

Case No. 15-3751 (and related cases: 15-3799; 15-3817; 15-3820; 15-3822; 15-3823; 15-3831; 15-3837; 15-3839; 15-3850; 15-3853; 15-3858; 15-3885; 15-3887; 15-3948; 15-4159; 15-4162; 15-4188; 15-4211; 15-4234; 15-4305; 15-4404)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

MURRAY ENERGY CORPORATION, et al.,)	In Re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, published June 29, 2015 (MCP No. 135)
Petitioners,)	
v.)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,)	
Respondents.)	On petition for review from the Environmental Protection Agency and the U.S. Army Corps of Engineers

OPENING BRIEF OF STATE PETITIONERS

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The thirty-one State Petitioners request oral argument to address the significant legal defects identified herein.

JURISDICTIONAL STATEMENT

The U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) (collectively, “Agencies”) promulgated the Clean Water Rule on June 29, 2015. *See* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054-37,105 (June 29, 2015) (“Final Rule” or “Rule”). The States filed timely petitions for review within 120 days, as required under 33 U.S.C. § 1369(B)(1). This Court held that it has jurisdiction over the State petitions under 33 U.S.C. § 1369(B)(1)(F). *See In re U.S. Dep’t of Defense and U.S. EPA Final Rule*, 817 F.3d 261, 273 (6th Cir. 2016). The States have standing because the Rule’s expansion of the Agencies’ authority under the Clean Water Act (“CWA”) imposes significant and sovereign harm upon them. *See, e.g.,* State Petitioners’ Motion for Stay Pending Review & Declarations, No. 15-3799, Dkt. 24, at 15-19 (filed Sept. 9, 2015).

INTRODUCTION

This case is about who has authority to regulate isolated land and water features that are far removed from any navigable waterway: the federal government or the sovereign States. The CWA, like the United States Constitution, reserves that authority to the States. Yet, in the Rule at issue here, the Agencies have asserted federal authority over many of those local resources.

When Congress enacted the CWA over forty years ago, it “chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.’” *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (“*SWANCC*”) (quoting 33 U.S.C. § 1251(b)). But it granted to the federal government primary jurisdiction over the nation’s “navigable waters,” defined as “waters of the United States.” 33 U.S.C. § 1362(7). The resulting statutory regime balances traditional state authority over land use and water resources within their borders with the need for uniform federal regulation to protect navigable-in-fact waters.

The Agencies have repeatedly sought to undermine this balance, asserting regulatory control over land and water resources far removed from the nation’s navigable-in-fact waters. Twice in the last fifteen years, the Supreme Court has rebuked the Agencies for their overreach. In *SWANCC*, the Court invalidated a federal rule that asserted jurisdiction over isolated, local ponds because the ponds were used by migratory birds. 531 U.S. at 174. Then, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court held that the Agencies could not regulate wetlands far removed from navigable-in-fact waters, including those wetlands adjacent to ditches and drains that the Agencies deemed tributaries of navigable waters. *Id.* at 742 (Scalia, J., plurality). In both *SWANCC* and *Rapanos*, the Court made clear

that, in order to preserve the federal-state regulatory balance, the statutory term “waters of the United States” must be given a meaning that is consistent with the primary purpose of the CWA—to protect navigable-in-fact waters. As the Court explained, “[t]he term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” *SWANCC*, 531 U.S. at 172; *see also Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring in the judgment) (a “central requirement” of the Act is that “the word ‘navigable’ in ‘navigable waters’ be given some importance”).

The Final Rule demonstrates that the Agencies have ignored the lessons of *SWANCC* and *Rapanos*. The Agencies now assert jurisdiction over the *very same* waters that the Supreme Court specifically held in those cases were outside the Agencies’ authority. But that is just the tip of the iceberg, as the Rule’s scope far exceeds what the Agencies sought to do in *SWANCC* and *Rapanos*. The Rule categorically federalizes stream beds that usually carry no water, and features that are connected to navigable-in-fact waters, if at all, only once a century. It reaches dry arroyos in New Mexico, ephemeral drainages in Wyoming, swales in Ohio farmland, isolated prairie potholes on the North Dakota plains, and thousands of square miles of Alaskan land that is frozen most of the year. The Rule destroys the

careful balance between federal and state authority that Congress struck in the CWA and that the Constitution mandates.

The Rule is also a textbook example of procedural failure. The Agencies finalized a rule that looks nothing like the version submitted for public comment, all while declaring that the “rule does not have federalism implications,” 80 Fed. Reg. at 37,102. The Corps determined that the Rule would not have significant environmental or socioeconomic implications, ignoring its obligations under the National Environmental Policy Act (“NEPA”). These deficiencies, coupled with the sheer magnitude of the federal regulation at issue, make the Rule one of the most significant procedural failures in the history of the Administrative Procedure Act (“APA”).

Finally, it is worth noting that for decades, the regulatory definition of the foundational term “waters of the United States” in the CWA has been named after the term it defines. But in an attempt to sell the country on an expansive new federal regulation, the Agencies coined a new term for their regulatory program—the “Clean Water Rule.” This terminology implies that without this Rule, the nation’s waters will be “unclean.” The thirty-one States challenging the Rule take deep exception to that implication. All of the States have robust regulatory programs that protect and preserve the natural resources within their boundaries.

ISSUES PRESENTED

1. May the Agencies violate the CWA by asserting federal authority over isolated local land and water resources?

2. May the Agencies define the statutory term “waters of the United States” based on central criteria they did not make available for public comment and that are not supported by the administrative record?

3. May the Agencies violate the Constitution by adopting a rule that (i) deprives the States of their Tenth Amendment rights, (ii) allows the Agencies to exercise power beyond the limits of the Commerce Clause, and (iii) is so vague that it prohibits ordinary people from understanding the CWA’s jurisdictional reach?

4. May the Corps violate NEPA by promulgating a major federal rule without preparing an environmental impact statement?

STATEMENT OF THE CASE

A. Statutory Background

The CWA provides that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.” 33 U.S.C. §1251(b). Congress granted the Agencies authority only over certain “navigable waters,” *see*,

e.g., *id.* § 1362(12), defining such waters as “waters of the United States, including the territorial seas,” *id.* § 1362(7).

The definition of “waters of the United States” determines the scope of numerous provisions in the CWA, including obligations imposed upon the States. Subject to certain exclusions, any person who causes pollutant discharges into “waters of the United States” must obtain a permit under the section 402 National Pollutant Discharge Elimination System (“NPDES”) program, *id.* § 1342, or under section 404 of the CWA for the discharge of dredged or fill material, *id.* § 1344. Forty-six States have assumed NPDES permitting responsibilities within their borders under 33 U.S.C. § 1342(b), NPDES Program Authorizations, <https://www.epa.gov/npdes/npdes-program-authorizations> (last visited October 31, 2016); another two have assumed section 404 permitting under 33 U.S.C. § 1344(g), 40 C.F.R. § 233.70-.71. All States are responsible for developing water quality standards for those “waters of the [United] State[s]” that lie within their borders. 33 U.S.C. § 1313. They must report on the condition of those waters to EPA every two years, *id.* § 1315, and if waters are not achieving their designated standards, the States must develop detailed pollution diets for the underperforming waters and submit those plans to EPA for approval, *id.* § 1313(d). Finally, States must issue water quality certifications for every federal permit that is issued by EPA or the Corps within their borders. *Id.* § 1341. In short, the regulatory

obligations of the thirty-one State Petitioners under the CWA are inextricably entwined with the scope of federal jurisdiction established by the term “waters of the United States.”

For waters that are not subject to section 402 or 404 permitting requirements, the States regulate the water quality and use of such waters under their independent sovereign authority. *See, e.g.*, N.D. Cent. Code §§ 61-28-01 *et seq.*; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. §§ 8-4-101 *et seq.*; Tex. Water Code §§ 26.001 *et seq.*; Ky. Rev. Stat. §§ 224.70-100 *et seq.*

B. Supreme Court Precedent

The Rule is not the first time the Agencies have attempted to expand their jurisdiction through unlawful interpretation of the statutory phrase “waters of the United States.” The Supreme Court has twice in the last fifteen years rejected the Agencies’ overbroad reading of that phrase.

In *SWANCC*, the Court invalidated the Migratory Bird Rule, which asserted jurisdiction over waters “[w]hich are or would be used as habitat” by migratory birds. 531 U.S. at 164. The Corps exceeded its authority, the Court held, because it claimed authority over “nonnavigable, isolated, intrastate waters,” *id.* at 172, such as seasonal ponds, *id.* at 163. The Court supported its determination by finding that the Corps’ interpretation would “alter[] the federal-state framework by

permitting federal encroachment upon a traditional state power”—specifically, the States’ “traditional and primary power over land and water use.” *Id.* at 173-74. The Court held that Congress had not, in the CWA, “express[ed] a desire to readjust the federal-state balance in this manner” or to invoke the “outer limits” of its power. *Id.* at 172-74.

In *Rapanos*, the Court rejected the Corps’ assertion of authority over intrastate wetlands that are not significantly connected to navigable-in-fact waters. 547 U.S. 715. The Court’s majority consisted of a four-Justice plurality opinion and Justice Kennedy’s concurrence in the judgment. The plurality concluded that the CWA “includes 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” those waters, *id.* at 742. The plurality said that “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall” are outside CWA jurisdiction. *Id.* at 739.

Justice Kennedy, in turn, explained that the Agencies only have authority over waters that are navigable-in-fact and waters with a “significant nexus” to such navigable waters. 547 U.S. at 779 (Kennedy, J., concurring in the judgment)

(citing *United States v. Appalachian Power Co.*, 311 U.S. 377, 407-08 (1940)). A water has a “significant nexus” if it “significantly affect[s] the chemical, physical, and biological integrity of” a navigable water. *Id.* at 779-80. Under Justice Kennedy’s approach, the Agencies are not permitted to assert jurisdiction over all “wetlands (however remote)” or all “continuously flowing stream[s] (however small).” *Id.* at 776; *see also id.* at 769 (“merest trickle, [even] if continuous” is insufficient). Justice Kennedy also specifically rejected the Corps’ “theory of jurisdiction,” namely, any “adjacency to tributaries, however remote and insubstantial.” *Id.* at 780.

