surface water exchange between wetlands and the jurisdictional waters they abut to create the jurisdictional link, consistent with case law and for ease of implementation. *See Riverside Bayview,* 474 U.S. at 129 (''The plain language of the [Corps' 1977] regulation refutes the Court of Appeals' conclusion that inundation or 'frequent flooding' by the adjacent body of water is a *sine qua non* of a wetland under the regulation.''). Rather, as proposed, a wetland that directly touches an otherwise jurisdictional water at a point or side is ''adjacent'' regardless of where ''the moisture creating the wetlands . . . find[s] it source.'' *Rapanos,* 547 U.S. at 772 (Kennedy, J., concurring), *citing Riverside Bayview,* 474 U.S. at 135.

In addition to wetlands that actually abut other jurisdictional waters, the proposed definition considers wetlands to be ''adjacent'' when they have a direct hydrologic surface connection to jurisdictional waters during a typical year. *See Rapanos,* 474 U.S. at 732 (Scalia, J., plurality) (recognizing that the term ''the waters'' within ''the waters of the United States'' includes ''the flowing or moving masses, as of waves or *floods,* making up . . . streams or bodies'') (emphasis added) (internal quotations omitted); *id.* at 770 (Kennedy, J., concurring) (''the term

'waters' may mean '*flood* or inundation' events that are impermanent by definition'') (emphasis added) (internal citations omitted). During times of inundation occurring from a jurisdictional water to a wetland in a typical year, ''adjacent wetlands'' are indistinguishable from and inseparably bound up with other waters of the United States. In addition to regular flooding, such direct hydrologic surface connections during a typical year may be the result of perennial or intermittent flow between a wetland and a jurisdictional water. Surface water from a wetland that overtops a berm and connects the wetland to a jurisdictional water or connections from a wetland to a jurisdictional water through upland or through a barrier as mediated by a culvert, tide gate, or similar structure would constitute direct hydrologic surface connections so long as such connections are perennial or intermittent as defined in this proposal and occur in a typical year. As proposed, a direct hydrologic surface connection may occur as either confined or unconfined perennial or intermittent flow. Wetlands with a direct hydrologic surface connection to other jurisdictional waters are indistinguishable from and inseparably bound up with those waters of the United States and are adjacent wetlands under this proposal. Ephemeral connections as well as subsurface connections between wetlands and jurisdictional waters do not constitute a direct hydrologic surface connection according to this proposal.

A mere hydrologic connection between a nonnavigable, isolated, intrastate wetland and a jurisdictional water, however, may be insufficient to establish adjacency under the proposed rule. For instance, the fact that a wetland may be connected to the navigable water by flooding, on average, once every 100 years does not satisfy the proposed ''adjacent wetlands'' definition. To be adjacent, a wetland that is otherwise physically separated from a ''water of the United States'' would need to have a direct hydrologic surface connection to a jurisdictional water *during a typical year;* ecological connections between physically separated wetlands and otherwise jurisdictional waters cannot be used to determine adjacency according to this proposal. *See* 547 U.S. at 741–42 (Scalia, J., plurality) (''*SWANCC* found such ecological consideration irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction.''). The agencies may determine that a direct hydrologic surface connection exists during a typical year using, for example, USGS stream gage records, channel-forming discharge recurrence interval, and/or wetland surface water level records. Physically remote isolated wetlands, however, would not be adjacent wetlands under this proposal.

In addition, a jurisdictional wetland divided by an artificial feature, such as a road, would be treated as a single wetland and remain jurisdictional unless there is no direct hydrologic surface connection during a typical year between the wetlands present on either side of that feature. Without such direct hydrologic surface connection, only that wetland (*i.e.,* that portion of the original wetland) which abuts or has a direct hydrologic surface connection to another ''water of the United States'' would be jurisdictional as adjacent, even if there is a subsurface hydrologic connection between the wetlands present on either side of the road. If there is a direct hydrologic surface connection between the wetlands on either side of the road during a typical year, such as where the road has a low-flow crossing or another direct hydrologic surface connection provided by a conduit, such as a culvert, as well as where there is a direct hydrologic surface connection via overtopping of the road, the wetlands on either side of the road may be treated as one wetland and would be jurisdictional as adjacent in its entirety.

For purposes of adjacency under the proposed rule, the entire wetland would be considered adjacent if any portion of the wetland abuts or has a direct hydrologic surface connection to another ''water of the United States,'' regardless of the size and extent of the wetland. For example, if a portion of one side of a wetland physically touches a tributary, then the wetland would be jurisdictional in its entirety. Similarly, if any part of a wetland has a direct hydrologic surface connection to a jurisdictional water, the entire wetland would be considered adjacent. Interpreting the entire wetland to be adjacent if any portion of it satisfies the proposed ''adjacent wetlands'' definition is consistent with longstanding practice. The agencies have found this approach to be simpler and easier to implement in the field than establishing a means of bifurcating wetlands. An adjacent wetland that changes classification (*e.g.,* as defined in Cowardin *et al.* 1979) due to landscape position, hydrologic inundation, or other factors, such as changing from salt marsh to brackish to freshwater wetland, would remain jurisdictional as one adjacent wetland.

The term ''adjacent wetlands'' as proposed includes reference to ''upland.'' The term upland has been used in program implementation for at least a decade following the agencies' *Rapanos* Guidance and thus is familiar to the regulated community and field staff. The term ''upland'' is defined in this proposal as any land that does not meet the three-part test (*i.e.,* hydrology, hydrophytic vegetation, and hydric soils) for wetland under normal circumstances, and as the ordinary meaning of the term clearly indicates, would not include other ''waters of the United States.''

Wetlands separated from other ''waters of the United States'' by upland or by dikes, barriers, or similar structures would not be adjacent and would not be jurisdictional wetlands under the proposed rule, unless there is a direct hydrologic surface connection between the wetland and those waters through or over such structures during a typical year. This is because upland or dikes, barriers, or similar structures typically block most surface water flow. However, if there is a direct hydrologic surface connection during a typical year between the wetland and other ''waters of the United States'' through the dike, barrier, or similar structure, such as through a culvert or tide gate, the wetland would remain adjacent under this proposed rule. A direct hydrologic surface connection can also result from water in the wetland overtopping a berm or barrier to connect the wetland via perennial or intermittent flow to a jurisdictional water in a typical year.

Adjacent wetlands under this proposal would include wetlands with alternating hydroperiods and seasonal wetlands with vegetation shifts so long as the delineated boundary of the wetland abuts a jurisdictional water. The delineated boundary of a seasonal wetland remains constant, even though all three delineation factors may not be apparent year-round, as is current practice. This proposed approach acknowledges seasonal variation in visible wetland characteristics as well as the variation in hydrology and climatic conditions across the country. For example, wetlands with alternating hydroperiods that abut another ''water of the United States'' in the arid West may only have hydrology present for three months while those wetlands in the southeast may have hydrology present for nine months. Wetland hydrology indicators involving direct observation of surface water or saturated soils often are present only during the normal wet portion of the growing season and may be absent during the dry season. Also, seasonal wetlands

with vegetation shifts may display hydrophytic vegetation abutting another ''water of the United States'' except during the dry season. Certain wetland indicators may not be present year-round in a typical year, such as indicators of hydrophytic vegetation, hydric soil, or wetland hydrology periodically due to normal seasonal or annual variability.

Where wetlands in a complex of wetlands have a continuous physical surface connection to one another such that upland boundaries or dikes, barriers, or other structures cannot be drawn to distinguish them as physically separated, the agencies would evaluate these wetlands as a single wetland under the proposed rule. If any portion of these physically interconnected wetlands is adjacent to another ''water of the United States,'' the wetland would be considered adjacent for purposes of this proposed rule.

Given the focus of the proposed adjacent wetlands definition based on the ordinary meaning of the term ''waters,'' common principles from case law, and the limitations on federal authority embodied in section 101(b) of the Act, this proposed definition does not include subsurface hydrologic connectivity as a basis for determining adjacency. The agencies are concerned that the use of shallow subsurface connection could encroach on State and tribal authority over land and water resources and could be confusing and difficult to implement, including in determining whether a subsurface connection exists and to what extent. The categorical inclusion of all wetlands that abut other ''waters of the United States'' and all wetlands with a direct hydrologic surface connection to other jurisdictional waters will invariably include some wetlands that also connect to those waters through shallow subsurface flow. Physically remote wetlands and wetlands lacking a direct hydrologic surface connection would be reserved to regulation by States and Tribes as land and water resources of those States and Tribes.

4. What are the specific issues upon which the agencies are seeking comment?

While the public may comment on all aspects of the agencies' proposed rule, the agencies have proposed a number of ways to try to address and clarify jurisdiction over wetlands as described above and are seeking comment. As a threshold matter, the agencies solicit comment on their interpretations of *Riverside Bayview, SWANCC,* and the *Rapanos* opinions, including specifically the proposal to provide regulatory certainty through categorical treatment of adjacent wetlands rather than on the case-by-case application of Justice Kennedy's significant nexus test.

While the agencies are not proposing to change the longstanding regulatory definition of ''wetlands,'' they request comment on whether including in the regulatory text that areas must satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances to qualify as wetlands would provide additional clarity. The agencies also seek comment on whether there are terms or phrases within the existing wetlands definition that require clarification (*e.g.,* ''under normal circumstances''), and if so how such terms might be defined and if clarification should be provided, for example, via regulatory text or future agency guidance.

The agencies are soliciting comment on other potential interpretations of adjacency, such as including a distance limit to establish the boundaries between Federal and State waters, which several pre-proposal commenters recommended. For example, some commenters have suggested using distance from another jurisdictional water as the basis for asserting jurisdiction over wetlands, even if those wetlands do not abut or have a direct hydrologic surface connection to such waters in a typical year. Others have suggested establishing a jurisdictional cut-off in a contiguous wetland for administrative purposes rather than extending jurisdiction to the outer limits of the wetland where all three wetland characteristics are no longer satisfied. The agencies solicit comment on these alternate suggestions.

The agencies are also soliciting comment on whether the definition of ''adjacent wetlands'' should not include reference to dikes, barriers, and similar structures and instead those terms should be included in the definition of ''upland.'' The definition of ''upland'' would then mean, ''any land area, including dikes, barriers, or similar structures, that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(15) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraphs (a)(1)–(6) of this section.'' Upland would include both natural and artificial land areas meeting the definition.

The agencies are also soliciting comment on an alternate approach, whereby wetlands that are separated from another jurisdictional water by upland or a dike, barrier or other similar structure would not be jurisdictional even if they have a direct hydrologic surface connection in a typical year to an otherwise jurisdictional water. Unlike the proposed approach, this alternative would not allow for seasonal overtopping, for example, to provide for a direct hydrologic surface connection during a typical year, but wetlands would be jurisdictional if the direct hydrologic surface connection is through the upland or structure (*e.g.,* through a culvert). The agencies solicit comment on whether this approach is more consistent with the considerations articulated above than the approach in the proposed definition.

The agencies note that identifying remotely whether wetlands abut a jurisdictional water can be challenging, especially with 2–D aerial imagery and the resolution of remote tools. The agencies are soliciting comment on which indicators can be used to determine whether a wetland abuts a jurisdictional water, and whether surface hydrology indicators or remote tools exist that may be helpful. The agencies believe that it is also important to consider weather and climatic conditions, *i.e.,* review recent precipitation and climate records, to ensure adjacency is not being assessed during a period of drought or after a major precipitation or infrequent flood event. These climatic assessments could employ the same tools used to evaluate whether it is a ''typical year'' for purposes of determining whether a tributary is jurisdictional.