C. The Proposed Rule

On April 21, 2014, the Agencies published a proposed rule redefining “waters of the United States.” 79 Fed. Reg. 22,188 (Apr. 21, 2014) (“Proposed Rule”). The Agencies proposed to categorize primary waters as “all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce,” as well as “[a]ll interstate waters, including interstate wetlands” and “the territorial seas.” *Id.* at 22,262. The Proposed Rule then provided three additional categories of waters that would fall within the definition of “waters of the United States”: (1) all “tributaries” of primary waters would be per se jurisdictional; (2) all waters “adjacent” to primary waters would be per se jurisdictional, with “adjacency” defined as including all waters lying in a “riparian

area” or “flood plain”; and (3) additional waters, on a case-by-case basis, that “alone or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a” primary water, meaning they “significantly affect[] the chemical, physical, or biological integrity” of a primary water. *Id.* at 22,269.

The Proposed Rule triggered more than one million comments, including comments from the States. A prevailing theme in many of the State comments was that the proposal reached too many local water and land features that are remote from navigable waters. *See, e.g.*, Multi-State Comments 2, ID-7988 (JA__);¹ WY DEQ Comments 3, ID-18020 (JA__); AK DEC Comments 27, ID-19465 (JA__); TX AG Comments 6, ID-5143 (JA__). The States also expressed concern that the Connectivity Study, used as the primary scientific support for the Proposed Rule, failed to address adequately the significance of the connection between waters. *See, e.g.*, AK DEC Comments 11-12, ID-19465 (JA__); ND Comments 5-6, ID-15365 (JA__). The States were also concerned that only a draft of the Connectivity Study was available during the comment period. *See* AK DEC Comments 11, ID-19465 (JA__). The Agencies failed to release a final and

¹ Citations to record materials within this brief are as follows: short title, a pinpoint page reference if applicable, an abbreviated EPA docket number, and a reference to the joint appendix.

significantly revised version of that report until two months *after* the close of the comment period. *See* Connectivity Study, ID-20859 (JA__); 80 Fed. Reg. 2,100 (Jan. 15, 2015).

Commenters also called for the Corps to comply with NEPA by preparing an Environmental Impact Statement (“EIS”) assessing the environmental and socioeconomic effects of the Proposed Rule, as compelled by 42 U.S.C. § 4332(2)(C). *See* AK DEC Comments 15-16, ID-19465 (JA__). The Corps ignored those comments and instead prepared a more streamlined Environmental Assessment (“EA”)² and corresponding Finding of No Significant Impact (“FONSI”),³ determining that the Rule fell below the significance threshold triggering the need for full evaluation in an EIS. And it waited to release those reports until six months *after* the close of the public comment period, shielding the Agencies from public scrutiny. *Compare* 79 Fed. Reg. 61,590, 61,591 (Oct. 14, 2014) (comments on proposed rule due November 14, 2014), *with* Final EA, ID-20867 (JA__) (released May 26, 2015).

D. The Final Rule

The Agencies published the Final Rule in the Federal Register on June 29, 2015. The Rule incorporates the proposal’s definition of primary waters and

² Final EA, ID-20867 (JA__).

³ FONSI, ID-20867 (JA__).

largely retains the proposal's sweeping approach to "tributaries," but then adopts a significantly different approach to "adjacent" waters and case-by-case waters. Importantly, several of the central components that guide the Rule's approach for adjacent waters and case-by-case waters are not even discussed, let alone analyzed, in the administrative record.

In general, the Rule includes three aspects that are relevant for the States' challenge in the present case:

Tributaries. The Rule claims per se jurisdiction over "[a]ll tributaries," 33 C.F.R. § 328.3(a)(5),⁴ defined as any "water that contributes flow, either directly or through another water" to a primary water and that is "characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark," *id.* § 328.3(c)(3). This includes even usually dry channels that provide "intermittent or ephemeral" flow through "any number" of links. 80 Fed. Reg. at 37,076.

Adjacent Waters. The Rule asserts automatic jurisdiction over all waters "adjacent" to primary waters and their "tributaries." 33 C.F.R. § 328.3(a)(6). The Rule defines "adjacent" as all waters "bordering, contiguous, or neighboring"

⁴ The Final Rule's definition of "waters of the United States" is located in multiple parts of the Code of Federal Regulations. For ease of reference, this brief refers to the first location identified in the Rule, 33 C.F.R. Part 328.

primary waters, impoundments, or tributaries. *Id.* §328.3(c)(1). This includes “waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.” *Id.* Departing significantly from the Proposed Rule, the Final Rule then defines “neighboring” to cover: (1) “all waters” any part of which are within 100 feet of the ordinary high water mark of a primary water or “tributary;” (2) “all waters” any part of which are within 1,500 feet of the ordinary high water mark of a primary water or “tributary” and within its 100-year floodplain; and (3) all waters any part of which are within 1,500 feet of the high tide line of a primary water. *Id.* §328.3(c)(2).

The Final Rule also adds an exclusion from the adjacent waters categories—not even mentioned in the Proposed Rule—for “[adjacent w]aters being used for established normal farming, ranching, and silviculture activities.” *Id.* § 328.3(c)(1). The Agencies did not explain why the per se jurisdictional tributaries category contains no similar exclusion.

Case-by-case Waters. The Final Rule allows the Agencies to exercise authority on a case-by-case basis over waters and land features in a way that differs significantly from the proposal. The Rule grants the Agencies authority, on a case-by-case basis, over those “waters [at least partially] located within the 100-year floodplain of a” primary water and “waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark of a” primary water,

impoundment, or tributary so long as the Agencies find a significant nexus with a primary water. *Id.* § 328.3(a)(8).

Under the Final Rule, a water will be deemed to have a “significant nexus” to a primary water if that water, “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]” based on “any single function or combination of functions performed by the water.” *Id.* § 328.3(c)(5) (emphasis added). For example, if bird species like ducks use hydrologically isolated wetlands for foraging and feeding, that use would extend federal jurisdiction to the isolated wetland. *See* 80 Fed. Reg. at 37,093. The same would be true if insects breed in an isolated wetland or marsh and then terminate their life cycle as food for fish or fowl in a non-navigable stream that crosses a state border. *See id.* And isolated wetlands or depressions could be deemed jurisdictional precisely *because of* their isolation—if the Agencies determine that such features store water, trap sediment, or cycle nutrients, they can be deemed jurisdictional individually or in conjunction with other similar waters. *See id.*

E. This Litigation

After the Rule was published in the Federal Register, thirty-one States filed petitions for review in courts of appeals. Pursuant to 28 U.S.C. § 2112, those petitions were consolidated in this Court. On October 9, 2015, this Court stayed

the Rule nationwide, finding that “it is far from clear that the new Rule’s distance limitations are harmonious” with *Rapanos*, and that “the rulemaking process by which the distance limitations were adopted is facially suspect.” *In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015). After granting the stay, this Court held that it has jurisdiction under 33 U.S.C. § 1369(B)(1)(F). *In re U.S. Dep’t of Defense and U.S. EPA Final Rule*, 817 F.3d at 274; *id.* at 282-83 (Griffin, J., concurring in the judgment).

SUMMARY OF ARGUMENT

I. The Rule exceeds the Agencies’ authority under the CWA.

Agencies can only exercise power that has been delegated to them by Congress. In just the last fifteen years, the Supreme Court has twice rebuked the Agencies for regulating beyond the boundaries set by Congress in the CWA, but the Agencies continue to defy those boundaries. In fact, the Rule regulates the very same waters the Court held fall outside the scope of the CWA in *SWANCC* and *Rapanos*.

The Agencies claim to rely exclusively on Justice Kennedy’s *Rapanos* concurrence, but the Rule plainly violates this approach. For example, the Rule’s tributaries category sweeps in usually dry channels that at most occasionally carry the “[t]he merest trickle[s]” into navigable waters. *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment). The adjacency category covers waters

simply because they are somewhat near a remote “tributary,” which are the *very same* waters that Justice Kennedy specifically explained fell outside of the CWA. *See id.* This category also asserts jurisdiction over land features that might link to navigable waters, if at all, only during once-in-a-century rainstorms, which exceeds any reasonable notion of a “significant nexus.” And the case-by-case waters category sweeps in—among many other features—the very same waters that the Supreme Court held were not jurisdictional in *SWANCC*, a decision that Justice Kennedy relied upon heavily.

The Rule also fails the test set out in the *Rapanos* plurality opinion because it includes isolated tributaries, non-adjacent waters misleadingly termed “adjacent,” and waters on a case-by-case basis that also are without a surface connection to relatively permanent navigable waters. The Agencies do not even argue that the Rule satisfies this test, and any such argument would be impossible.

Even if the Rule were not prohibited by the Supreme Court’s clear directives on the meaning of the phrase “waters of the United States,” the Rule’s assertion of broad authority at, and beyond, constitutional limits requires clear congressional authorization. The Supreme Court in *SWANCC* held that the assertion of federal authority in that case was unlawful, in part, to avoid serious constitutional concerns. These concerns apply with much greater urgency to the Rule, which covers not only the very same waters at issue in *SWANCC*, but innumerable other

local land and water features, the regulation of which is a core sovereign function of the States.

II. The Agencies adopted the Rule in plain violation of the APA.

The Agencies unlawfully built the Final Rule around five distance-based components and an unduly narrow exclusion that are not even arguably a “logical outgrowth” of the proposal. The Final Rule’s adjacency and case-by-case waters categories are oriented around several distance-based components that were nowhere mentioned in the Proposed Rule. The Agencies’ notice was so lacking as to these components that the Agencies have not been able to identify even a single comment, out of more than a million, that addresses any of the components. This sort of procedural failure would be unacceptable as to any agency rule, but it is particularly egregious given the context of this rulemaking, which defines how millions of acres of local land and water features will be regulated.

The Agencies’ failure to comply with the APA’s notice-and-comment requirements contributed to another APA violation: the failure to offer record support for the Final Rule. The five distance-based components and the unduly narrow exclusion lack *any* record support, forcing the Agencies to rely upon vague assertions of “reasonable and practical” distinctions and unspecified “experience” to justify their inclusion. 80 Fed. Reg. at 37,085-91. These conclusory statements are insufficient to justify the Rule.

The Agencies' "significant nexus" analysis in support of the Final Rule is similarly problematic. The Agencies rely heavily on the scientific analysis in their Connectivity Study to support their expansive new assertion of jurisdiction. But the science simply supports the unremarkable conclusion that upstream waters are connected to downstream waters. The science does not establish the significance of that connection, as the law requires.

III. The Rule violates the Constitution in three principal ways.

First, it intrudes upon the States' sovereign interests in regulating their land and water resources in violation of the Tenth Amendment, contrary to the core federalism principles also reflected in the CWA. *See* 33 U.S.C. § 1251(b). The Rule asserts jurisdiction over local land and water features that have only a remote connection, if any, to navigable-in-fact waters, turning the Agencies into a "*de facto*" federal "zoning board." *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). This imposes significant burdens on the States, and deprives the States of their sovereign land-use authority.

Second, the Rule exceeds Congress's constitutional authority under the Commerce Clause because it assigns the federal government jurisdiction over isolated, intrastate waters with no meaningful impact on or connection to interstate commerce. *See SWANCC*, 531 U.S. at 173.

Third, the Rule violates the Due Process Clause because it is unconstitutionally vague. The Rule defines jurisdictional tributaries based on the presence of ordinary high water marks and other difficult-to-identify features, which are “so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application,” *Ass’n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007). Similarly, the Rule allows the Agencies to assert jurisdiction over waters on a case-by-case basis without providing sufficient guidance for making such a determination, making it impossible for ordinary citizens to know when their lands will be swept within the CWA on an enforcement agent’s whim.

IV. The Corps violated NEPA in at least three ways.

First, the Corps violated NEPA by failing to prepare an EIS analyzing the environmental and socioeconomic effects of the Final Rule. As one of the most far-reaching regulations ever adopted in the environmental arena, the Rule easily triggered NEPA’s EIS requirement.

Second, the Corps relied on a wholly inadequate EA to determine that the Final Rule will not have significant effects on the human environment. The EA was devoid of analysis of key factors that, if considered, would have prompted any reasonable agency to prepare an EIS.

Third, the Corps' alternatives analysis was similarly defective. The Corps analyzed only two options: the Final Rule and the existing post-*Rapanos* regulatory regime. The Corps ignored reasonable and feasible alternatives, including several raised by the States during the public comment period on the Proposed Rule. By narrowing the range of alternatives considered, the Corps narrowed its scope of review, depriving the public and the States of meaningful participation.

ARGUMENT

I. THE RULE VIOLATES THE CLEAN WATER ACT.

The Rule's interpretation of the statutory term "waters of the United States" in the CWA cannot be squared with the Act or the Supreme Court's understanding of that term. As the CWA makes clear, "waters of the United States" is synonymous with "navigable waters." 33 U.S.C. §§ 1362(7), 1362(12). This means that any reasonable interpretation of "waters of the United States" must apply to navigable-in-fact waters and, at the very most, additional waters that directly impact the water quality of navigable-in-fact waters. The plain terms of the CWA do not permit the Agencies to sweep in local, isolated waters and land features, which have only a tangential relationship to navigable-in-fact waters. In fact, it is a "central requirement" of the Act that "the word 'navigable' in 'navigable waters' be given some importance." *Id.* at 778 (Kennedy, J., concurring in the judgment).

In two opinions, a majority of the Supreme Court in *Rapanos* rejected a previous attempt by the Corps to define the phrase “waters of the United States” in a manner that swept in waters remote from navigable-in-fact waters. A four justice plurality concluded that the phrase applies only to “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). Justice Kennedy concurred in the judgment, explaining instead that “waters of the United States” includes waters “navigable in fact or that could reasonably be so made” and waters with a “significant nexus” to a navigable-in-fact water. *See id.* at 759, 779 (Kennedy, J., concurring in the judgment).

Under *Marks v. United States*, 430 U.S. 188 (1977), “[w]hen a fragmented Court decides a case[,] . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Id.* at 193 (citation omitted). This Court has not yet decided which opinion controls under *Marks*, *see United States v. Cundiff*, 555 F.3d 200, 208-09 (6th Cir. 2009), and it need not do so here. Given that the Agencies justified the Rule based solely on Justice Kennedy’s test, the Rule must be held unlawful if it fails that test. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Even if the Agencies are not bound by their reliance on Justice Kennedy’s test, the Rule also

fails the plurality’s test. And, at the very minimum, if any doubt remains as to the Rule’s legality under either test, that doubt is settled under avoidance principles—as invoked by the Supreme Court in *SWANCC*—because the Rule goes to (and beyond) the limits of Congress’s constitutional authority and settles questions of deep political significance.

A. The Rule Fails Justice Kennedy’s Significant Nexus Test.

In *Rapanos*, Justice Kennedy concluded that the CWA covers only “waters that are or were navigable in fact or that could reasonably be so made” and secondary waters with a “significant nexus” to a navigable-in-fact water. 547 U.S. at 759 (Kennedy, J., concurring in the judgment). A significant nexus exists where the water “either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of” a navigable-in-fact water. *Id.* at 780. This means that the CWA does not include waters with a “speculative or insubstantial” nexus to navigable waters. *Id.* at 780. Thus, Justice Kennedy explained that the CWA does not extend to all “wetlands (however remote),” all “continuously flowing stream[s] (however small),” *id.* at 776, and all waters containing “[t]he merest trickle, [even] if continuous,” *id.* at 769. Justice Kennedy specifically rejected the Corps’ approach of sweeping in all wetlands actually adjacent to tributaries of navigable waters, “however remote and insubstantial,” *id.* at 778-79, explaining that the standard’s breadth “preclude[d] its

adoption,” *id.* at 781. The Rule violates Justice Kennedy’s approach in multiple respects.

1. Per Se Coverage Of “Tributaries.” The Rule’s provision that all “tributaries” of primary waters are per se “waters of the United States” cannot be squared with Justice Kennedy’s approach. Under the Rule, a tributary is any land feature with “a bed and banks and an ordinary high water mark” and that “contributes flow”—no matter how ephemeral—“either directly or through another water” to a primary water. 33 C.F.R. § 328.3(c)(3). This covers land features with “one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground).” *Id.* If there is such a break, the feature is still a tributary if it has “a bed and banks and an ordinary high water mark [that] can be identified upstream of the break.” *Id.* A feature also qualifies as a tributary if it contributes flow (even through a chain of “any number” of other waters) to a primary water. *Id.*; 80 Fed. Reg. at 37,076. As a result, tributaries under the Rule include typically dry land features that indirectly and only occasionally contribute even a mere trickle into a navigable water. *See* 80 Fed. Reg. at 37,076. This wide-reaching definition fails Justice Kennedy’s test because it provides no “assurance” that jurisdictional waters have a *significant* nexus to a

navigable water. *See Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment).

First, the Rule sweeps in features based upon the fact that they “contribute[] flow,” 33 C.F.R. § 328.3(c)(3), even if the flow is “intermittent” or “ephemeral” and “only in response to precipitation events,” 80 Fed. Reg. at 37,076-77; *see also id.* (adding that the presence of such “tributaries” may be “infer[red]” through “desktop tools” where not apparent through “direct field observation”). This disregards Justice Kennedy’s concern that the “volume and regularity” of flow are relevant to decide whether a feature plays a sufficient role in “the integrity of an aquatic system” to establish a significant nexus to a navigable-in-fact water, *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment). Justice Kennedy expressly rejected jurisdiction over features with “[t]he merest trickle [even] if continuous.” *Id.* at 769.

Second, the Rule’s ordinary high water mark (“OHWM”) criterion does not sufficiently identify “flow” to satisfy Justice Kennedy’s test. The Rule defines an OHWM as “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” 33 C.F.R. § 328.3(c)(6). In

Rapanos, Justice Kennedy rejected reliance on the OHWM as a “determinative measure” for establishing a significant nexus. 547 U.S. at 761, 781 (Kennedy, J., concurring in the judgment) (citing 33 C.F.R. § 328.3(e) (2005)). Justice Kennedy concluded that the use of an OHWM as a standard could “provide[] a rough measure of the volume and regularity of flow” if it were consistently applied. *Id.* at 781. “Yet the breadth of this 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 toward it.” *Id.* Such a standard would sweep in waters “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.

In fact, the Agencies’ own studies demonstrate that the presence of an OHWM has no connection to water flow and fails to provide assurance of a significant nexus to navigable waters. For example, a 2006 Corps study found “no direct correlation between the location of OHWM indicators and the inundation areas” in the arid southwest.⁵ Rather, the indicators are “frequently the result of moderate to extreme flood events,” and “are not associated with any return interval

⁵ Robert W. Lichvar et al., U.S. Army Corps of Eng’rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability in Identifying the Limits of “Waters of the United States” in Arid Southwestern Channels* 14 (2006), <http://acwc.sdp.sirsi.net/client/search/asset/1001678>; see also AMA Comments 10-11, ID-13951 (JA__).

event or with physical channel features found in the field.” *Id.* Similarly, a 2013 Corps study concluded that “OHWM indicators are distributed randomly throughout the [arid west] landscape and are not related to specific channel characteristics.”⁶ The Rawhide Wash in Scottsdale, Arizona provides a compelling example of why these studies are accurate. The Wash only conveyed flow 12 times over a 15-year period, *for a total of 18 hours during that time*. City of Scottsdale Comments 3, ID-18024 (JA__). Like most washes in the city, the flow is highly episodic and infiltrates the permeable soils long before it reaches a navigable-in-fact water. *Id.* But that does not matter under the Rule, as this and similar dry washes in Arizona and throughout the arid southwest would be subject to automatic federal jurisdiction under the new tributary definition. In short, the presence of OHWM provides no indication of the regularity of flow and no indication of other channel characteristics that could justify a significant nexus.

Third, the “bed and banks” requirement is an even less reliable measure of water flow than the OHWM rejected by Justice Kennedy. For example, “erosional channels or cuts often will appear to have a distinguishable bed and banks . . . , but [those] are not evidence that the channels actually contribute flow to [navigable

⁶ Lindsey Lefebvre, et al., U.S. Army Corps of Eng’rs, *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* 17 (2013), http://acwc.sdp.sirsi.net/client/en_US/search/asset/1017540; *see also* AMA Comments 11, ID-13951 (JA__).

waters].” AMA Comments 9, ID-13951 (JA__); *see also* WAC Comments 34, ID-14568 (JA__) (“Bed, banks, and OHWM can be seen even in features without ordinary flow.”). Particularly in the arid west, channels with a bed and banks do not necessarily convey even a minimal amount of water. *See* Freeport Comments 2, ID-14135 (JA__); City of Scottsdale Comments 3-5, ID-18024 (JA__). The bed and banks requirement thus provides no assurance that a water “significantly affect[s] the chemical, physical, and biological integrity of” a navigable water, *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

Fourth, any doubt about the propriety of the Rule’s tributaries category is dispelled by its inclusion of the remote “drains, ditches and streams” that Justice Kennedy explained fall outside the CWA. *Id.* at 781. The Rule covers “[d]itches with perennial flow, . . . [d]itches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, . . . [and] [d]itches, *regardless of flow*, that are excavated in or relocate a tributary.” 80 Fed. Reg. at 37,078 (emphasis added). These are the “drains, ditches and streams” carrying only minor water volumes that Justice Kennedy references. *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment). The Agencies’ explanation that they will identify some ditches based not on current conditions but on the “historical presence of tributaries,” 80 Fed. Reg. at 37,078-79, simply confirms their failure to comply with the limits of Justice Kennedy’s analysis.