The agencies seek comment on whether it is appropriate to describe a ''direct hydrologic surface connection'' as occurring due to inundation from an (a)(1)–(5) water or via perennial or intermittent flow between a wetland and an (a)(1)–(5) water in a typical year. Additionally, the agencies request comment on whether other types of hydrologic surface connections between wetlands and jurisdictional waters could constitute a ''direct hydrologic surface connection'' or if and under what circumstances subsurface water connections between wetlands and jurisdictional waters could be used to determine adjacency.

The agencies are also soliciting comment on other tools that may be helpful in implementation of the proposed adjacent wetlands category. For example, the agencies seek comment as to whether tools such as NRCS Soil Surveys (Flooding Frequency Classes), tidal gauge data, and site-specific modeling (*e.g.,* Hydrologic Engineering Centers River System

Analysis System or HEC–RAS), as well as historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics, could be helpful in implementation.

H. Waters and Features That Are Not Waters of the United States

1. What are the agencies proposing?

In paragraph (b) of the proposal, the agencies propose eleven exclusions from the definition of ''waters of the United States.'' Specifically, under this proposal, any water not enumerated in paragraphs (a)(1) through (6) would not be a water of the United States. The proposed rule would exclude groundwater, including groundwater drained through subsurface drainage systems. This proposed rule would exclude ephemeral surface features and diffuse stormwater run-off such as directional sheet flow over upland. This proposal would exclude all ditches from the definition of ''waters of the United States'' except those ditches identified in paragraph (a)(3) of the proposed rule. Jurisdictional ditches identified in paragraph (a)(3) include: (1) Ditches that satisfy any of the conditions identified in paragraph (a)(1); (2) ditches constructed in a tributary as long as those ditches also satisfy the conditions of the tributary definition; and (3) ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition. See the Section III.E for further discussion on the types of ditches which would be considered ''waters of the United States'' under this proposed rule. All other ditches are proposed to be excluded.

Prior converted cropland has been excluded from this definition since 1993 and would continue to be excluded. The agencies include in the proposed rule a definition of ''prior converted cropland'' and an explanation of when a prior converted cropland designation would no longer be applicable for purposes of the CWA. The agencies also propose to exclude artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease. In addition, the agencies propose to exclude artificial lakes and ponds constructed in upland, such as water storage reservoirs, farm and stock watering ponds, settling basins, and log cleaning ponds, as long as they are not subject to jurisdiction under either paragraph (a)(4) or (a)(5) of the proposed rule. The proposed rule would also exclude water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel. The agencies also propose to exclude stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off. Also proposed to be excluded are wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins. Waste treatment systems have been excluded from this definition since 1979, and they would continue to be excluded under this proposal; however, waste treatment systems are being defined for the first time in this proposed rule under paragraph (c). A waste treatment system would include all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge). A waste treatment system requires a section 402 permit if it discharges into a water of the United States.

2. Why are the agencies proposing this approach?

These proposed exclusions generally reflect the agencies' current practice, and their inclusion in the proposed rule would further the agencies' goal of providing greater clarity over which waters are and are not regulated under the CWA. Just as the proposed categorical assertions of jurisdiction over tributaries and adjacent wetlands would simplify the jurisdiction issue, the categorical exclusions would likewise simplify the process, and they reflect the agencies' proposed determinations of the lines of jurisdiction based on the case law and the agencies' long-standing practice and technical judgment that certain waters and features are not subject to the CWA.

The plurality opinion in *Rapanos* noted that there were certain features that were not primarily the focus of the CWA, such as channels that periodically provide drainage for rainfall. *See* 547 U.S. at 734. During outreach for this proposed rule, many States, regional groups, and national associations requested ''distinct,'' ''specific,'' and ''clear'' exclusions from the definition of ''waters of the United States.'' In this proposed rule, the agencies propose to thus draw lines and articulate that certain waters and features would not be subject to the jurisdiction of the CWA, consistent with the agencies' proposed interpretation of this statutory term.

Importantly, the agencies are proposing that all waters and features identified in paragraph (b) as excluded would not be ''waters of the United States.'' As stated in paragraph (b)(1) of the proposed rule, waters or water features not enumerated in paragraphs (a)(1) through (6) would not be a water of the United States. The agencies are proposing to take this approach to avoid suggesting that but for an applicable exclusion, such features could be jurisdictional. This proposed approach comprehensively excludes all waters and features the agencies do not intend to include as ''waters of the United States.'' Different features are called different names in different parts of the country, so this approach is intended to also eliminate the risk of confusion.

In proposed paragraph (b)(2), the agencies would exclude groundwater, including groundwater drained through subsurface drainage systems. The agencies have never interpreted ''waters of the United States'' to include groundwater and would continue that practice through this proposed rule by explicitly excluding groundwater.

In proposed paragraph (b)(3), the agencies would exclude ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland. Such features would not be jurisdictional under the proposed terms of paragraph (a) or the proposed definitions in paragraph (c). They would be specifically excluded in the proposed rule to avoid confusion. This proposed exclusion would further highlight and clarify that such features are not tributaries under the proposed rule.

The proposed ditch exclusion in paragraph (b)(4) is intended to be clearer for the regulated public to identify and more straightforward for agency staff to implement than current practice. The agencies have proposed a clear statement that all types of ditches would be excluded except for three instances (see paragraph (a)(3) and the Section III.E for further information on ditches). First, ditches that are (a)(1) waters would be ''waters of the United States.'' Second, ditches constructed in a tributary and that continue to satisfy the conditions of the tributary definition after alteration would be ''waters of the United States.'' And third, ditches constructed in an adjacent wetland that satisfy the conditions of the tributary definition would be ''waters of the United States.'' Many States, regional groups and national associations that commented during the Federalism consultation and during the agencies' general outreach efforts noted that the definition of ''waters of the United States'' should exclude ditches. This

approach reasonably balances the exclusion with the need to preserve jurisdiction over tributaries and adjacent wetlands as defined in this proposal. With this proposed approach, the agencies seek to address the kinds of ditches of concern to many stakeholders.

The definition of ''waters of the United States'' would continue to exclude prior converted cropland in this proposed rule. The agencies are proposing to move this exclusion to paragraph (b)(5), add a definition of ''prior converted cropland'' in paragraph (c)(8), and clarify that the prior converted cropland exclusion would no longer be applicable when the cropland is abandoned *and* the land has reverted to wetlands, as that term is defined in paragraph (c)(15). Under this proposed rule, prior converted cropland is considered abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. Agricultural purposes include land use that makes the production of an agricultural product possible, including but not limited to grazing and haying. This proposed rule would also clarify that cropland that is left idle or fallow for conservation or agricultural purposes for any period of time remains in agricultural use, and therefore maintains the prior converted cropland exclusion. The agencies believe that this clarification is necessary to ensure that cropland enrolled in long-term and other NRCS conservation programs administered by the United States or by State and local agencies that prevents erosion or other natural resource degradation does not lose its prior converted cropland designation as a result of implementing conservation practices. The five-year timeframe for maintaining agricultural purposes is consistent with the 1993 preamble. 58 FR 45033. It is also consistent with the five-year timeframe regarding validity of a jurisdictional determination. *See* 2005 Corps Regulatory Guidance Letter (RGL) 05–02. These proposed revisions are intended to clarify the scope and application of the prior converted cropland exclusion and reaffirm key principles from the 1993 preamble. 58 FR 45033.

In 1993, the agencies categorically excluded prior converted cropland from the definition of ''waters of the United States.'' The 1993 preamble defined prior converted cropland as ''areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible [and that are] inundated for no more than 14 consecutive days during the growing season.'' 58 FR 45031. As explained in detail in the 1993 preamble, the agencies' objective is to protect the nation's waters, including the navigable waters, and due to the degraded and altered nature of prior converted cropland, the agencies determined that such lands should not be treated as jurisdictional wetlands for purposes of the CWA. 58 FR 45032. The 1993 preamble also set out a mechanism to ''recapture'' prior converted cropland into the section 404 program when the land has been abandoned and wetland features return. 58 FR 45034. This approach is consistent with the principles in the 1990 Corps RGL 90–7. Although included in the 1993 preamble and RGL 90–7, these principles have not been incorporated into the text of any promulgated rule. This rulemaking therefore represents the first time the agencies are proposing regulatory language to clarify the meaning of ''prior converted cropland,'' the application of the exclusion, and a recapture mechanism based on abandonment and reversion to wetlands.

Historically, the agencies have attempted to create consistency between the CWA and the Swampbuster program for prior converted cropland. The agencies continue to believe that consistency across these programs is important for the regulated community (*see* 58 FR 45033), and therefore propose to continue excluding prior converted cropland from the definition of waters of the United States. By incorporating the abandonment principles from the 1993 preamble, this proposal remains consistent with the concepts underlying the Swampbuster program but differs in implementation from certain aspects of USDA's current program. Incorporating the abandonment principle, as opposed to a pure ''change in use'' policy (described below), is important for the agencies to appropriately manage wetland resources while providing better clarity to the farming community.

When the 1993 preamble was published, the abandonment recapture principle was consistent with USDA's implementation of the Swampbuster program. Three years later, the 1996 Swampbuster amendments modified the abandonment principle and incorporated a ''change in use'' policy. Under the new policy, prior converted cropland would continue to be regulated as such even if wetland characteristics returned because of lack of maintenance of the land or other circumstances beyond the owner's control, ''as long as the prior converted cropland continues to be used for agricultural purposes.'' Conf. Rep. No. 104–494, at 380 (1996). In 2005, the Army and USDA issued a joint Memorandum to the Field (the 2005 Memorandum) in an effort to again align the CWA 404 program with Swampbuster. The 2005 Memorandum provided that, ''certified [prior converted] determination made by [USDA] remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the [prior converted] determination is no longer applicable and a new wetland determination is required for CWA purposes.''

The 2005 Memorandum did not clearly address the abandonment principle that the agencies had been implementing since the 1993 rulemaking. The change in use policy was also never promulgated as a rule and was declared unlawful by one district court because it effectively modified the 1993 preamble language without any formal rulemaking process. *New Hope Power Co.* v. *U.S. Army Corps of Eng'rs,* 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010). Implementing the 2005 Memorandum created other challenges for the agencies and the regulated community. For example, because the 2005 Memorandum did not clearly address whether or how the abandonment principles should be applied in prior converted cropland cases, neither the agencies nor the regulated community could be certain which approach would be applied to a specific case. If this proposed exclusion is finalized, the Army would take action to withdraw the 2005 Memorandum. It is the agencies' intent that this proposed rule will clarify the prior converted cropland issue and provide regulatory certainty.

The following features also would not be ''waters of the United States'' under this proposed rule:

- Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease (paragraph (b)(6));
- Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, settling basins, and log cleaning ponds) which are not identified in paragraph (a)(4) or (a)(5) of this section (paragraph (b)(7)); and
- Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand or gravel (paragraph (b)(8)).