2. Per Se Coverage Of All “Adjacent” Waters. The Rule’s per se coverage of all “adjacent” waters is also irreconcilable with Justice Kennedy’s approach. The Rule defines adjacent waters as, *inter alia*, (1) “all waters [at least partially] located within 100 feet of the ordinary high water mark of a” primary water, impoundment, or tributary; (2) all “waters located within the 100-year floodplain of a” primary water, impoundment, or tributary “and not more than 1,500 feet from the ordinary high water mark of such water;” and (3) “all waters [at least partially] located within 1,500 feet of the high tide line of a” primary water. 33 C.F.R. § 328.3(c)(2).

As a threshold matter, because the Rule’s per se coverage of “tributaries” is unlawful, any assertion of jurisdiction over “adjacent waters” is illegal to the extent it relies on a connection with a “tributary.” As explained above, the Rule’s coverage of tributaries violates Justice Kennedy’s test by sweeping in waters regardless of frequency, duration, or volume of flow or proximity to navigable waters. It follows that “adjacent waters” included solely on account of their connection to a tributary necessarily lack a “significant nexus” to interstate, navigable waters. Indeed, this aspect of the Rule flagrantly violates Justice Kennedy’s explicit holding in *Rapanos*. Justice Kennedy rejected the Corps’ prior approach of asserting jurisdiction over all wetlands actually adjacent to tributaries of navigable-in-fact waters. *Rapanos*, 547 U.S. at 778-83 (Kennedy, J., concurring

in the judgment). In the Rule, the Agencies double down on this unlawful assertion of authority by defining adjacency itself far more broadly than the adjacency notion that Justice Kennedy found insufficiently robust when dealing with tributaries of navigable-in-fact waters.

The adjacency definition itself fails to satisfy Justice Kennedy's test, even when not dealing with tributaries.

Most obviously, the first part of the Rule's adjacency definition—per se coverage of all waters within the 100-year floodplain and within 1,500 feet of a primary water or a “tributary,” 33 C.F.R. § 328.3(c)(2)(ii)—extends to small ponds, drainages, and wetlands simply because they might have a relationship with such water during a once-in-a-century storm. That plainly violates Justice Kennedy's approach in *Rapanos*, which requires “assurance” that a water “significantly affect[s]” the “chemical, physical, and biological integrity” of a “navigable waters in the traditional sense,” 547 U.S. at 779-81 (Kennedy, J., concurring in the judgment). As Justice Kennedy explained, “[a] mere hydrologic connection should not suffice in all cases,” because it “may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.” *Id.* at 784-85. A once-in-a-hundred-years hydrologic connection is surely too insubstantial given its infrequency.

Thus, the Rule’s categorical claim of federal jurisdiction over all “adjacent” waters as far as 1,500 feet from a “tributary” is far more expansive than the Corps’ jurisdictional theory Justice Kennedy rejected in *Rapanos* as “precluded” by the CWA. *See id.* at 781; *see also id.* at 778-79 (Corps cannot regulate simply “whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.”). And the Rule’s labeling these waters as “adjacent” also fails under *SWANCC*, upon which Justice Kennedy relied in *Rapanos*. After noting that *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), had upheld federal jurisdiction “over wetlands that actually abutted on a navigable waterway,” the Court in *SWANCC* rejected jurisdiction over “ponds that are *not* adjacent to open water.” 531 U.S. at 167-68; *see also Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012) (contrasting abutting waters in *Riverside* with non-adjacent waters in *SWANCC* and *Rapanos*); *Summit Petroleum Corp. v. U.S. EPA*, 690 F.3d 733, 744 (6th Cir. 2012) (using the *Rapanos* understanding that “adjacent” does not mean “merely ‘nearby’” in a Clean Air Act case).

The Rule’s other two distance-based adjacency categories—“all waters [at least partially] located within 100 feet of the ordinary high water mark of a” primary water, impoundment, or tributary, and “all waters [at least partially] located within 1,500 feet of the high tide line of a” primary water—are similarly

unlawful. 33 C.F.R. § 328.3(c)(2). EPA’s Science Advisory Board noted that “the available science supports defining adjacency or determination of adjacency on the basis of *functional relationships*,’ rather than ‘solely on the basis of *geographical proximity of distance* to jurisdictional waters.” 80 Fed. Reg. at 37,064 (citation omitted) (emphasis added). Yet, the Agencies based definitions of adjacent waters “solely” on “geographical proximity.” These definitions do not provide the necessary assurance that the covered land features “play an important role in the integrity of . . . navigable waters,” *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring in the judgment).

3. Case-By-Case Waters. The Rule’s approach to case-by-case jurisdictional waters is also inconsistent with Justice Kennedy’s test. Under the Rule, the Agencies can assert jurisdiction over all waters determined to have a “significant nexus to a” primary water, provided that the waters are: (1) “located within the 100-year floodplain of a” primary water; or (2) “located within 4,000 feet of the high tide line or ordinary high water mark of a” primary water, impoundment or tributary. 33 C.F.R. § 328.3(a)(8). Based on the “functions performed by the water,” a “significant nexus” exists if the water “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].” 33 C.F.R. § 328.3(c)(5) (emphasis added). The functions include, among others, “[c]ontribution of flow,”

“[e]xport of organic matter,” “[e]xport of food resources,” and “[p]rovision of life cycle dependent aquatic habitat” for “species located in” primary waters. *Id.* By EPA’s own admission, the definition covers “the vast majority of the nation’s water features.” Economic Analysis 11, ID-20866 (JA__).

The Rule’s definition of “significant nexus” covers far more waters than permitted under Justice Kennedy’s approach. The Rule permits jurisdiction if a water affects just one aspect of a primary water, not just a navigable water: the “chemical, physical, or biological integrity” of that water. Thus, it expressly permits the Agencies to find a “significant nexus” based solely on a single function, such as “contribution of flow” or “provision of life cycle dependent aquatic habitat” for “species located in” primary waters. 33 C.F.R. § 328.3(c)(5). This means, for example, that the Rule allows for jurisdiction simply if a water affects “dispersal,” 80 Fed. Reg. at 37,063, 37,072, 37,094, which is when “[p]lants and invertebrates” “hitchhik[e]” on waterfowl. Connectivity Study 5-5, ID-20859 (JA__).

In contrast, Justice Kennedy would permit regulation of an intrastate water only where it “significantly affects” the “chemical, physical, *and* biological integrity” of a navigable water in the traditional sense. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment) (emphasis added). The difference is illustrated by the Supreme Court’s decision in *SWANCC*, on which Justice

Kennedy relied in developing his test. In *SWANCC*, the Supreme Court rejected the Corps' argument that it had jurisdiction over isolated sand and gravel pits based merely on the presence of "approximately 121 bird species" that "depend upon aquatic environments for a significant portion of their life requirements." 531 U.S. at 164. As Justice Kennedy explained in *Rapanos*, the Corps' argument in *SWANCC* did not establish a sufficient "connection" between the isolated pits and navigable waters. 547 U.S. at 779 (Kennedy, J., concurring in the judgment). But under the Rule's permissive approach to case-by-case waters, the asserted basis for jurisdiction in *SWANCC* would be sufficient. Several of the bases for jurisdiction discussed above—*e.g.*, provision of "life cycle dependent aquatic habitat[s]" and impact on "dispersal"—are in practical effect no different from the Corps' reliance in *SWANCC* on the mere presence of migratory birds (since, for example, such birds necessarily engage in "dispersal" as they fly from navigable-in-fact to remote waters).

4. Interstate, Non-Navigable Waters. The Rule also violates Justice Kennedy's test because its definition of primary waters—from which the Rule's definitions of tributaries, adjacency, and case-by-case waters then operate—includes a category of waters that are not "navigable in fact," *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring in the judgment), and "could [not] reasonably be so made," *id.* at 759. Specifically, the Rule's primary waters definition covers

“interstate waters, including interstate wetlands,” 33 C.F.R. § 328.3(a)(2), even where such waters are not “navigable in fact” and “could [not] reasonably be so made,” *Rapanos*, 547 U.S. at 759, 778 (Kennedy, J., concurring in the judgment). Under Justice Kennedy’s test, the CWA protects waters that are navigable and those additional waters that have a significant nexus to such navigable waters. Both Justice Kennedy and the statutory text make clear that non-navigable waters—whether they are interstate or not—are not the focus of the CWA. Accordingly, the Rule should not premise jurisdiction over non-navigable waters on a purported significant nexus to non-navigable interstate waters. To the extent that any category of such interstate waters is covered by the CWA, they could only be included under Justice Kennedy’s approach after a showing that they have a significant nexus to navigable-in-fact waters.

B. The Rule Fails The *Rapanos* Plurality’s Test.

Although the Agencies are precluded from arguing that the *Rapanos* plurality opinion justifies the Final Rule, *see Chenery*, 318 U.S. at 95, such an argument would fail in any event. The *Rapanos* plurality concluded that the CWA “includes 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 “those wetlands with a continuous surface connection to” those waters, *id.* at 742. It does not include “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” *Id.* at 739. The Rule violates these principles for at least four reasons.

First, the Rule’s tributary definition includes features with intermittent or ephemeral flow in excess of the *Rapanos* plurality’s reading of the CWA. The Agencies admit that the Rule covers “perennial, intermittent, [and] ephemeral” streams with “flowing water only in response to precipitation events in a typical year.” 80 Fed. Reg. at 37,076. But the plurality specifically found it unreasonable to read “waters of the United States” to include “channels containing merely intermittent or ephemeral flow.” *Rapanos*, 547 U.S. at 733 (Scalia, J., plurality).

Second, the Rule’s per se coverage of adjacent waters fails the plurality’s test because it does not require any continuous surface connection to relatively permanent bodies of water. The Rule includes all waters within the 100-year floodplain and within 1,500 feet of the OHWM of a primary water regardless of actual connectivity or the significance of that connectivity. 33 C.F.R. § 328.3(c)(2)(ii). Many waters in these areas are on average connected to a primary water only once every one-hundred years, which falls far short of a “continuous surface connection” with a relatively permanent water. In addition, the Rule includes waters based solely on a connection to a “tributary,” which as

explained earlier can be usually dry channels. Although there may be a connection, that connection is not to a “relatively permanent, standing or flowing bod[y] of water.” See *Rapanos*, 547 U.S. at 732. And because the Rule includes waters based solely on certain distances, including from any “tributary” in a long chain, see 33 C.F.R. § 328.3(c)(2), it sweeps in waters with no surface connection to any body of water, let alone a continuous surface connection to a primary water.

Third, the Rule’s assertion of case-by-case jurisdiction also covers waters with no continuous surface connection to a relatively permanent body of water, in violation of the *Rapanos* plurality. The Rule’s definition of “significant nexus” can be satisfied based on any one of a number of functions, which can be present even if a continuous surface connection is absent. For example, a usually dry channel could meet the requirement for “[c]ontribution of flow,” 33 C.F.R. § 328.3(c)(5), during a rare heavy rainstorm and yet lack “a continuous surface connection” with the water. Similarly, an isolated body of water that is used by some wildlife might affect the “[p]rovision of life cycle dependent aquatic habitat . . . for species located in a [primary] water,” 33 C.F.R. § 328.3(c)(5), and yet lack a “continuous surface connection” with the primary water.

Fourth, the Rule’s inclusion of non-navigable interstate waters as a primary water, 33 C.F.R. § 328.3(a), also violates the plurality’s approach. The plurality held that the CWA is concerned with protecting “a relatively permanent body of

water connected to traditional interstate navigable waters.” *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality). Clearly, non-navigable interstate waters fall outside of that understanding.

C. The Rule Is Not Clearly Authorized By The CWA.

Even if the Rule were not plainly foreclosed by the CWA, the Rule would still exceed the Agencies’ statutory authority because its transformational exercise of authority is not clearly authorized by Congress. It is well-established that “‘Congress legislates against the backdrop’ of certain unexpressed presumptions,” *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)), two of which apply here. The first is that Congress does not delegate to agencies authority at the outer reaches of Congress’s power except in clear terms. *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). “This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” *Id.* The second is that Congress does not grant transformative authority to regulate matters of vast political and economic significance absent a clear statement. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (“*UARG*”). Both of these presumptions require a clear

statement from Congress to justify the Rule’s assertion of the broad authority that it claims. Such a statement is clearly missing here.⁷

First, clear congressional authorization is required for a rule that raises serious federalism concerns. It is a “well-established principle that it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the usual constitutional balance of federal and state powers.” *Bond*, 134 S. Ct. at 2089 (internal quotation and citation omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Thus, if Congress intends to legislate “in traditionally sensitive areas, such as legislation affecting the federal balance,” it must make its intention plain. *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (“To displace traditional state regulation . . . the federal statutory purpose must be ‘clear and manifest.’”); *Tennessee v. FCC*, 832 F.3d 597, 610 (6th Cir. 2016) (finding that “[a]ny attempt by the federal government to interpose itself into [the] state-subdivision relationship therefore must come about by a clear directive from Congress”).

⁷ For these and other reasons, the Agencies are not entitled to any deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See* Opening Br. for the Business & Municipal Pet’rs Part III.C.

The Supreme Court applied this clear statement rule in *SWANCC* to invalidate an assertion of CWA jurisdiction by the Corps far less capacious than what is at issue in the Rule. Finding “nothing approaching a clear statement from Congress that it intended [the CWA] to reach an abandoned sand and gravel pit,” the Court rejected the agency’s claimed jurisdiction because it “would result in a significant impingement of the States’ traditional and primary power over land and water use.” *SWANCC*, 531 U.S. at 174. The Court noted that “[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.’” *Id.* (quoting 33 U.S.C. §1251(b)).

Similarly, the plurality in *Rapanos* applied the clear statement rule to bolster its rejection of the Corps’ attempt to extend CWA jurisdiction to “intermittent” and “ephemeral flows of water.” 547 U.S. at 737-38 (Scalia, J., plurality). The plurality found that any attempt to federally regulate such water would not only be “an unprecedented intrusion into traditional state authority,” but would also “stretch[] the outer limits of Congress’ commerce power and raise[] difficult questions about the ultimate scope of that power.” *Id.* at 738. That sort of authority requires a “clear and manifest statement from Congress,” and “the phrase ‘the waters of the United States’ hardly qualifies” as such a statement. *Id.*; *see also*

id. (“[W]e would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.”).

The Rule likewise reaches and even exceeds the outer bounds of Congress’s constitutional authority. The Rule’s expansion of federal authority over intrastate waters will “impinge[] o[n] the States’ traditional and primary power over land and water use,” and “readjust the federal-state balance.” *SWANCC*, 531 U.S. at 174. The Rule’s coverage of intermittent waters, ephemeral waters, and isolated sometimes-wet lands “presses the envelope of constitutional validity,” *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality) (citation omitted), far more than the challenged agency actions in *Rapanos* and *SWANCC*.

The Agencies cannot point to a clear statement from Congress authorizing the expansion of authority they assert. The CWA provides only that the Agencies may require permits for pollutant discharges to “navigable waters” defined as “waters of the United States.” This text does not support the Agencies’ expansive interpretation, and certainly does not do so clearly. *See SWANCC*, 531 U.S. at 174. To the contrary, Congress expressed an intent to “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources,” 33 U.S.C. § 1251(b).

Second, recent Supreme Court cases have made clear that agencies cannot exercise transformative power over matters of vast economic and political

significance without clear congressional authorization. In *UARG*, EPA attempted to expand two Clean Air Act programs to cover sources based only on their greenhouse gas emissions. The Supreme Court rejected that effort, explaining that when an agency seeks to “bring about an enormous and transformative expansion” in its authority to make “decisions of vast ‘economic and political significance,’” *UARG*, 134 S. Ct. at 2444, under a “long-extant statute,” it must point to a clear statement from Congress, *id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). The Supreme Court affirmed this principle last year in *King v. Burwell*, 135 S. Ct. 2480 (2015), holding that courts are not to presume that Congress would implicitly delegate to agencies “question[s] of deep ‘economic and political significance’” because, if “Congress wished to assign [such] question[s] to an agency, it surely would have done so expressly.” *Id.* at 2489 (citation omitted).

In the Final Rule, the Agencies assert transformative authority. The Rule seeks to change fundamentally the allocation of federal and state authority in land and water use. As the plurality noted in *Rapanos*, “extensive federal jurisdiction . . . would authorize the [Agencies] to function as [] *de facto* regulator[s] of immense stretches of intrastate land . . . with the scope of discretion that would befit a local zoning board.” 547 U.S. at 738 (Scalia, J. plurality). By the Agencies’ own estimate, the Rule will result in an increase in determinations of federal jurisdiction

by 2.84 to 4.65 percent. 80 Fed. Reg. at 37,101. Even accepting as true this under-inclusive estimation of the Final Rule's expansion, *but see, infra*, section IV.A., this seemingly small percentage translates to the assertion of authority over a vast amount of additional water and sometimes-wet land. Such an expansion of authority conflicts with the findings of *Rapanos* and *SWANCC* and allows the Agencies to function as a zoning board with the authority to effectively regulate road construction, building construction, farming, and numerous other activities almost anywhere in the nation. *See, e.g.*, ND Comments 3-4, ID-15365 (JA__); Multi-State Comments 12, ID-7988 (JA__).

The economic implications of the Rule for the landowners, businesses, and public agencies that will be subject to additional federal permitting requirements further demonstrate the Rule's transformative expansion of federal authority. As the Supreme Court observed recently, “[t]he costs of obtaining . . . a permit [from the Corps] are significant,” *U.S. Army Corps of Eng’rs v. Hawkes, Co.*, 136 S. Ct. 1807, 1812 (2016), and “the permitting process can be arduous, expensive, and long,” *id.* at 1815 (citing *Rapanos*, 547 U.S. at 721 (Scalia, J., plurality)). Indeed, “[o]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetland permits alone.” *Rapanos*, 547 U.S. at 721 (Scalia, J., plurality) (quotation and citation omitted). And those are just the costs associated with permitting. Among other economic implications, the Rule's expansion of the Agencies'

authority will result in lost opportunities when permits improperly required under the expanded federal regime are delayed or are too costly to justify a project in the first place. *See, e.g.*, AK DEC Comments 14, 16, ID-19465 (JA__, __); WAC Comments 78, ID-14568 (JA__).

The Agencies cannot point to a clear statement from Congress authorizing such a transformative expansion of the Agencies' authority over local land and water use. The phrase "waters of the United States" in the CWA cannot plausibly be construed to clearly authorize the wide reach of the Rule.

II. THE RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

The APA includes two important safeguards relevant to this case. First, an agency must make its rules available for meaningful public comment. 5 U.S.C. § 553(b). Second, a reviewing "court shall . . . hold unlawful and set aside" any final rules that are "arbitrary [or] capricious." *Id.* § 706(2)(A).

There is a critical relationship between these two APA requirements, which this Rule starkly demonstrates. An agency's failure to abide by the strictures of notice-and-comment rulemaking deprives the agency of meaningful comment, increases the likelihood of arbitrary decision-making, and frustrates the courts' ability to conduct meaningful review. For example, when a party challenges a final rule in court, that party is generally "limited to the administrative record" in making its arguments. *Latin Ams. for Soc. & Econ. Dev. v. Adm'r of the Fed.*

Highway Admin., 756 F.3d 447, 464-65 (6th Cir. 2014). In turn, the record the party will need to rely upon will often consist of the “responsive data or argument” submitted during the notice-and-comment period. S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945). That is why one of the principal purposes of the notice-and-comment requirement is “to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” See *Int’l Union, UMWA v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); see also *Ohio Dep’t of Human Servs. v. U.S. Dep’t of Health & Human Servs.*, 862 F.2d 1228, 1236 (6th Cir. 1988). Importantly, when an agency adopts a final rule that is not a “logical outgrowth” of the proposal, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007), the result will often be the imposition of significant regulatory requirements on which the record is underdeveloped, or in an extreme example like this case, silent.

The Final Rule here is a textbook example of such a breakdown in the APA’s processes. The Agencies constructed the Rule’s definition of “waters of the United States” around five central distance-based components and an unduly narrow exclusion that were not even arguably presaged in the proposal. This deprived parties of the opportunity to comment meaningfully on those components, thereby undermining informed agency decision-making and meaningful judicial review. These failures, in turn, contributed to the promulgation of a Rule that is

unsupported by *any* record evidence. These and other failures compel a finding that this rulemaking is arbitrary, capricious, and unlawful.

A. The Agencies Built The Final Rule Around Distance-Based Components And An Unduly Narrow Exclusion That Were Never Submitted For Public Notice-And-Comment.