Paragraphs (b)(6), (7), and (8) of the proposed rule identify features and waters that the agencies have identified as generally not ''waters of the United States'' in previous preambles. The agencies intend that codifying these longstanding practices would further the agencies' goals of providing greater clarity and predictability for the regulated public and the regulators. Several of these exclusions use the phrase ''upland.'' In keeping with the goal of providing greater clarity, the agencies have proposed a definition of ''upland'' in paragraph (c)(13). It is important to note that a ''water of the United States'' would not be considered ''upland'' just because it lacks water at a given time. Similarly, an area may remain ''upland'' even if it is wet after a rainfall or flood event. Also, the upland requirement would not apply to all exclusions under paragraph (b). Those waters/features under proposed paragraph (b) that do contain the stipulation that they must be created in upland to be excluded must be created wholly in upland. Features not constructed wholly in upland could meet the proposed definition of ''waters of the United States,'' unless otherwise excluded under another part of paragraph (b). The agencies note that the mere interface between the excluded feature constructed wholly in upland and a jurisdictional water would not make that feature jurisdictional. For example, a ditch constructed wholly in upland that connects to a tributary would not be considered a jurisdictional ditch. Finally, a proposed excluded feature that develops wetland characteristics within the confines of the water/feature would remain excluded from the definition of ''waters of the United States.''

In proposed paragraph (b)(7) regarding artificial lakes and ponds constructed in upland, the agencies have removed language regarding ''use'' of the ponds, including the term ''exclusively,'' which were used in the 1986 and 1988 preambles. In most cases, the ''use'' of the pond is captured in its name. More importantly, the agencies recognize that artificial lakes and ponds are often used for more than one purpose and can have a variety of beneficial purposes, including water retention or recreation. The proposed exclusion reflects the agencies' practice and would ensure that waters the agencies have historically not treated as jurisdictional would not become so because of another incidental beneficial use. In the text of the proposed exclusion, the agencies are also clarifying that these features would not be excluded if they are jurisdictional impoundments because altering a water by impounding it would not change the water's jurisdictional status, consistent with longstanding agency practice. However, when an applicant receives a permit to impound a water of the United States in order to construct a waste treatment system (as excluded under (b)(11)), the agencies are affirmatively relinquishing jurisdiction over the resulting waste treatment system as long as it is used for this permitted purpose, consistent with longstanding practice. Also consistent with longstanding practice, waters upstream of the waste treatment system may still be considered jurisdictional where they meet the proposed definition of ''waters of the United States.''

In proposed paragraph (b)(8), the proposed rule includes several refinements to the existing 1986 and 1988 preamble language related to the exclusion for water-filled depressions created in upland as a result of certain activities. In addition to construction activity, the agencies have also proposed to exclude water-filled depressions created in upland incidental to mining activity. This is consistent with the exclusion in the 2015 Rule and with the agencies' 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and the agencies believe there is no need to distinguish between features based on whether they are created by construction or mining activity.

In proposed paragraph (b)(9), the agencies would exclude stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater runoff. The agencies' practice is to view stormwater control measures that are not built in ''waters of the United States'' as non-jurisdictional. Conversely, the agencies currently view some waters, such as channelized streams with intermittent or perennial flow, as jurisdictional even where used as part of a stormwater management system. Nothing in the proposed rule is intended to change that practice. Rather, this exclusion would clarify the appropriate limits of jurisdiction relating to these systems. A key element of the exclusion is whether the feature or control system was built in upland and whether it conveys, treats, or stores stormwater. Certain features, such as curbs and gutters, may be features of stormwater collection systems, but have never been considered waters of the United States. Stormwater control features have evolved considerably over the past several years, and their nomenclature is not consistent, so in order to avoid unintentionally limiting the proposed exclusion, the agencies have not included a list of excluded features in the rule. The proposed rule is intended to exclude the diverse range of stormwater control features that are currently in place and may be developed in the future.

Traditionally, stormwater controls were designed to direct runoff away from people and property as quickly as possible. Cities built systems to collect, convey, or store stormwater, using structures such as curbs, gutters, and sewers. Retention and detention stormwater ponds were built to store excess stormwater until it could be more safely released. More recently, treatment of stormwater has become more prevalent to remove pollutants before the stormwater is discharged. Even more recently, cities have turned to green infrastructure, using existing natural features or creating new features that mimic natural hydrological processes that work to infiltrate or evapo-transpirate precipitation, to manage stormwater at its source and keep it out of the conveyance system. These engineered components of stormwater management systems can address both flood control and water quality concerns, as well as provide other benefits to communities. This proposed rule is designed to avoid disincentives to this environmentally beneficial trend in stormwater management practices.

The agencies propose to exclude wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins in paragraph (b)(10). This proposed exclusion clarifies the agencies' current practice that waters and water features used for water reuse and recycling would not be jurisdictional when constructed in upland. The agencies recognize the importance of water reuse and recycling, particularly in areas like California and the Southwest where water supplies can be limited and droughts can exacerbate supply issues. This proposed exclusion responds to numerous commenters and is intended to avoid discouraging or creating barriers to water reuse and conservation. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and infiltration ponds are becoming more prevalent tools for water reuse and recycling. These features are used to

collect and store water, which then infiltrates into groundwater via permeable soils. Though these features are often created in upland, they are also often located in close proximity to tributaries or other larger bodies of water. The proposed exclusion in paragraph (b)(10) would codify longstanding agency practice and encourage water management practices that the agencies recognize are important and beneficial.

Proposed paragraph (b)(11) would exclude waste treatment systems. The waste treatment system exclusion has existed since 1979, and the agencies are continuing such exclusion under this proposal. The agencies are also for the first time proposing a definition of ''waste treatment system'' under paragraph (c)(14) to clarify which waters and features are considered part of a waste treatment system and therefore excluded. Continuing current practice, any entity with a waste treatment system would need to comply with the CWA by obtaining a section 404 permit if constructed in waters of the United States, and a section 402 permit for discharges from the waste treatment system into waters of the United States. The agencies intend for this exclusion to apply only to waste treatment systems constructed in accordance with the requirements of the CWA and to all waste treatment systems constructed prior to the 1972 CWA amendments. One proposed ministerial change is the deletion of a cross-reference in the current language to an EPA regulation that no longer exists.

Some pre-proposal commenters suggested the agencies clarify how the waste treatment system exclusion is currently implemented. Many comments raised questions about stormwater systems and wastewater reuse and whether such facilities are considered part of a complete waste treatment system for purposes of the waste treatment system exclusion. For clarity, the agencies propose related exclusions in paragraphs (b)(9) and (b)(10) and propose to add settling basins and cooling ponds to the definition of ''waste treatment system'' in paragraph (c)(14). The agencies note that cooling ponds that are created under section 404 in jurisdictional waters and that have section 402 permits are and would continue to be subject to the waste treatment system exclusion under the proposed rule. Cooling ponds created to serve as part of a cooling water system with a valid state permit constructed in waters of the United States prior to enactment of the 1972 amendments of the CWA and currently excluded from jurisdiction would also remain excluded under the proposed rule.

3. How might the agencies implement this approach?

The agencies propose to include an exclusion for groundwater under paragraph (b)(2), including groundwater drained through subsurface drainage systems. The agencies added the subsurface drainage clarification to specify that even when groundwater is channelized in subsurface systems, like tile drains used in agriculture, it still remains subject to the exclusion. However, the exclusion would not apply to surface expressions of groundwater, such as where groundwater emerges on the surface and becomes baseflow in intermittent or perennial streams.

The proposed rule would exclude ephemeral features and diffuse stormwater run-off including directional sheet flow over upland under proposed paragraph (b)(3). This exclusion would include ephemeral flows, swales, and erosional features, including gullies and rills, as non-jurisdictional features. Tributaries can be distinguished from these excluded features by the flow regime proposed in the definition of ''tributary.'' Tributaries would have intermittent or perennial flow while these proposed excluded features would have ephemeral flow. It should be noted that some streams are colloquially called ''gullies'' or the like even when they exhibit the characteristics of a tributary; regardless of the name they are given locally, waters that meet the definition of ''tributary'' would not be excluded ephemeral features.

With respect to implementing the proposed ditch exclusions consistent with the proposed rule, that reach of a ditch that meets any of the three categories in paragraph (a)(3) would be considered a ''water of the United States.'' The jurisdictional status of other reaches of the same ditch would have to be assessed based on the specific facts and under the terms of the proposed rule to determine the jurisdictional status of the ditch. For example, a ditch that is constructed in a tributary would not be an excluded ditch under proposed paragraph (b)(4) so long as it satisfies the conditions of the tributary definition, and a ditch is constructed in a tributary when at least a portion of the tributary's original channel has been physically moved. Further, the exclusion of a ditch does not affect the possible status of the ditch as a point source. The agencies believe the proposed ditch exclusion included in the proposed rule would address the majority of irrigation and drainage ditches, including most roadside and other transportation ditches, as well as agricultural ditches.

For the proposed prior converted cropland exclusion, the agencies propose to clarify that when cropland has been abandoned and wetlands have returned, any prior converted cropland designation for that site would no longer be valid for purposes of the CWA. In general, the Corps' current practice has been to defer to certifications of prior converted cropland made by the USDA for areas in agricultural use; but in instances when land has been proposed to change from agricultural to non-agricultural use, the Corps has made new jurisdictional determinations, regardless of any previous designation of prior converted cropland or if an actual change in use has occurred. In other instances when cropland may have been abandoned, the Corps may apply the test from the 1993 preamble. This proposed rule would clarify that the Corps would only apply abandonment principles consistent with the 1993 preamble and would no longer apply the change in use analysis. Under the proposed rule, the Corps must first determine if the land has been ''abandoned.'' Prior converted cropland will be considered abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. If the Corps determines that the land is abandoned, then it must evaluate the current condition of the land to determine whether wetlands conditions have returned. If wetlands are currently present on the property, the Corps must determine whether the wetlands are waters of the United States, consistent with this proposed rule.

As the term ''prior *converted* cropland'' suggests, and as stated in the preamble to the 1993 Rule, land properly designated prior converted cropland has typically been so extensively modified from its prior condition that it no longer exhibits wetland hydrology or vegetation, and no longer performs the functions it did in its natural and original condition as a wetland. 58 FR 45032. It is often altered and degraded, with long-term physical and hydrological modifications that substantially reduce the likelihood of reestablishment of hydrophytic vegetation. Consistent with longstanding Corps policy and wetland delineation procedures, if a former wetland has been lawfully manipulated to the extent that it no longer exhibits wetland characteristics under normal circumstances, it would not be a jurisdictional wetland under the CWA. The altered nature of prior converted

cropland and its conditions constitute the ''normal circumstances'' of such areas. The agencies expect the majority of prior converted cropland in the nation to fall into this category and not be subject to CWA regulation, even after it is abandoned.

However, at least some abandoned prior converted cropland may, under normal circumstances, meet the proposed definition of ''wetlands'' under paragraph (c)(15). To determine whether wetland characteristics are present under ''normal circumstances,'' and whether the site contains waters of the United States as defined under this proposed rule, the agencies could, pursuant to existing regulations and guidance, and in accordance with this proposed rule, prepare a new jurisdictional determination for abandoned prior converted cropland. Such a determination would also evaluate whether the wetland is adjacent within the meaning of paragraph (c)(1) of this proposed rule.

The agencies consider rulemaking to be appropriate here in order to clarify the definition of ''prior converted cropland'' and to provide regulatory certainty over when such lands are no longer eligible for the CWA exclusion. The USDA is responsible for making the determination as to whether land is prior converted cropland for its program purposes, which the agencies would adopt for purposes of the prior converted cropland exclusion under this proposed rule. The EPA and the Corps enforce the prior converted cropland exclusion for CWA purposes and identify whether lands that are no longer prior converted cropland may be waters of the United States. The EPA and the Corps intend to consult with other federal agencies as appropriate, including USDA, when evaluating whether a parcel of land may no longer be eligible for the CWA prior converted cropland exclusion. The agencies' implementation of the proposed prior converted cropland exclusion for CWA regulatory purposes does not affect USDA's administration of the Swampbuster program or a landowner's eligibility for benefits under that program.