The APA's notice-and-comment mandate, 5 U.S.C. § 553(b), is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union*, 407 F.3d at 1259. These procedures "ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994). To secure these critical objectives, the final rule must be a "logical outgrowth" of the proposal. *Long Island*, 551 U.S. at 174. A final rule satisfies that test if affected parties "should have anticipated that [the] requirement" embodied in the final rule might be adopted, including because the agency satisfied its duty of informing the public of "the range of alternatives being considered with reasonable specificity." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

The D.C. Circuit has explained that adopting a final rule that is not a logical outgrowth of the proposal “almost always requires vacatur.” *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). For example, in *Small Refiner*, EPA “gave general notice that it might make unspecified changes in the definition of small refinery.” 705 F.2d at 549. The D.C. Circuit held that the agency violated the APA in the final rule by adopting a date-of-ownership limitation on the definition of “small refinery.” *Id.* at 548-49. Similarly, in *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991), the court vacated a final rule where the listing of hazardous waste went from a “largely supplementary function” in the proposal to a “heavy emphasis” in the final rule. *Id.* at 751-52. And in *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076 (D.C. Cir. 2009), the agency violated the APA by proposing to allow parties to recommend comparing data from the most recent year, but then adopting a rule that allowed data comparison over the past four years. *Id.* at 1082; *accord Int’l Union*, 407 F.3d at 1259-60; *Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

Here, the Final Rule’s definition of “waters of the United States” includes five distance-based components and an unduly narrow exclusion that are not a logical outgrowth of the proposal.

1. The first three of these distance-based components involve the definition of per se “adjacent waters.” The Proposed Rule defined “adjacent waters” as all

waters within a so-called “riparian area” or “flood plain” of a primary water. 79 Fed. Reg. at 22,269. In the Final Rule, the Agencies adopted three entirely new distance-based components to define adjacency: (1) waters within 100 feet of a primary water, impoundment, or “tributary;” (2) waters within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or “tributary;” and (3) waters within 1,500 feet of the high-tide line of a primary water. 33 C.F.R. § 328.3(c)(2).

None of these three central “adjacency” distance-based components is a logical outgrowth of the proposal, because no interested party “should have anticipated” them, *Small Refiner*, 705 F.2d at 549. Had proper notice been given, parties from all sides would have submitted comments, data, and detailed maps, addressing the practical import and reasonableness of adopting these particular components. This did not occur because the public had no idea these components were being considered.

Notably, the Agencies cannot identify a single public comment (out of over *one million* submitted) addressing these three distance-based components or the other new components discussed below. The best the Agencies can muster are comments discussing the merits and demerits of distance-based concepts in

general. *See, e.g.*, No. 15-3799, Dkt. 50-1, at 5.⁸ The one internal Corps memorandum, No. 15-3799, Dkt. 132-2, that this Court mandated be included in the administrative record confirms this point. Even the Corps was in the dark about these significant modifications to the proposed rule until months after the close of the public comment period. *See* Moyer Memorandum 1, ID-20882 (JA__).

The Agencies' approach thus resulted in a final rule that was never "tested via exposure to diverse public comment," and was adopted in a manner manifestly "[un]fair[] to affected parties," including because it gave "affected parties [no] opportunity to develop evidence in the record to support their objections to the rule." *Int'l Union*, 407 F.3d at 1259. It also deprived the Agencies of information from those "most interested" and "best informed" regarding this subject matter: the regulated community and the state regulators who implement the CWA and related state programs at the field level. *Phillips Petroleum*, 22 F.3d at 620.

The Agencies have argued that they did not violate the APA because in the Proposed Rule they sought comment on "'establishing specific geographic limits'

⁸ Even if the Agencies now manage to locate a comment or two guessing at one of the five standards or the unduly narrow exclusion, this would be of "little significance" because "the agency must itself provide notice of [its] proposal." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 462 (D.C. Cir. 2012). Indeed, when comments are "sparse and ambiguous at best," this supports the argument that the notice was not adequate. *Shell Oil*, 950 F.2d at 751.

for adjacency such as ‘distance limitations.’” Dkt. 47-1, at 5 (quoting 79 Fed. Reg. at 22,208-09). The Agencies’ position appears to be that because they asked about the merits of “geographical limitations” in general, they could then adopt, as a final rule, any distance-based definition of adjacency whatsoever, including both as to the reference point—e.g., “primary water, impoundment, or tributary;” “floodplain;” “high tide line;” *or any other feature*—and to the distance from that reference point—“100 feet,” “1,500 feet,” *or any other distance*—without seeking public input. This approach could be used to justify virtually “any final [adjacency] rule” and must be rejected. *Envtl. Integrity*, 425 F.3d at 998.

While the Agencies’ approach would be unlawful regardless of the context, it is particularly unacceptable given the scope of this rulemaking. The decision as to what qualifies as a “water of the United States” affects how millions of acres of local land and water features are regulated for purposes of the entire CWA. If the Agencies wanted to build the definition of adjacency around distances from certain reference points, they were duty-bound to inform the public of “the range of alternatives being considered with reasonable specificity,” *Small Refiner*, 705 F.2d at 549, as to *both* the particular reference points themselves *and* the particular distances. The Agencies’ failure on this score led to an APA failure orders of magnitude more significant than the comparatively banal notice failures involving the definition of “small refinery,” *Small Refiner*, 705 F.2d at 549, whether the

listing of wastes would play a “supplementary” or “heavy” role, *Shell Oil*, 950 F.2d at 751-52, or whether data from one or four years could be considered, *CSX*, 584 F.3d at 1078.

2. The next two distance-based components that the Agencies unexpectedly adopted in the Final Rule relate to case-by-case waters. The proposal included a limitless, unlawful approach to these waters, providing that the CWA applied to any water that, in the Agencies’ judgment, had a “significant nexus” to a primary water. 79 Fed. Reg. at 22,269. In the Final Rule, the Agencies sought to address the illegality of their proposed approach, but did so in a manner that violated the notice-and-comment requirement (among other defects). Specifically, the Agencies provided that their case-by-case analysis would now relate to, as relevant here: (1) waters within the 100-year floodplain of a primary water; and (2) waters within 4,000 feet of a primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8). The Agencies’ decision to add these two distance-based components to the case-by-case waters inquiry violates the notice-and-comment requirement because no regulated parties “should have anticipated,” *Small Refiner*, 705 F.2d at 549, that the Agencies would adopt this approach.

The Agencies’ defense of their actions with regard to adding these two components is no more credible than with regard to the three adjacency concepts discussed above. The most the Agencies have been able to muster is a citation to

the Proposed Rule's observation that "'distance of hydrologic connection' is one of the factors that could be considered when evaluating a connection with a downstream water." No. 15-3799, Dkt. 50-1, at 6 (quoting 79 Fed. Reg. at 22,214). But this opaque sentence appeared to be addressing factors that the Agencies would take into account *in conducting* their all-things-considered, case-by-case approach. It did not suggest that the Agencies were considering hard-and-fast distance requirements for case-by-case waters, let alone inform the public of "the range of alternatives being considered with reasonable specificity," *Small Refiner*, 705 F.2d at 549, as to either the particular reference points or the particular distances being considered. Notably, the subsections of the proposal that follow this single sentence consist of three-and-a-half pages discussing potential requirements for case-by-case waters, and *none* of the approaches contemplates adopting criteria based upon specific distances from specific reference points. *See* 79 Fed. Reg. at 22,214-17.

3. The sixth and final standard that the Agencies adopted in the Final Rule was that "waters being used for established normal farming, ranching, and silviculture activities" were excluded from per se jurisdiction under the Rule's adjacency category, but not from the tributary category. 33 C.F.R. § 328.3(c)(1). The Agencies "nowhere even hinted," *CSX*, 584 F.3d at 1082, that they were considering treating farmland differently as between the adjacency and "tributary"

categories. Had the Agencies informed the public that they were contemplating this exclusion, the States and farmers would have submitted comments explaining why farmland should be excluded from all per se categories.

B. The Distance-Based Components And Unduly Narrow Exclusion Are Unsupported By The Record.

The APA's judicial review provision provides that a final rule must be "set aside" if that rule is "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). While this inquiry is deferential, "[t]he arbitrary-and-capricious standard . . . does not require [courts] merely to rubber stamp the [agency's] decision." *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 474 (6th Cir. 2008) (citation omitted). A rule is arbitrary and capricious if it is unsupported by the record, *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41-42 (1983), does not explain why alternatives were rejected, *id.*, or fails to "treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so," *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). In addition, "conclusory statements will not do; an agency's statement must be one of *reasoning*." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted). And judicial review becomes "meaningless where the administrative record is insufficient." *Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 648 (D.C. Cir. 1976). All five of the distance-based components and the

unduly narrow exclusion that the Agencies unexpectedly adopted in their Final Rule fail the APA's "arbitrary [or] capricious" standard.

1. With regard to the three adjacency distance-based components, as well as the two case-by-case criteria, nothing in the record supports a per se jurisdictional finding for all waters and lands (1) within 100 feet of a primary water, impoundment, or tributary, (2) within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or tributary, or (3) within 1,500 feet of the high tide line of a primary water. 33 C.F.R. § 328.3(c)(2). The same is true for case-by-case coverage focused upon (1) waters within the 100-year floodplain of a primary water, and (2) waters within 4,000 feet of a primary water, impoundment, or tributary. *Id.* § 328.3(a)(8).

The Agencies argue that these distance-based components are "reasonable and practical," consistent with unspecified "experience," and supported by "the implementation value of drawing clear lines." 80 Fed. Reg. at 37,085-91. Such "conclusory statements" are insufficient, *Amerijet*, 753 F.3d at 1350 (D.C. Cir. 2014), especially given the Agencies' necessary concession that the Final Rule would be arbitrary and capricious if "the administrative record [failed to] support[] the bright-lines that the Agencies crafted," No. 15-3799, Dkt. 50-1, at 8.

And while some bright-line distance approaches could—perhaps—survive review given a proper administrative record, the record here is entirely

“insufficient.” *See Nat’l Welfare*, 533 F.2d at 648. To the extent the record says anything about this subject, the Agencies’ Science Advisory Board rejected any distance-based approach, arguing that “the available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water.” SAB 2-3, ID-7531 (JA__).

More generally, nothing in the record supports the Agencies’ decision to choose the specific distances—100 feet, 1,500 feet, 4,000 feet—over any alternative distances from any alternative reference points. Given that the Agencies adopted the distance-based components without record support and without explaining why alternative distances and reference points were rejected, *State Farm*, 463 U.S. at 41-42, and then justified these components by “conclusory” statements, *Amerijet*, 753 F.3d at 1350, the Rule is plainly unlawful.

2. The Rule’s exclusion of farmland from the per se adjacent waters category, but not the per se tributary category, is also arbitrary and capricious. The Agencies explained that this exclusion was justified in light of “the vital role of farmers in providing the nation with food, fiber, and fuel.” 80 Fed. Reg. at 37,080. While the States agree with this rationale, that justification applies just as strongly to excluding farmland from the per se tributary category. The Agencies’ failure to explain their decision to exclude farmland from one per se category, but not the

other, violates the mandate that an agency must “treat similar cases in a similar manner unless it can provide a legitimate reason,” *Babbitt*, 92 F.3d at 1258.

C. The Rule’s Expansive Interpretation Of “Significant Nexus” Is Arbitrary And Capricious.

The Agencies claim that their Rule is grounded in sound science—indeed, the term “science” is repeated ninety times in the preamble to the Rule, with an additional sixty-four references to the Agencies’ Connectivity Study. The Agencies also claim that “science,” as documented in the Connectivity Study, shows that Justice Kennedy’s significant nexus test is satisfied by the Rule’s expansive new definitions of “waters of the United States.” But the Connectivity Study only highlights a fundamental disconnect between the actual science and the Agencies’ claimed reliance on that science.

According to the Agencies, the scientific basis for the Rule is that water flows downhill to create hydrological connections, *see* 80 Fed. Reg. at 37,063, and that the “protection of upstream waters is critical to maintaining the integrity of the downstream waters,” *id.* at 37,056. This is nothing but a truism, and implies a limitless expansion of federal power. Of course, upstream waters contribute to downstream waters, but that only establishes—at most—a “nexus” between the two.

Whether any such nexus is “significant,” which is the key question in the Agencies’ conception of how to define “waters of the United States,” is a legal

question that, as the Agencies acknowledge, *science does not answer*. “While the agencies agree defining significant nexus by quantified metrics would improve clarity, for the reasons discussed in the Science Report . . . , such an approach is not supported by the science at this time.” RTC, Topic 9, 23, ID-20872 (JA__). At best, the science demonstrates that connectivity occurs along a continuum that “can be described in terms of frequency, duration, magnitude, timing, and rate of change.” *Id.* at 19. But the Agencies never explain anywhere in the record how or when these or other scientific factors demonstrate a significant nexus between downstream navigable waters that they have the unquestioned authority to protect, and the upstream waters that are within the States’ exclusive jurisdiction unless those waters have *significant* nexus to downstream navigable waters.

Instead, the Agencies admit that while “[t]he science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, . . . it is the agencies’ task to determine where along that gradient to draw lines of jurisdiction under the CWA.” *Id.* at 21. And the Agencies made that determination based largely on (erroneous) legal and policy considerations, not science. *Id.* at 17 (“The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies’ expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.”).

As explained above, those legal grounds are legally insufficient. The mere existence of a hydrological connection—even a *continuous one*—is insufficient under Justice Kennedy’s approach. *Rapanos*, 547 U.S. at 769. But that is all the Connectivity Study demonstrates; it can at most be used to establish a nexus, but not the significance of that nexus. The Agencies have therefore failed to “articulate a rational connection between the facts found” and the expansive definitions in the Final Rule, one of the hallmarks of arbitrary decision-making. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974).

III. THE RULE VIOLATES THE CONSTITUTION.

The Final Rule violates the U.S. Constitution in at least three ways. First, it intrudes upon the States’ sovereign interests in regulating their land and water resources in violation of the Tenth Amendment. Second, it exceeds Congress’s constitutional authority under the Commerce Clause because it provides for federal jurisdiction over isolated, intrastate waters with no meaningful impact on or connection to interstate commerce. And third, it violates the Due Process Clause because it is unconstitutionally vague. As a result, the Rule must be vacated.

A. The Rule Violates The States’ Tenth Amendment Rights.

Under the Tenth Amendment, “[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the

people.” U.S. Const., amend. X. Tenth Amendment concerns are implicated when a federal rule regulates the “states as states,” when it addresses matters that are indisputably attributes of state sovereignty, and when compliance with the rule would directly impair a State’s ability to structure integral operations in areas of traditional state functions. *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 286-87 (1981). The federal system “protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” *Bond v. United States*, 564 U.S. 211, 222 (2011).

State authority to regulate and manage local lands and waters is a core sovereign interest. Indeed, state authority in this realm “is perhaps the quintessential state activity.” *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982). That is why Congress so clearly recognized the States’ inherent powers over local lands and water resources in the CWA, *see* 33 U.S.C. § 1251(b), and purposefully integrated federalism principles throughout the Act. In *SWANCC*, the Supreme Court relied on this core “traditional state power” to explain its narrower interpretation of the CWA. 531 U.S. at 172-73. The provision of the rule at issue in *SWANCC* exceeded the Agencies’ authority, the Court held, because it covered

“nonnavigable, isolated, intrastate waters” such as seasonal ponds. *Id.* at 170-71. The Court supported its determination by finding that the Corps’ interpretation would “alter[] the federal-state framework by permitting federal encroachment upon a traditional state power”—specifically, the States’ “traditional and primary power over land and water use.” *Id.* at 173-74.

The Rule’s overbroad assertion of authority over local land and water features that have only a remote connection to navigable-in-fact waters invades the States’ sovereign authority, in violation of their Tenth Amendment rights. As already discussed, the definitions in the Rule extend federal jurisdiction to remote, usually-dry, and entirely intrastate land and water features remote from any navigable waterway. Once the Agencies assert federal jurisdiction, they displace state and local land regulation, and act as a “*de facto*” federal “zoning board.” *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). The issue is not merely the breadth of jurisdiction asserted by the federal government, but also the scope of regulatory power that the federal government would exercise in those areas. *See SWANCC*, 531 U.S. at 173.⁹ Here, that regulatory power is the “[r]egulation of land use”—“a

⁹ Indeed, once federal jurisdiction is triggered, the potential scope of that power is exceedingly broad. *See, e.g.*, 33 C.F.R. § 320.4(a) (identifying approximately 25 “public interest” factors the Corps considers when determining whether to issue a section 404 permit, including economic, aesthetics, land use, historic properties, safety, and food and fiber production).

quintessential state and local power.” *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality).

The Rule’s expansion of federal jurisdiction over traditional state lands and water resources necessarily regulates “states as states,” *Hodel*, 452 U.S. at 286-87, because of the extensive cooperative federalism principles embodied in the CWA. For example, all States are required to develop water quality standards for federal jurisdictional waters within their borders. 33 U.S.C. § 1313. They must also review those standards at least every three years, *id.* § 1313(c), and report to EPA on the quality of all federal waters in the State every other year, *id.* § 1315(b). States must also develop complicated total maximum daily loads for any water not meeting established water quality standards. *Id.* § 1313(d). States are also required to issue water quality certifications for every permit the federal government issues within their borders, including section 404 permits issued by the Corps. *See id.* § 1341(a)(1). For the forty-six States with authority to implement the NPDES program under 33 U.S.C. § 1342, additional federal waters means additional permitting responsibilities. Michigan and New Jersey bear additional obligations, as the two States that have assumed authority to issue dredge and fill permits under 33 U.S.C. § 1344. Finally, expanded federal jurisdiction directly affects state highway, transmission line, and pipeline projects, triggering federal permitting requirements for potential impacts to newly-minted federal waters. *See,*

e.g., AK DEC Comments 14-15, ID-19465 (JA__); ADOT Comments 1, ID-15215 (JA__).

The practical impact upon the States from the Rule's expansion of federal authority is breathtaking. From prairie potholes in North Dakota, to arroyos in New Mexico, ephemeral drainages in Wyoming, and coastal prairie wetlands in Texas, the Final Rule extends jurisdiction to virtually every potentially wet area of the country. *See* 33 C.F.R. § 328.3(b). In fact, the Rule sweeps so broadly that the Agencies find it necessary explicitly to disclaim authority over "puddles" and swimming pools "created in dry land." *Id.* § 328.3(b)(4). The Agencies acknowledge that "the 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" and that the 100-year floodplain encompasses an even larger area. Economic Analysis 11, ID-20866 (JA__). These areas are swept within the jurisdictional reach of the Final Rule.

Alaska presents a telling example. *See* AK DEC Comments 18-20, ID-19465 (JA__). Forty-three percent of Alaska is wetlands, covering more than 174 million acres. Many of those wetlands are frozen much of the year, and are underlain with permafrost. During the warmer seasons, the surface soils become inundated when thawing conditions generate near-surface water that cannot penetrate the underlying permafrost, causing the soils to exhibit wetland-like

characteristics. These areas can extend for hundreds of miles inland from the main navigable-in-fact waterways, as much of northern Alaska is covered in “continuous permafrost.” *Id.* at 19, Att. 5 (JA__, __). Under the Rule, these lands are subject to federal jurisdiction by virtue of the straddling provision contained in the Rule’s definition of neighboring: “The entire water is neighboring *if a portion* is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain.” 33 C.F.R. § 328.3(c)(2)(ii) (emphasis added). As Alaska warned the Agencies, the Proposed Rule would “federalize land use decisions for State, local and private lands” in Alaska because “nearly all waters and wetlands in Alaska” would be subject “to regulation by the EPA and the Corps.” AK Gov. Comments 1, ID-19465 (JA__). This conclusion applies just as much to the Final Rule.

The City of Scottsdale, Arizona provides another compelling example in a completely different ecological region. *See* City of Scottsdale Comments, ID-18024 (JA__). The City is replete with ephemeral drainages that flow in response to “high intensity and short duration storms.” *Id.* at 3 (JA__). The flow is limited in duration, and typically infiltrates through the highly permeable soils long before it reaches a navigable-in-fact water, if at all. *See, e.g., id.* (describing Rawhide Wash as flowing 0.014% of the time over a 15-year period). And a single storm may produce flow in one wash, but others a mile away could be bone dry. *See id.* But all washes in the region are marked by a bed and banks and an OHWM,

sometimes created after a single rain event. *See id.* These dry washes will be per se jurisdictional under the Rule, despite historically being treated as non-jurisdictional under the Agencies' post-*Rapanos* guidance. *See id.* at 4 (JA__).

The Rule's additional regulation will come at a steep financial cost to the States. For example, the Agencies have estimated that the Rule will impose additional obligations on the States of between \$798,000 and \$1.3 million per year under the section 401 water quality certification program. Economic Analysis 19, ID-20866 (JA__). The NPDES storm water permit program will add \$360,000 each year to state budgets, *id.* at 25 (JA__), and another \$270,000 to regulate confined animal feeding operations, *id.* at 27-28 (JA__). The States believe that these and other estimates in the Agencies' Economic Analysis are grossly understated. *See, e.g.,* AK DEC Comments 17, ID-19465 (JA__); KS Comments 6, ID-14794 (JA__); WY DEQ Comments 5, ID-18020 (JA__). Alaska, for example, paid approximately \$8 million to offset wetland and other impacts associated with the development of public projects between 2009 and 2015. AK DEC Comments 16, ID-19465 (JA__). "The[se] costs will only multiply with the additional waters that would become jurisdictional." *Id.* These costs and increased regulatory obligations impair the States' ability "to structure integral operations in areas of traditional state functions." *Hodel*, 452 U.S. at 287-88 (internal quotation and citations omitted). The same is true for local governments. In Scottsdale,

Arizona, for example, the City fears that the per se assertion of jurisdiction over the region's many dry washes will have "detrimental impacts" on "proposed development projects" and on "City transportation, parks, and drainage and flood control projects. These impacts would increase the costs of capital projects and put a greater strain on an ever tightening City budget." City of Scottsdale Comments 7, ID-18024 (JA__).