In paragraph (b)(6), the agencies propose to clarify their longstanding view that the artificial irrigation exclusion would only apply to the specific land being directly artificially irrigated, including fields flooded for rice or cranberry growing, which would revert to upland should artificial irrigation cease; it is not the case that all waters within watersheds where irrigation occurs would be excluded. Historically, the agencies have taken the position that ponds for rice growing are generally not considered waters of the United States, as reflected in the 1986 preamble and the 2015 Rule. *See* 51 FR 41217. In the past, the agencies have considered those under the artificial lakes or ponds exclusion but propose today to include them in the artificial irrigation category as any wetland crop species, such as rice and cranberry operations, is typically supplied with artificial flow irrigation or similar mechanisms. The agencies take comment on whether this approach is better aligned with existing practices or if rice and cranberry operations should remain in the artificial lakes and ponds exclusion.

In the proposed exclusion at (b)(7) for artificial lakes or ponds, the agencies have also proposed to add farm ponds, log cleaning ponds,[33] and cooling ponds to the list of excluded ponds in the rule for additional clarity. Artificial lakes and ponds created in upland and not subject to jurisdiction under paragraphs (a)(4) or (a)(5) would be excluded. As proposed, this exclusion would also apply to artificial lakes and ponds created as a result of impounding non-jurisdictional waters or features. Conveyances created in upland that are physically connected to and are a part of the proposed excluded feature would also be excluded. The agencies emphasize that ponds that are proposed to be excluded from ''waters of the United States'' could, in some circumstances, be point sources of pollutants subject to section 301 of the Act.

Under proposed paragraph (b)(8), the proposed rule would exclude water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel. In addition to construction activity, the agencies have proposed to exclude water-filled depressions created in upland incidental to mining activity. Since pits excavated in upland for the purpose of obtaining fill, sand, or gravel, which are forms of mining, were not considered to be ''waters of the United States'' as described in the 1986 and 1988 preambles, the agencies believe mining activities should also be explicitly excluded. This is consistent with the 2015 Rule. In addition, through this proposed exclusion the agencies intend to make clear that such water-filled depressions and pits would typically not become ''waters of the United States.''

[33] Log cleaning ponds are used to float logs for removal of twigs, branches, and large knots.

The agencies also propose to exclude in paragraph (b)(9) stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off. As stated previously, the proposed rule is intended to exclude the diverse range of stormwater control features that are currently in place and may be developed in the future. This proposed exclusion does not cover ditches, as ditches would be addressed under paragraph (b)(4) of the proposed rule.

Paragraph (b)(10) of the proposed rule clarifies that wastewater recycling structures constructed in upland would be excluded. The agencies propose to include in this exclusion detention and retention basins as well as groundwater recharge basins and infiltration ponds built for wastewater recycling. The proposed exclusion would also cover water distributary structures that are built in upland for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to an infiltration pond. The agencies have not considered these water distributary systems jurisdictional.

The existing exclusion for waste treatment systems moves to paragraph (b)(11). As discussed above, the agencies propose to not change the longstanding approach to implementing the waste treatment exclusion. As a result, the agencies would continue to apply the exclusion to systems that are treating water so as to meet the requirements of the CWA. Discharges from these systems to waters of the United States would continue to be subject to regulation by the section 402 permitting program. Similarly, if a waste treatment system is abandoned or otherwise ceases to serve the treatment function for which it was designed, it would not continue to qualify for the exclusion.

The agencies also considered other exclusions recommended by stakeholders that were not added to the proposed rule. The agencies did not propose these additional exclusions because they were either so broadly characterized as to introduce significant confusion and potentially exclude waters that the agencies have consistently determined should be covered as ''waters of the United States,'' they were so site-specific or activity-based that they did not warrant inclusion in the nationally-applicable definition, or they were covered by another exclusion in the proposed rule.

It is important to note that while the waters and features listed in the proposed exclusions would not be ''waters of the United States,'' some of

them may convey perennial or intermittent flow to a downstream jurisdictional water, so that portions of a tributary upstream and downstream of the excluded water may meet the definition of ''tributary'' at (c)(11). For example, when water from a tributary is moved into another jurisdictional water through an excluded ditch, the ditch itself would be excluded from jurisdiction under the proposed rule but the tributary upstream and downstream of such break would remain ''waters of the United States.'' Excluded geographic features, such as ditches, may function as ''point sources'' under CWA section 502(14), so that discharges of pollutants to navigable waters through these features would be subject to other parts of the CWA (*e.g.,* CWA section 402).

4. What are specific issues upon which the agencies are seeking comment?

The agencies seek comment on all aspects of the proposed exclusions. In addition, the agencies solicit comment on whether they should enumerate additional specific exclusions for the purposes of clarity, or whether proposed paragraphs (a) and (b) are sufficiently clear as to account for all of the agencies' intended jurisdictional and non-jurisdictional waters. For example, features that move water (particularly in the arid West) that do not eventually reconnect into a tributary or other jurisdictional water would not be jurisdictional and therefore do not need their own specific exclusion. These features would not meet the definition of ''tributary'' or may meet the currently proposed ditch exclusion as an artificial conveyance of water. However, the agencies seek comment on the jurisdictional status of features (other than the ditches the agencies currently propose to exclude) whose purpose is to move water and which do eventually reconnect to the tributary system.

Further, the agencies seek comment on the clarity of the groundwater exclusion in proposed paragraph (b)(2) and ask commenters to consider whether the exclusion could instead read, ''groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems.'' The agencies recognize that unique groundwater situations such as shallow aquifers and tile drainage systems exist around the country and welcome comments on the parameters of the groundwater exclusion and any implementation issues that may arise.

With respect to the proposed exclusion for ditches, the agencies solicit comment on whether certain ditches excavated in upland but with perennial or intermittent flow to an (a)(1) through (5) water should be treated as a jurisdictional tributary and why, and if so, what flow regime would apply (*e.g.,* perennial only or both perennial and intermittent). Recognizing that excluded ditches must be used to convey water, the agencies also seek comment on whether the exclusion for ditches should instead focus on particular ditch use, such as roadside, railway, agriculture, irrigation, water supply, or other similar uses, and if so, why. As discussed in Section III.E, the agencies are soliciting comment on available tools to help identify whether a ''ditch'' is artificial or whether it was constructed in a tributary or adjacent wetland.

The agencies solicit comment on the proposed exclusion of prior converted cropland that uses the abandonment principle to determine whether prior converted cropland would be subject to CWA jurisdiction or if the agencies should apply the change in use analysis. The agencies also solicit comment on procedures that may be useful in implementing the proposed exclusion for prior converted cropland. In particular, the agencies solicit comment as to what constitutes ''for, or in support of, agricultural purposes'' as the term applies to the proposed prior converted cropland definition in this proposal. The agencies also seek comment on the kind of documentation a landowner must maintain to demonstrate that cropland has not been abandoned, or in the alternative, that the land has been used for, or in support of, agricultural purposes at least once in the immediately preceding five years. The agencies also solicit comment on what evidence, other than a USDA determination, the agencies should evaluate and rely upon to determine if cropland is eligible for the prior converted cropland exclusion. Finally, the agencies solicit comment on whether the five-year timeframe for maintaining agricultural purposes is appropriate.

The agencies also request comment on whether the proposed exclusion for artificially irrigated areas should include fields flooded to support the production of other wetland crop species in addition to rice and cranberries. Additionally, the agencies seek comment on whether the proposed artificially irrigated areas exclusion should be expanded to include areas flooded to support aquaculture, such as crayfish production.

The agencies also seek comment on whether the waters and features proposed to be excluded in paragraphs (b)(7), (b)(8), (b)(9), and (b)(10) must be constructed *wholly* in upland, not just in upland as provided in the proposed regulatory text, in order for the exclusion to apply and how such a requirement would affect the utility of these proposed exclusions. The agencies also request comment on whether the proposed exclusion in paragraph (b)(9) for stormwater control features should be expanded or clarified to include permitted municipal separate storm sewer systems (MS4s). If so, the agencies request comment on whether the exclusion would apply to the entire MS4 or limited portions thereof. The agencies also request comment on how they might implement such an exclusion.

The agencies intend for the exclusion in paragraph (b)(11) to apply only to lawfully constructed waste treatment systems. The agencies solicit comment on whether greater clarity is needed by including in the rule text that the exclusion only applies to ''lawfully constructed waste treatment systems.''

I. Summary of Proposed Rule as Compared to the 1986 and 2015 Regulations

The agencies are proposing a definition of ''waters of the United States'' that they consider to be superior to both the 1986 and 2015 Rules. The agencies are proposing to revise previous regulatory definitions of this term to distinguish between water that is a ''water of the United States'' subject to Federal regulation under the CWA and water or land that is subject to exclusive State or tribal jurisdiction, consistent with the scope of jurisdiction authorized under the CWA and the direction in that Act to ''recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .'' 33 U.S.C. 1251(b). The Supreme Court has recognized that new administrations may reconsider the policies of their predecessors so long as they provide a reasonable basis for the change in approach. *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012), *citing FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514–15 (2009) (Rehnquist, J., concurring in part and dissenting in part). The agencies intend that the proposed revised interpretation of the Federal regulatory scope of the CWA would resolve longstanding confusion over broad and unclear definitions of ''waters of the United States.''

The agencies propose to replace the 2015 Rule for the reasons discussed in the Step 1 proposal and supplemental

notice of proposed rulemaking (SNPRM). *See* 83 FR 32227 (July 12, 2018). In addition, the agencies consider this proposal to adhere more closely than the 2015 Rule to the text of the CWA and its legislative history, to the scope of Congress' authority in promulgating the CWA, to the guiding principles that the Supreme Court has articulated in *Riverside Bayview, SWANCC,* and *Rapanos* for interpreting the reach of the CWA, and because it provides a straightforward definition that would be easier to implement than the 2015 Rule. As discussed in Section II of the preamble, this proposed definition of ''waters of the United States'' reflects the ordinary meaning of the term ''waters,'' such as oceans, rivers, and lakes, as opposed to, as discussed in the Step 1 SNPRM, for example, ephemeral geographic features that are dry almost all of the year, as well as nonnavigable, isolated waters as the 2015 Rule would regulate.

The agencies consider the proposed definitions of ''tributary'' and ''adjacent wetlands'' to be more consistent with the Supreme Court's interpretation of the agencies' authority than the scope of ''waters of the United States'' under the 2015 Rule. Congress' traditional commerce power over navigation extends beyond waters traditionally considered navigable, but it is not unlimited. This proposed interpretation of the scope of ''waters of the United States'' would adhere more closely to the limits of Congress' authority over navigable waters than the 2015 Rule, which allows for jurisdiction over a range of ephemeral waters that meet that regulation's definition of ''tributary'' (as well as physically remote isolated wetlands and other waters) that may be located at great distances from traditional navigable waters, so long as they have indicators of a bed, banks, and ordinary high-water mark and eventually contribute flow to a navigable water.

In addition, this proposal would also adhere more closely than the 2015 Rule to the statute and legislative history of the Act, including the policy articulated in CWA section 101(b) that States should maintain primary responsibility over land and water resources. 33 U.S.C. 1251(b). As noted in the Step 1 SNPRM, many commenters on the 2015 Rule indicated that the potential breadth of the 2015 Rule could interfere with State and local land use planning. They expressed particular concern that the 2015 Rule's use of the 100-year floodplain as a factor to establish jurisdiction and the extension of jurisdiction potentially to water features as far as 4,000 feet from a covered tributary, traditional navigable water, interstate water, or territorial sea extended into the regulatory domain of States, Tribes, and local governments. This proposed definition of ''waters of the United States,'' which would limit CWA jurisdiction over rivers and streams to those that contribute perennial or intermittent flow to traditional navigable waters or territorial seas in a typical year, certain lakes and ponds, and wetlands abutting or having a direct hydrologic surface connection to other jurisdictional waters in a typical year, would restore the authority of States, Tribes, and local governments over large swaths of lands and waters that they have traditionally managed based on the preferences of their citizens. *See SWANCC,* 531 U.S. at 174.

The agencies believe that this proposal is also more consistent with *Rapanos* than the 2015 Rule. It reflects the key concepts in the plurality opinion that limited jurisdiction to relatively permanent waters and wetlands with a continuous surface connection to those waters, 547 U.S. at 742, 751 n.13, as well as addressing Justice Kennedy's concern with respect to regulation of wetlands adjacent to ''drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it,'' *id.* at 781. The plurality and Justice Kennedy both agreed in principle that the definition of ''waters of the United States'' must consider: (1) The connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters. The plurality refers to the necessary connection of a wetland to a tributary as a ''continuous surface connection'' or ''continuous physical connection,'' as demonstrated in *Riverside Bayview. Id.* at 742, 751 n.13. Justice Kennedy states that the Act requires a water or wetland have a connection in the form of a '''significant nexus' to waters that are or were navigable in fact or that could reasonably be so made.'' *Id.* at 759. Justice Kennedy recognized that ''the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC,* there may be little or no connection.'' *Id.* at 767. The agencies are particularly concerned that the 2015 Rule's reading of Justice Kennedy's significant nexus test exceeds the agencies' authority under the Act, for the reasons discussed in the Step 1 SNPRM.

For example, as the Step 1 SNPRM explains, Justice Kennedy wrote that adjacent ''wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' '' *Id.* at 780. The opinion does not define the terms ''in the region'' or ''similarly situated,'' but it is reasonable to presume that that Justice Kennedy did not intend ''similarly situated'' to be synonymous with ''all'' waters in a region. The 2015 Rule, however, effectively applied the significant nexus test to lakes, ponds, and other waters, not just wetlands, either alone or in combination with other waters in an entire watershed. *See, e.g.,* 80 FR 37106. The agencies are concerned that this broad reading of the significant nexus test relies too heavily on considerations that Justice Kennedy expresses regarding the interconnected nature of waters but fails to balance those ''environmental concerns'' with the ''limits in the statutory text'' the agencies cannot disregard. *See* 547 U.S. at 778. The agencies also do not think that the opinion of a single justice in a complex case should be the primary determinant of federal jurisdiction over potentially large swaths of aquatic resources, particularly an approach that relies on potentially subjective case-by-case application that reduces regulatory certainty for the regulated community and hinders straightforward implementation by regulatory agencies.

The agencies also believe the definitions of ''tributary'' and ''adjacent wetlands'' in this proposed rule better reflect the importance of the term ''navigable'' in ''navigable waters,'' *id.* at 778–79, than did the analogous definitions in the 2015 Rule. This proposal would give effect to the term ''navigable'' by limiting jurisdiction to tributaries and wetlands that have a continuous physical connection, during some part of a typical year, to traditional navigable waters or the territorial seas. In contrast, under the 2015 Rule, all features meeting the ''tributary'' definition, including ordinarily dry channels, are categorically jurisdictional no matter how small, remote, or frequently flowing, and all ''adjacent'' waters and wetlands, such as those located within 1,500 feet of the high tide line of an (a)(1) or (a)(3) water, are categorically jurisdictional. Additionally, the 2015 Rule provides that waters and wetlands as far as 4,000

feet from an (a)(1) through (5) water are jurisdictional if they, either alone or in combination with other similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of an (a)(1) through (3) water. Such interpretations create considerable tension with Justice Kennedy's understanding of the term ''significant nexus.'' *See id.* at 781–82 (''[I]n many cases wetlands adjacent to tributaries covered by [the Corps' 1986 tributary] standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC.*''). The agencies are concerned that these expansive interpretations of key elements of the definition of ''waters of the United States'' in the 2015 Rule may not comport with the CWA. *See id.* at 778. As the agencies described in the Step 1 SNPRM, the 2015 Rule may have failed to appropriately recognize that the science in the Connectivity Report, while informative and important to consider, is not dispositive in interpreting the statutory reach of ''waters of the United States,'' which is ultimately a legal determination based on the language and structure of the Act and applicable judicial precedent. *Id.*[34]

The agencies are mindful that courts that have considered the merits of challenges to the 2015 Rule have similarly observed that the rule may conflict with Justice Kennedy's opinion in *Rapanos,* particularly the rule's definition of ''tributary.'' *See North Dakota,* 127 F. Supp. 3d at 1056; *Georgia,* 2018 U.S. Dist. LEXIS 97223, at *17. Likewise, the Sixth Circuit stated in response to petitioners' ''claim that the Rule's treatment of tributaries, 'adjacent waters,' and waters having a 'significant nexus' to navigable waters is at odds with the Supreme Court's ruling in *Rapanos*'' that ''[e]ven assuming, for present purposes, as the parties do, that Justice Kennedy's opinion in *Rapanos* represents the best instruction on the permissible parameters of 'waters of the United States' as used in the Clean Water Act, it is far from clear that the new Rule's distance limitations are harmonious with the instruction.'' *In re EPA,* 803 F.3d at 807 & n.3 (noting that ''[t]here are real questions regarding the collective meaning of the [Supreme] Court's fragmented opinions in *Rapanos*''). This proposed tributary definition as a river or stream that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year, better reflects the limits to the agencies' authority that the plurality, as well as Justice Kennedy, recognized in *Rapanos.*

The proposed definition of ''adjacent wetlands'' in this rulemaking, which encompasses wetlands abutting or having a direct hydrologic surface connection to other jurisdictional non-wetland waters in a typical year also specifically reflects the Supreme Court's longstanding views on the scope of jurisdictional wetlands, as opposed to the far broader interpretation in the 2015 Rule. Since *Riverside Bayview,* the Court has held that the Corps could define ''waters of the United States'' to include wetlands ''actually abut[ting]'' navigable waters, but it has not extended its deference to an agency interpretation to encompass more physically remote wetlands. *Rapanos,* 547 U.S. at 740, 741 n.10 (Scalia, J., plurality), *citing Riverside Bayview,* 474 U.S. at 135, and *SWANCC,* 531 U.S. 159. The 2015 Rule expanded the scope of jurisdictional wetlands well beyond those wetlands ''that form the border of or are in reasonable proximity to other waters of the United States,'' *Riverside Bayview,* 474 U.S. at 134, *quoting* 42 FR 37128 (July 19, 1977), that the Supreme Court has long held to be a permissible exercise of authority of the CWA. For instance, the 2015 Rule defined ''adjacent'' and, in turn, ''neighboring'' to include as categorically jurisdictional all waters located within the 100-year floodplain of an (a)(1) through (5) water and not more than 1,500 feet from the ordinary high water mark of such water. The agencies propose to correct this broad interpretation, thereby maintaining consistency with the Supreme Court's opinions and ensuring the agencies operate within the bounds of our Constitutional authority, *see SWANCC,* 531 U.S. at 172, as well as protecting the States' traditional authority over their waters and land use, and the right of the public to clear limits to agency authority.

The proposed rule's specific tributary and adjacent wetlands definitions would eliminate the need for the case-specific significant nexus test that was required for many features after Justice Kennedy's concurring opinion in *Rapanos* and according to the agencies' *Rapanos* Guidance. The categorical treatment of all tributaries and adjacent wetlands, as defined by this proposal, will provide clarity to the regulated public regarding the jurisdictional status of such features and ease the administrative burden the agencies face in conducting a case-specific significant nexus analysis to complete many jurisdictional determinations under previous regulations and guidance.

This proposal would also establish greater clarity with respect to the scope of CWA jurisdiction than the 2015 Rule. The Step 1 SNPRM described the widespread confusion regarding the reach of the 2015 Rule. Filings in the Sixth Circuit demonstrate that petitioners representing the States in that case view the 2015 Rule as extending ''jurisdiction to virtually every potentially wet area of the country.'' Opening Brief of State Petitioners at 15, 61, *In re EPA,* No. 15–3751 (6th Cir. Nov. 1, 2016). In contrast, petitioners representing environmental organizations viewed the 2015 Rule as violating the CWA by failing to cover certain waters. Brief of Conservation Groups at 11, *In re EPA,* No. 15–3751 (6th Cir. Nov. 1, 2016). In addition to the differing interpretations of stakeholders, the litigation itself could lead to further uncertainty. A successful challenge to the 2015 Rule could result in a court order vacating the rule in all or part of the country, potentially contributing to the existing patchwork of legal regimes in effect in different parts of the country. This proposed definition of ''waters of the United States'' would establish bright line jurisdictional boundaries that are intended to be easily comprehensible and implementable by the regulated community, and would avoid the potentially extremely complex jurisdictional landscape that could result from litigation over the 2015 Rule.

The agencies believe that the proposed rule would also be clearer than both the substantive content of the 1986 Rule and the way it has been implemented as a result of litigation. For the reasons discussed in the Step 1 proposal and SNPRM, the 1986 Rule, as interpreted by the Supreme Court and implemented through agency guidance, is preferable to the 2015 Rule. However, a clear, comprehensive regulation that encompasses the Supreme Court's interpretations and agency guidance is preferable to the 1986 Rule. The language of the original 1986 Rule leaves substantially more room for discretion and case-by-case variation than this proposal, particularly paragraph (a)(3) in the 1986 regulation, which claims jurisdiction over waters that are used by interstate or foreign travelers for recreational or other purposes, with no reference to navigable waters. Following the Supreme Court's opinions on the definition of ''waters of the United States,'' particularly

[34] In the 2015 Rule, the agencies acknowledged that science cannot dictate where to draw the line of federal jurisdiction. *See, e.g.,* 80 FR 37060. Notwithstanding that qualifier, the agencies relied on the Connectivity Report extensively in establishing the 2015 Rule's definition of ''waters of the United States.''

SWANCC and *Rapanos,* the 1986 Rule cannot be implemented as promulgated, but rather it must be implemented taking into account the Court's holdings and agency guidance interpreting those cases. In the decade since the *Rapanos* decision, the agencies and the public have become familiar with this multi-layered interpretive approach, which is the reason that the agencies have proposed maintaining this regime during the process of developing and considering public comments on this proposal. Yet a codified definition of ''waters of the United States'' that incorporates Supreme Court caselaw and guidance, and is clear as to the scope of jurisdictional waters, certainly provides greater regulatory predictability than the 1986 regulations, as interpreted by the Supreme Court and implemented through agency guidance.

This proposal more appropriately reflects the scope of the agencies' authority under the statute, the Constitution, the vital role of the States and Tribes in managing their land and water resources, and the need of the public for predictable, easily implementable regulations.

J. Placement of the Definition of Waters of the United States in the Code of Federal Regulations

Consistent with existing placement of the definition of ''waters of the United States'' in the Code of Federal Regulations, the agencies propose to locate the proposed definition of ''waters of the United States'' at 33 CFR 328.3, 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 401.11, and Appendix E to 40 CFR part 300. Alternatively, the agencies seek comment on whether the definition should be codified in just two places in the Code of Federal Regulations for the sake of simplicity, rather than in the eleven locations in which it currently appears. Following this alternate approach, the agencies would retain one definition in Title 33 of the Code of Federal Regulations, which implements the Corps' statutory authority, and one in Title 40, which generally implements EPA's statutory authority. The agencies are not aware of any implications that this alternate approach might have on program implementation aside from making references to the definition less confusing. The agencies solicit comment on any potential impacts this alternate placement approach could have on program implementation.

IV. State, Tribal and Federal Agency Datasets of ''Waters of the United States''

During the extensive pre-proposal outreach to the general public and focused engagement with States and Tribes, the agencies heard from a number of States about their familiarity with waters within their borders and their expertise in aquatic resource mapping. As co-implementers of CWA programs, they also emphasized the potential benefit of greater State and tribal involvement in jurisdictional determinations. Several States suggested the agencies consider their knowledge and increase the role of States and Tribes in identifying those waters that are ''waters of the United States.'' Stakeholders also indicated that maps could increase certainty and transparency regarding the data and methods used to determine which waters are jurisdictional and which waters are not.

In response, the agencies are interested in advancing the development of state-of-the-art geospatial data tools through Federal, State and tribal partnerships to provide an enhanced, publicly-accessible platform for critical CWA information, such as the location of federally jurisdictional waters, the applicability of State and tribal water quality standards, permitted facility locations, impaired waters, and other important features.

Such mapped features would make it easier for agency field staff, the general public, property owners, permit-holders and others to understand the relationship between familiar geographical features and the overlay of CWA jurisdictional waters. For Federal, State and tribal agencies, such geospatial data sets could improve the administration of CWA programs and attainment of water quality goals. Geospatial datasets and resulting future maps that indicate which waters are likely subject to federal jurisdiction could allow members of the regulated community to more easily and quickly ascertain whether they may want to contact a government agency regarding the potential need for a CWA permit. These datasets, when fully developed, would promote greater regulatory certainty and relieve some of the regulatory burden associated with determining the need for a permit and play an important part in helping to attain the goals of the CWA. They could also eventually be used to identify in one layered geospatial map water quality standards, total maximum daily loads, water quality monitoring data, and other beneficial information.

The agencies are seeking public input on possible approaches to developing or utilizing existing aquatic resource mapping, remote sensing technology, or satellite data in order to facilitate the implementation of this proposed definition of ''waters of the United States.'' Specifically, the agencies are interested in suggestions for how to create a regulatory framework that would authorize interested States, Tribes, and Federal agencies to develop for the agencies' approval geospatial datasets representing ''waters of the United States,'' as well as waters excluded from the definition and ''waters of the State'' or ''waters of the Tribe'' within their respective borders.

The agencies anticipate that such geospatial dataset development would be optional and not a requirement. The agencies are not proposing such a framework today because they would like to engage more fully in discussions with States, Tribes, other Federal agencies, and other technical experts before developing a proposal. The agencies anticipate a possible future rulemaking that could propose a specific approach that would be informed by public comments and suggestions on this notice.

State and tribal geospatial datasets would be unrelated to the ability of States or Tribes to establish their own jurisdiction over waters based on State or tribal law that may be broader than the CWA. They would also be unrelated to the subset of waters for which a State or Tribe could assume permitting responsibility for under the CWA, such as section 402 and section 404 permitting. In a separate rulemaking, the EPA intends to clarify the waters for which a State or Tribe could assume responsibility under section 404(g).

Developing geospatial datasets of ''waters of the United States'' may raise a number of technical and process challenges and questions. This is why the agencies are soliciting public input on the feasibility of creating a geospatial dataset of jurisdictional waters to help inform the agencies' considerations rather than proposing a specific approach today. Below is a discussion of some of the technical and process considerations the agencies have anticipated. The public is encouraged to comment on these and other challenges and questions that might arise from geospatial datasets of CWA jurisdiction.

Dataset development would likely be a longer-term activity involving collaboration among technical geospatial experts from Federal, State, tribal governments, and involving other

key stakeholders, such as consensus standards organizations, the private sector, and academia. The agencies are aware that other entities, including, but not limited to, the Advisory Committee on Water Information, which reports to the Department of the Interior; the National Hydrography Dataset program of the U.S. Geological Survey; the National Wetlands Inventory program of the U.S. Fish and Wildlife Service; the Risk Mapping, Assessment, and Planning program of the Federal Emergency Management Agency; the National Wetland Team of the Natural Resources Conservation Service; and others, possess geospatial data and expertise in matters of geospatial identification of water features. In addition, the agencies would anticipate drawing on the expertise and infrastructure of the standing Federal Geographic Data Committee (FGDC) for convening experts, resolving technical issues and vetting developments and innovative ideas.

In the realm of geospatial data, the Federal government has sought to establish ''standards'' for geospatial data through the FGDC. The agencies expect that a final rule defining the scope of ''waters of the United States'' would be the policy with which any mapping effort would need to be consistent. The primary question the methods and data specifications would address is how to remotely identify the measurable hydrologic features that comprise the ''waters of the United States'' in order to create these geospatial datasets. The agencies recognize the need to provide specifications for the data in order to ensure that ''waters of the United States'' datasets are consistent nationwide. These specifications would include the specific structure and content details for the dataset itself, such as the acceptable geographic or projected coordinate system(s), identification of all mandatory (and any optional) data fields to be populated, minimum FGDC-compliant metadata attributes, and acceptable file format(s).

One approach the agencies could take is a future rulemaking following collaboration with technical experts as described above and prior to the States, Tribes, or Federal agencies creating such datasets. States, Tribes, and Federal agencies could then submit method(s) for creating a dataset which would be consistent with the revised definition of ''waters of the United States.'' The EPA and Corps would then review each proposed method in order to determine whether the method results in a complete and accurate representation of ''waters of the United States'' within a dataset extent. Under this approach, any methods determined to result in complete and accurate datasets would be published in the **Federal Register** or through a public website, along with a statement of the geographic area(s) where use of each method is appropriate and approved for use. This approach would likely account for the variation in landscapes and data availability across the nation, would leverage the knowledge the Federal land management agencies, States and Tribes possess regarding their own geography, and could be completed sooner than if the agencies were to develop applicable methods first.

The agencies solicit comment on this proposed approach and suggestions for alternative approaches that the agencies might consider as part of a future rulemaking. For example, how would the methods and datasets, once approved by the agencies, be most effectively communicated to the public? One option might be that, as part of the approval process, States, Tribes and Federal agencies undertake a public notice and comment process for proposed datasets prior to submitting the jurisdictional geospatial dataset to the EPA and the Corps for approval. With respect to review by EPA and the Corps, should there should be a requirement that the agencies approve or disapprove the dataset within a set number of days? As datasets would need to be updated periodically, the agencies also request comment on the appropriate process for updating datasets and a reasonable frequency for doing so such that the datasets effectively represent current conditions.

The goal would be to develop datasets that graphically represent ''waters of the United States'' or portions thereof, to which agencies' staff, the potentially regulated community, and others could refer to see waters that are presumptively jurisdictional under the CWA. No such dataset currently exists. The agencies anticipate that, for such a presumption, a geospatial dataset would need to be developed using a method approved by the EPA and the Corps, be within the specifications for the dataset, and be approved by the agencies to be of sufficient quality. Such a dataset would be subject to potential site-specific refinement in individual jurisdictional determinations to address, for example, the lateral extent of jurisdiction. This approval or disapproval could be subject to judicial review. Following approval, the agencies anticipate that individual waters could be added to or removed from a dataset based on site-specific jurisdictional determinations. Presently, jurisdictional determinations by the Corps are valid for five years, and the agencies anticipate these approved geospatial datasets would need to be updated at a reasonable frequency to ensure they reflect current conditions.

As part of such an effort, the agencies would make public approved methods, specifications and the geospatial datasets at a centralized location. The agencies therefore solicit comment on appropriate features and attributes of the website that would publish this information, as well as any privacy considerations the agencies should understand. In order to provide a useful tool to the public, the agencies anticipate that each approved geospatial dataset would need to be viewable online via a web-based map, on a federally-maintained website. The EPA currently maintains a website at *https://watersgeo.epa.gov/cwa/CWA-JDs/* that presents information on approved jurisdictional determinations made by the Corps and the EPA under the CWA since August 28, 2015. The agencies envision that in the future, this site or another site could provide access to a web-based map.

Because the EPA and the Corps would review the methods used to generate the datasets for consistency with the definition of ''waters of the United States'' and an acceptable level of completeness and accuracy, the resulting State, tribal, and Federal agency datasets would not inappropriately delegate the authority to determine federal jurisdiction under the CWA. Under this proposal, the agencies would retain their current final authority regarding the scope of ''waters of the United States.''

The agencies are interested in learning about experiences States, Tribes, and other Federal agencies have had with mapping aquatic resources and using this information for program implementation. What technical and financial resources were required by their past mapping efforts, and what challenges were faced in mapping various types of aquatic resources? Does past experience recommend an incremental approach, such that States, Tribes, and other Federal agencies start the process with more manageable first steps such as focusing on tributaries rather than all types of waters of the United States, or by focusing on a portion rather than or all of the watersheds or other defined areas within their borders? Under such an incremental approach, the States, Tribes, and other Federal agencies could establish datasets for additional waters over time. However, an incremental approach would require recognition that any approved dataset would not capture

all waterbody types and therefore the agencies would identify any limitations on the web map viewer to provide clarity. As the agencies engage with States, Tribes, other Federal agencies, and the public in a discussion of possible aquatic resource datasets, the agencies would like to better understand the level of interest in developing geospatial datasets of jurisdictional waters should such an option be available.

V. Overview of Supporting Analyses

The agencies conducted a series of analyses to better understand the potential effects across CWA programs associated with a revised definition of ''waters of the United States.'' The analyses are contained and described more fully in the *Resource and Programmatic Assessment for the Proposed Revised Definition of* ''*Waters of the United States*'' and in the *Economic Analysis for the Proposed Revised Definition of* ''*Waters of the United States.*'' Copies of these documents are available in the docket for this action.

As a preliminary matter, the agencies note that they are not aware of any map or dataset that accurately or with any precision portrays the scope of CWA jurisdiction at any point in the history of this complex regulatory program. Establishing a mapped baseline from which to assess regulatory changes is likewise impracticable at this time. As summarized in Section II, for example, what was understood about the potential scope of CWA jurisdiction changed in the 1970s, in the mid-80s with *Riverside Bayview* and regulatory updates, in 2001 with the landmark *SWANCC* decision, in 2006 with the fractured *Rapanos* decision, in 2007 and 2008 with the agencies' attempts to discern the meaning of the *Rapanos* decision through guidance and throughout the ensuing decade of litigation that tested those interpretations, in 2015 with a major rulemaking to redefine the operative phrase ''waters of the United States,'' and throughout the complex litigation following that rulemaking. As the Chief Justice of the Supreme Court succinctly observed in 2016, ''[i]t is often difficult to determine whether a particular piece of property contains waters of the United States . . . .'' *Army Corps of Eng'rs* v. *Hawkes Co.,* 136 S. Ct. at 1812. Given this history, the agencies are not aware of any means to quantify changes in CWA jurisdiction with any precision that may or may not occur as a result of this proposed rule. The agencies acknowledge that they faced criticism from many commenters regarding the accuracy and assumptions they made when attempting to estimate changes in jurisdiction for the economic analysis associated with the 2015 Rule.

Within this complex framework, the agencies have attempted to look at available data to analyze the potential effects of this proposed definition across CWA programs, recognizing that there will be limitations with any approach. In their analyses, the agencies describe how the proposed regulation compares to the baseline of the 2015 Rule and an alternate baseline of pre-2015 practice (*i.e.,* the pre-2015 regulations as interpreted by the Supreme Court and implemented through agency guidance), both of which represent current practice in some areas of the country. The documents outline the agencies' assessment of the potential effects of the proposed definition on aquatic resources across the country and on CWA programs, and the Resource and Programmatic Assessment provides further information on programs addressing aquatic resource quality under other federal statutes. The agencies also researched current State laws and programs to better understand how States already regulate waters within their borders. This information was utilized throughout the agencies' analyses; the State descriptions may be found in Appendix B of the Resource and Programmatic Assessment.

The agencies also identified relevant datasets and technical limitations for analyses of potential changes in jurisdiction for different types of aquatic resources. For the analyses, the agencies examined data records in the Corps' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database that documents Corps decisions regarding the jurisdictional status of various aquatic resource types (*i.e.,* jurisdictional determinations). The aquatic resource types used in ORM2 generally track the *Rapanos* Guidance (*e.g.,* relatively permanent waters) but do not directly correlate with the terms used in the proposed rule, with limited exceptions. The agencies attempted to use publicly-available data from national datasets (*e.g.,* the National Hydrography Dataset (NHD) at High Resolution and the National Wetlands Inventory (NWI)) to assess the potential extent of types of waters whose jurisdictional status might change as a result of the proposed rule. While the NHD and NWI datasets are widely used and recognized as the most comprehensive national datasets that generally map waters and wetlands, they are neither designed nor able to portray jurisdictional waters under the CWA. Therefore, they have technical limitations that would affect the agencies' analyses, as more fully described in the Resource and Programmatic Assessment and Economic Analysis for this proposal. Because of these limitations and the uncertainties in the way in which States or Tribes might respond following a change in the definition of ''waters of the United States,'' many of the potential effects of the proposed rule are discussed qualitatively, and some are discussed quantitatively where possible.

For the Economic Analysis, the agencies applied a two-stage analysis to make the best use of limited local and national level water resources information in their effort to assess the potential implications of this proposed rule. The agencies believe that the outputs of this two-stage analysis are the best way to illustrate the potential overall impact of the proposed rule against the baseline of the 2015 Rule being in effect nationwide (*i.e.,* the sum effect of both stages) and of the 2015 Rule not being in effect (*i.e.,* second stage only). The agencies acknowledge that determining what may happen following the issuance of a new regulation requires making various assumptions, which are discussed throughout the analyses.

The first stage of the Economic Analysis (hereinafter Stage 1) assesses the potential impacts of moving from the 2015 Rule to the pre-2015 practice baseline (*i.e.,* repealing the 2015 Rule and recodifying the prior regulations). For the Stage 1 analysis, the agencies used the original 2015 Rule economic analysis as a starting point and developed a quantitative assessment limited to Stage 1. However, several significant changes to the 2015 Rule analysis have been made in the Stage 1 analysis to account for existing State laws and programs that regulate water and potential State governance responses, as well as to account for better information used to assess the potential benefits and costs of the Stage 1 effects. The agencies developed several scenarios using different assumptions about potential State regulation of waters to provide a range of costs and benefits. Under the scenario that assumes the fewest number of States regulating newly non-jurisdictional waters, the agencies estimate the proposed rule would produce annual avoided costs ranging between $98 and $164 million and annual forgone benefits ranging between $33 to $38 million. When assuming the greatest number of States are already regulating newly non-jurisdictional waters, the agencies estimate there would be avoided annual costs ranging

from $9 to $15 million and annual forgone benefits are estimated to be approximately $3 million. Under the scenario that assumes no States will regulate newly non-jurisdictional waters, an outcome the agencies believe would be unlikely, the agencies estimate the proposed rule would produce annual avoided costs ranging from $165 and $343 million and annual forgone benefits ranging from $93 to $104 million.

The second stage of the economic analysis (hereinafter Stage 2) consists of a series of qualitative analyses and three detailed case studies of moving from the pre-2015 practice to the proposal. The qualitative analysis is intended to provide information on the likely direction of the potential effects on CWA regulatory programs. In addition, the agencies conducted case studies in three major watersheds (Ohio River basin, Lower Missouri River basin, and Rio Grande River basin) to provide information for a quantitative assessment of the potential effects of the proposal. The case studies considered potential ecological effects, and their accompanying potential economic effects for programs implemented pursuant to sections 311, 402, and 404 of the CWA. Because of data limitations, the agencies were only able to provide Stage 2 national-level estimates of the potential avoided permit and mitigation costs and forgone benefits for the CWA 404 program. Using the same methodologies employed in the case studies and using a meta function benefits transfer to value forgone wetland benefits, the national annual avoided costs of the CWA 404 program are estimated to range from $28 million to $266 million and national annual forgone benefits from the CWA 404 program are estimated to range from $7 million to $47 million. When considering the full range of scenarios regarding potential State regulation of waters no longer considered jurisdictional under the proposal, the estimated national annual avoided costs of the CWA 404 program range from $28 million to $497 million and national annual forgone benefits range from $7 million to $136 million.

The agencies solicit comment on all aspects of the analyses performed, including the assumptions made and information used, and request that commenters provide any data that may assist the agencies in evaluating and characterizing potential effects of the proposed change of the definition of ''waters of the United States.'' For example, the agencies request comment on the suitability of the NHD and NWI datasets as tools for performing comparative analyses of revisions to the definition of ''waters of the United States,'' the datasets used (including how they were used) for purposes of the case studies and the national estimates of costs and benefits for CWA 404 program, and the appropriateness of the stated preference studies used to value household willingness to pay for changes in wetland acreage. The agencies also solicit comment on the utility of using focused case studies to help inform the agencies' analysis of a nationwide rule given the lack of comprehensive national datasets representing jurisdictional waters.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017), this proposed rule is expected to be a deregulatory action.

B. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review

This action is an ''economically significant regulatory action'' that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. In addition, the agencies prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in *Economic Analysis for the Proposed Revised Definition of ''Waters of the United States,''* which is available in the docket and briefly summarized in Section V. Additional analysis can be found in the *Resource and Programmatic Assessment for the Proposed Revised Definition of ''Waters of the United States''* which is also available in the docket.

C. Paperwork Reduction Act

This action does not impose any new information collection burden under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2050–0021 and 2050–0135 for the CWA section 311 program and 2040–0004 for the CWA section 402 program. For the CWA section 404 program, the current OMB approval number for information requirements is maintained by the Corps (OMB approval number 0710–0003). However, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR).

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed rule on small entities, ''small entity'' is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration's size standards (*see* 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

The purpose of the RFA is ''to fit regulatory and informational requirements to the scale of the businesses, organizations and governmental jurisdictions subject to the regulation.'' 5 U.S.C. 601. Small entities subject to this proposed rule are largely those entities whose activities are directly covered by the CWA sections 402, 404, and 311 programs. The proposed rule is expected to result in fewer entities subject to these programs, and a reduced regulatory burden for many of the entities that will still be subject to these programs. As a result, small entities subject to these regulatory programs are unlikely to suffer adverse impacts as a result of regulatory compliance.

As addressed in the Economic Analysis for the proposed rule, narrowing the scope of CWA regulatory jurisdiction over waters may result in a reduction in the ecosystem services provided by some waters, and as a result, some entities may be adversely impacted. Some business sectors that depend on habitat, such as those catering to hunters or anglers, or that require water treatment to meet production needs, could experience a

greater impact relative to other sectors. These changes in ecosystem services are likely to be small, infrequent, and dispersed over wide geographic areas, thereby limiting the significance of these impacts on these business sectors. In addition, States and Tribes may already address waters potentially affected by a revised definition, thereby reducing forgone benefits.

The sector likely to be most impacted by the proposed rule are mitigation banks, and companies that provide restoration services. Because fewer waters would be subject to the CWA under the proposed rule than are subject to regulation under the 2015 Rule or pre-2015 practice, there may be a reduction in demand for mitigation and restoration services under the section 404 permitting program. Assessing impacts to this sector is problematic, because this sector lacks a SBA small business definition, and many of the businesses that fall within this sector are also classified under various other NAICs categories. Furthermore, impacts to this sector would not be the direct result of these businesses complying with the proposed rule, rather they would be the indirect result of other entities no longer being required to mitigate for discharges of dredged or fill material into waters that would no longer be jurisdictional under the proposed rule. In addition, potential impacts would be lessened when accounting for State and tribal dredged and fill programs that would necessitate the purchase of mitigation credits. For a more detailed discussion see the RFA section of the Economic Analysis for the proposed rule.

The agencies certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This is a deregulatory action, and the burden on all entities affected by this proposed rule, including small entities, is reduced compared to the 2015 Rule and pre-2015 practice. The agencies have therefore concluded that this action will relieve regulatory burden to small entities.

E. Unfunded Mandates Reform Act

This proposed rule does not contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The proposed definition of ''waters of the United States'' applies broadly to CWA programs. The proposed action imposes no enforceable duty on any state, local or tribal governments or the private sector, and does not contain regulatory requirements that significantly or uniquely affect small governments.

F. Executive Order 13132: Federalism

Consulting with state and local government officials, or their representative national organizations, is an important step in the process prior to proposing regulations that may have implications for State and local governments under the terms of Executive Order 13132 (64 FR 43255, August 10, 1999). The agencies undertook a 60-day Federalism consultation early in the process and then conducted additional outreach to States for this proposed rulemaking to ensure that the agencies could hear the perspectives on how the agencies might revise the definition of ''waters of the United States'' from our State co-regulators. All letters received by the agencies during Federalism consultation may be found on EPA's website at *https://www.epa.gov/wotus-rule/federalism-consultation.*

State and local governments were consulted at the outset of rule development starting on April 19, 2017. The agencies held nineteen Federalism meetings between April 19 and June 16, 2017. Seventeen intergovernmental associations, including nine of the ten organizations identified in EPA's 2008 E.O. 13132 Guidance, attended the initial Federalism consultation meeting, as well as several associations representing State and local governments. Organizations in attendance included: The National Governors Association, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the Council of State Governments, the National Conference of State Legislatures, the County Executives of America, the National Association of Towns and Townships, the Environmental Council of the States, the Western Governors Association, the National Association of Clean Water Agencies, the Association of Clean Water Administrators, the National Association of State Departments of Agriculture, the Association of State Wetlands Managers, the Association of State Floodplain Managers, the National Water Resources Association, the State/Local Legal Center, and several members of EPA's Local Government Advisory Committee (LGAC).

The LGAC met 10 times during this period to address the charge given to its members by the EPA Administrator on a revised rule and completed a report addressing the questions outlined in their charge. The July 14, 2017, final report can be obtained here: *https://www.epa.gov/sites/production/files/2017-07/documents/lgac-final-wotusreport-july2017.pdf.*

The agencies held two additional webinars, the first for Tribes, States, and local governments on December 12, 2017; and, one for States on February 20, 2018. In addition, one in-person meeting to seek technical input on the proposed rule was held with a small group of nine states (Arizona, Arkansas, Florida, Iowa, Maryland, Minnesota, Oregon, Pennsylvania, and Wyoming) on March 8 and 9, 2018.

These meetings and the letters provided by representatives provide a wide and diverse range of interests, positions, comments, and recommendations to the agencies. The agencies have prepared a report summarizing their consultation and additional outreach to state and local governments and the results of this outreach. A copy of the draft report is available in the docket (Docket Id. No. EPA–HQ–OW–2018–0149) for this proposed rule.

Under the technical requirements of Executive Order 13132, the agencies have determined that this proposed rule may not have federalism implications but believe that the requirements of the Executive Order have been satisfied in any event.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

The EPA consulted with tribal officials under the *EPA Policy on Consultation and Coordination with Indian Tribes* early in the process of developing this action to permit them to have meaningful and timely input into its development. In the course of this consultation, the Department of the Army participated in aspects of the process.

EPA initiated a tribal consultation and coordination process before proposing this rule by sending a ''Notification of Consultation and Coordination'' letter on April 20, 2017, to all of the 567 Tribes federally recognized at that time. The letter invited tribal leaders and designated consultation representatives to participate in the tribal consultation and coordination process. The agencies held two identical webinars concerning this matter for tribal representatives on

April 27 and May 18, 2017. Tribes and tribal organizations sent 43 pre-proposal comment letters to the agencies as part of the consultation process. The agencies met with nine Tribes at a staff-level and with three Tribes at a leader-to-leader level, and additional meetings with Tribes are to be scheduled. The agencies continued engagement with Tribes after the end of the formal consultation, including at national update webinars on December 12, 2017 and February 20, 2018, and an in-person Tribal Co-Regulators Workshop on March 6–7, 2018. The agencies have prepared a report summarizing the consultation and further engagement with tribal nations. This report, *Summary Report of Tribal Consultation and Engagement for the Proposed Rule: Definition of ''Waters of the United States''* (Docket Id. No. EPA–HQ–OW–2018–0149), is available in the docket for this proposed rule.

This action may have tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law.

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

J. National Technology Transfer and Advancement Act

This proposed rule does not involve technical standards. The agencies recognize, however, that if they pursue a separate rulemaking to establish a process for approving methodologies and geospatial datasets as discussed in Section III.H, there would be technical standards involved.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

This action is not subject to Executive Order 12898 (59 FR 7629, February 11, 1994) because there is no significant evidence of disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898.

List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Navigation (water), Water pollution control, Waterways.

40 CFR Part 110

Environmental protection, Oil pollution, Reporting and recordkeeping requirements.

40 CFR Part 112

Environmental protection, Oil pollution, Penalties, Reporting and recordkeeping requirements.

40 CFR Part 116

Environmental protection, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 117

Environmental protection, Hazardous substances, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 230

Environmental protection, Water pollution control.

40 CFR Part 232

Environmental protection, Intergovernmental relations, Water pollution control.

40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Occupational safety and health, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

40 CFR Part 302

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

40 CFR Part 401

Environmental protection, Waste treatment and disposal, Water pollution control.

Dated: December 11, 2018.

Andrew R. Wheeler,

Acting Administrator, Environmental Protection Agency.

Dated: December 11, 2018.

R.D. James,

Assistant Secretary for the Army (Civil Works), Department of the Army.

Title 33—Navigation and Navigable Waters

For the reasons set forth in the preamble, the Corps of Engineers proposes to amend 33 CFR part 328 as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

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

Authority: 33 U.S.C. 1251 *et seq.*

■ 2. Section 328.3 is revised to read as follows:

§ 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

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

(2) Tributaries of waters identified in paragraph (a)(1) of this section;

(3) Ditches that satisfy any of the conditions identified in paragraph (a)(1) of this section, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(4) Lakes and ponds that satisfy any of the conditions identified in paragraph (a)(1) of this section, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (a)(1) in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this

section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (a)(1) through (5) of this section in a typical year;

(5) Impoundments of waters identified in paragraphs (a)(1) through (4) and (6) of this section; and

(6) Adjacent wetlands to waters identified in paragraphs (a)(1) through (5) of this section.

(b) The following are not ''waters of the United States'':

(1) Waters or water features that are not identified in paragraphs (a)(1) through (6) of this section;

(2) Groundwater, including groundwater drained through subsurface drainage systems;

(3) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(4) Ditches that are not identified in paragraph (a)(3) of this section;

(5) Prior converted cropland;

(6) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(7) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (a)(4) or (5) of this section;

(8) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(9) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(10) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(11) Waste treatment systems.

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

(1) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (a)(1) through (5) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (a)(1) through (5) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (a)(1) through (5) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (a)(1) through (5) water. Wetlands physically separated from a paragraph (a)(1) through (5) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(2) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(3) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(4) *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.

(5) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(8) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (c)(15) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(9) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(10) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(11) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(12) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(13) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation,

hydric soils) identified in paragraph (c)(15) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (a)(1) through (6) of this section. Waters identified in paragraphs (a)(1) through (6) of this section are not upland.

(14) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(15) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

Title 40—Protection of Environment

For reasons set out in the preamble, the EPA proposes to amend 40 CFR part 110 as follows:

PART 110—DISCHARGE OF OIL

■ 3. The authority citation for part 110 continues to read as follows: 33 U.S.C.

Authority: 1251 *et seq.,* 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR parts 1971–1975 Comp., p. 793.

■ 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) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *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.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (3)(xv) of this definition. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(ix) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

* * * * *

PART 112—OIL POLLUTION PREVENTION

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

Authority: 33 U.S.C. 1251 *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) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (a)(1) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (iv) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (1)(v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to

convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *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.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (3)(xv) of this definition. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(ix) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

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

Authority: 33 U.S.C. 1251 *et seq.*

■ 8. Section 116.3 is amended by revising the definition of ''Navigable waters'' to read as follows:

§ 116.3 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 definition, the term ''waters of the United States'' means:

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

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (a)(1) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (iv) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *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.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (3)(xv) of this definition. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(ix) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water

channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

■ 9. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.,* and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

■ 10. Section 117.1 is amended by revising paragraph (i) 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 (i)(2) of this section, the term ''waters of the United States'' means:

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

(ii) Tributaries of waters identified in paragraph (i)(1)(i) of this section;

(iii) Ditches that satisfy any of the conditions identified in paragraph (i)(1)(i) of this section, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (i)(1)(i) of this section, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (i)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (i)(1)(ii) through (vi) of this section or through water features identified in paragraph (i)(2) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (i)(1)(i) through (v) of this section in a typical year;

(vi) Impoundments of waters identified in paragraphs (i)(1)(i) through (iv) and (vi) of this section; and

(vii) Adjacent wetlands to waters identified in paragraphs (i)(1)(i) through (v) of this section.

(2) The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraphs (i)(1)(i) through (vi) of this section;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (i)(1)(iii) of this section;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (i)(1)(iv) or (v) of this section;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this paragraph (i), the following definitions apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (i)(1)(i) through (v) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (i)(1)(i) through (v) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (i)(1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (i)(1)(i) through (v) water. Wetlands physically separated from a paragraph (i)(1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *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.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (i)(3)(xv) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(ix) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (i)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (i)(1)(ii) through (vi) of this section or through water features identified in paragraph (i)(2) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (i)(3)(xv) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (i)(1)(i) through (vi) of this section. Waters identified in paragraphs (i)(1)(i) through (vi) of this section are not upland.

(xiv) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

* * * * *

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'' to read as follows:

§ 122.2 Definitions.

* * * * *

Waters of the United States or *waters of the U.S.* 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 definition, the term ''waters of the United States'' means:

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

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this section;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *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.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (3)(xv) of this definition. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(ix) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or

retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

* * * * *

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, Secs. 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. 1344(b) and 1361(a)).

■ 14. Section 230.3 is amended by revising paragraph (o) to read as follows:

§ 230.3 Definitions.

* * * * *

(o) The term *waters of the United States* 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 (o)(3) of this section, the term ''waters of the United States'' means:

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

(ii) Tributaries of waters identified in paragraph (o)(1)(i) of this section;

(iii) Ditches that satisfy any of the conditions identified in paragraph (o)(1)(i) of this section, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (o)(1)(i) of this section, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (o)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (o)(1)(i) of this section or through water features identified in paragraph (o)(2) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (o)(1)(i) through (v) of this section in a typical year;

(v) Impoundments of waters identified in paragraphs (o)(1)(i) through (iv) and (vi) of this section; and

(vi) Adjacent wetlands to waters identified in paragraphs (o)(1)(i) through (v) of this section.

(2) The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraphs (o)(1)(i) through (vi) of this section;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (o)(1)(iii) of this section;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (o)(1)(iv) or (v) of this section;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this paragraph (o), the following definitions apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (o)(1)(i) through (v) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (o)(1)(i) through (v) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (o)(1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (o)(1)(i) through (v) water. Wetlands physically separated from a paragraph (o)(1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *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.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean

Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (o)(3)(xv) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(ix) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (o)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (o)(1)(i) through (vi) of this section or through water features identified in paragraph (o)(3) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (o)(3)(xv) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (o)(1)(i) through (vi) of this section. Waters identified in paragraphs (o)(1)(i) through (vi) of this section are not upland.

(xiv) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

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

■ 15. The authority citation for part 232 continues to read as follows:

Authority: 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 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 definition, the term ''waters of the United States'' means:

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

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as

a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *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.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (3)(xv) of this definition. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(ix) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xvi) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

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

Authority: 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 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 definition, the term ''waters of the United States'' means:

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

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in

an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following definitions apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *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.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (3)(xv) of this definition. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(ix) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary

does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

* * * * *

■ 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 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 definition, the term ''waters of the United States'' means:

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

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this section.

(2) The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(xi) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *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.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (3)(xv) of this definition. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(ix) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal*

waters and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

* * * * *

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

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

Authority: 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 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 definition, the term ''waters of the United States'' means:

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

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(xi) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *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.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (3)(xv) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(ix) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

* * * * *

PART 401—GENERAL PROVISIONS

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

Authority: 33 U.S.C. 1251 *et seq.*

■ 23. Section 401.11 is amended by revising paragraph (l) to read as follows:

§ 401.11 General definitions.

* * * * *

(l) *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 (l)(2) of this section, the term ''waters of the United States'' means:

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

(ii) Tributaries of waters identified in paragraph (l)(1)(i) of this section;

(iii) Ditches that satisfy any of the conditions identified in paragraph (l)(1)(i) of this section, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (l)(1)(i) of this section, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (l)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (l)(1)(ii) through (vi) of this section or through water features identified in paragraph (l)(2) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (l)(1)(i) through (v) of this section in a typical year;

(v) Impoundments of waters identified in paragraphs (l)(1)(i) through (iv) and (vi) of this section; and

(vi) Adjacent wetlands to waters identified in paragraphs (l)(1)(i) through (v) of this section.

(2) The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraphs (l)(1)(i) through (vi) of this section;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (l)(1)(iii) of this section;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (l)(1)(iv) or (v) of this section;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this paragraph (l), the following definitions apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (l)(1)(i) through (v) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (l)(1)(i) through (v) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (l)(1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (l)(1)(i) through (v) water. Wetlands physically separated from a paragraph (l)(1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch.* The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *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.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(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 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) *Perennial.* The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (l)(3)(xv) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(ix) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.,* in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (l)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (l)(1)(ii) through (vi) of this section or through water features identified in paragraph (l)(2) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year.* The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (l)(3)(xv) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (l)(1)(i) through (vi) of this section. Waters identified in paragraphs (l)(1)(i) through (vi) of this section are not upland.

(xiv) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water 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.

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