In addition, through the Rule, the Agencies are asserting regulatory authority over traditionally state-regulated waters. This displacement of state authority impairs the States' abilities to establish and enforce their own policies for their waters and lands. For example, waters that fall outside the scope of federal jurisdiction remain subject to regulation as state waters through local laws and regulations. *See, e.g.,* N.D. Cent. Code §§ 61-28-01 *et seq.*; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. §§ 8-4-101 *et seq.*; Tex. Water Code §§ 26.001 *et seq.*; Ky. Rev. Stat. §§ 224.70-100 *et seq.* Instead of regulating land and water within their borders to advance their own sovereign interests, the States must now defer to the federal government's framework and policies established under the CWA.

B. The Rule Exceeds Congress's Commerce Clause Authority.

The Constitution grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const. art. I, § 8, cl. 3. That power extends only to three areas: (1) “channels of interstate commerce;” (2) the “instrumentalities of interstate commerce;” and (3) “activities that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The Rule imposes federal authority outside of these areas, and thus improperly steps into the realm of the States’ regulatory authority.

1. The CWA’s protection of “navigable waters” rests entirely upon Congress’s authority to regulate the “channels of interstate commerce.” *Id.* As the Supreme Court explained in *SWANCC*, the CWA is authorized by Congress’s “traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made.” 531 U.S. at 172; *id.* at 168 n.3 (finding no indication that “Congress intended to exert anything more than its commerce power over navigation”); accord *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) (“It has long been settled that Congress has extensive authority over this Nation’s waters under the Commerce Clause” as channels of interstate commerce.); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-97 (1824). This understanding of the CWA’s constitutional basis is mandated by the statutory text, which asserts jurisdiction only to protect “navigable waters,” *see, e.g.*, 33 U.S.C. § 1362(12), and does not invoke Congress’s authority to protect instrumentalities of commerce or those matters substantially affecting interstate commerce.

The Rule reaches far beyond Congress's authority to protect in-fact navigable waters; that is, those waters that can be used as channels of interstate commerce. While Congress has authority to regulate more than merely the channels themselves, regulation under this authority must be carefully limited to protecting those channels. For example, "Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions." *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941). But as explained above, the Rule sweeps in numerous local land and water features that are not navigable-in-fact and have only an extremely tangential, if any, connection to navigable-in-fact waters, including just once every one-hundred years. Given that the Agencies' assertion of authority in *SWANCC* raised grave constitutional issues because the waters there were somewhat remote from navigable-in-fact waters, 531 U.S. at 174, the far more expansive authority over local land and water features at issue in the Rule moves from mere concern to outright constitutional violation.

2. Since the CWA is based exclusively upon Congress's authority over channels of interstate commerce, the Agencies may not rely on the second or third—and broadest—category of activities that "substantially affect interstate commerce," *Lopez*, 514 U.S. at 558-59, or the aggregation doctrine that the Court has developed and applied exclusively in the context of that third category, *id.* at

560-61. Congress has not adopted a comprehensive scheme for water and land use management, as it had for the regulation of controlled substances at issue in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). Instead, Congress enacted a regime tied to one specific category of waters: those that are navigable-in-fact or could reasonably be made so.

Even if this Court were to analyze the Rule under *Lopez*'s third prong, however, the Rule would not be lawful because it allows for regulation of much more than activities that "substantially affect interstate commerce." And in so doing, the Rule "effectually obliterate[s] the distinction between what is national and what is local," *Lopez*, 514 U.S. at 557 (internal quotations omitted). Importantly, this is not a limited problem of the "de minimis character of individual instances arising under [the Rule]," *Raich*, 545 U.S. at 17, but rather the heart of the Rule's reach.

In both *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court rejected the federal government's attempt to defend the constitutionality of a law regulating non-economic activities based on an argument that those non-economic activities, taken in aggregate, would have a substantial effect on interstate commerce. In *Lopez*, the Court determined that the law reached activity—specifically, the possession of a firearm in a school zone—that was "in no sense an economic activity." 514 U.S. at 567. The Court rejected the argument

that Congress had the authority to reach this non-economic activity because, in aggregate, guns in school zones would have a substantial effect on interstate commerce. Such aggregation would involve “pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Id.* Similarly, in *Morrison*, the law at issue—the right to bring a civil action in federal court for domestic violence victims—targeted “noneconomic activity,” whereas every case “in our Nation’s history” that upheld Commerce Clause regulation of intrastate activity involved “activity [that was] economic in nature.” 529 U.S. at 613. As in *Lopez*, the federal government’s argument relied on an impermissible “but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce.” *Morrison*, 529 U.S. at 615.

The Rule, to the extent it would be analyzed under the third prong at all, would fail for similar reasons.

First, the Rule allows the Agencies to regulate non-economic activities, which *Lopez* and *Morrison* held cannot be aggregated to produce the required substantial effect on interstate commerce. As the *Rapanos* plurality observed, “[i]n deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot, relying on such factors as ‘economics,’ ‘aesthetics,’ ‘recreation,’ and ‘in general, the needs and welfare of the people.’” 547 U.S. at

721 (Scalia, J., plurality) (quoting 33 C.F.R. § 320.4(a) (2004)). Thus, for example, the Agencies could prohibit an individual from disposing of leaves or brush in a shallow swale on his or her property provided that the swale is within 1,500 feet of the ordinary high water mark of a “tributary” to a navigable water. That is “in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Lopez*, 514 U.S. at 567.

Second, the Rule fails to “express[ly] . . . limit its reach to [activities that] have an explicit connection with or effect on interstate commerce.” *Id.* at 562. The Rule’s definitions for tributaries, adjacent waters, and case-by-case waters sweep in numerous waters and usually-dry lands that lack any meaningful connection to interstate commerce. For example, the tributary definition extends to any land feature with “a bed and banks and an ordinary high water mark”—whether observable in the field or not—and that “contributes flow”—no matter how ephemeral—“either directly *or through another water*” to a primary water. 33 C.F.R. § 328.3(c)(3) (emphasis added). This includes usually-dry channels that carry a minimal amount of water after a rainstorm to a stream that connects with other streams that *then* eventually flow into a navigable water.

The Rule’s assertion of case-by-case jurisdiction is based on an analysis that has little to nothing to do with commerce. For example, the Agencies may assert authority over a water or land because it “[e]xport[s] . . . organic matter,” 33

C.F.R. § 328.3(c)(5)(vii), to a primary water. In other words, if a bird flies from a primary water to another water or piece of dry land and a plant or invertebrate “hitchhik[es],” Connectivity Study 5-5, ID-20859 (JA__), on the bird’s feathers and travels back to the primary water, that would be sufficient for the Agencies to assert jurisdiction under the Rule. Or if the land feature “[e]xport[s] . . . food resources,” 33 C.F.R. § 328.3(c)(5)(viii), because a bird travels to eat, the Agencies could deem it jurisdictional under the Rule. This is precisely the kind of overreach the Supreme Court expressly rejected in *SWANCC*.

Third, as in *Lopez* and *Morrison*, the Rule ultimately relies on an attenuated causal chain that “obliterate[s] the distinction between what is national and what is local,” *Lopez*, 514 U.S. at 557 (quotations omitted). In *Lopez* and *Morrison*, the Supreme Court rejected the federal government’s theory “that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce,” *Morrison*, 529 U.S. at 617. The Court explained that such reasoning would improperly permit the federal government to take over whole “areas of traditional state regulation.” *Id.* at 615. The same is true here, where the Rule’s overbroad assertion of authority over local land and water features tramples the States’ authority to manage local lands and waters.

C. The Rule Is Unconstitutionally Vague.

A statute or regulation is constitutionally invalid under the Due Process Clause if it prohibits conduct “in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Ass’n of Cleveland Fire Fighters*, 502 F.3d at 551 (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). In *Chicago v. Morales*, 527 U.S. 41 (1999), for example, the Supreme Court found void for vagueness an ordinance that imposed a criminal sanction for loitering, defined as “remaining in any one [public] place with no apparent purpose,” with one or more people the police officer reasonably believes are gang members. *Id.* at 47 (quotations and citations omitted). The Court reasoned that it would be difficult for a person to “know if he or she had an ‘apparent purpose.’” *Id.* at 57.

A law may be unconstitutionally vague for two independent reasons. “First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.” *Id.* at 56. Such vagueness concerns are particularly acute where, as with the CWA, the term at issue involves a criminal prohibition. *See Johnson v. United States*, 135 S. Ct. 2556-57 (2015); 33 U.S.C. § 1319(c). Under these standards, the Rule is unconstitutionally vague.

First, the Rule “fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits.” *Morales*, 527 U.S. at 56. For example, the Rule’s tributaries category covers any “water that contributes flow, either directly or through another water” and that is “characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.” 33 C.F.R. § 328.3(c)(3). But as a Corps’ 2004 report explains, “selection of reliable OHWM field indicators [is] challenging” and “especially difficult in arid regions” even with respect to present channels.¹⁰ Moreover, the Agencies explain that they will use remote sensing and desktop tools to determine the OHWM and bed and banks of tributaries where “physical characteristics of bed and banks and another indicator of [OHWM] are absent in the field.” 80 Fed. Reg. at 37,077. In other words, even where there is no evidence of a bed and bank to the naked eye, the Agencies can assert jurisdiction over an indentation on the landscape that appears through sophisticated digital photography and satellite imaging to which ordinary people do not have access. *See id.*

¹⁰ R.W. Lichvar & J.S. Wakeley, U.S. Army Corps of Eng’rs, *Review of Ordinary High Water Mark Indicators for Delineating Arid Streams in the Southwestern United States* (2004), <http://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/>; *see also* AMA Comments 10, ID-13951 (JA__).

Relatedly, the Rule's inclusion of "[d]itches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, [and] [d]itches, regardless of flow, that are excavated in or relocate a tributary," 80 Fed. Reg. at 37,078, is similarly unconstitutionally vague. The Agencies explain that these ditches will be identified by the "historical presence of tributaries using a variety of resources, such as historical maps, historical aerial photographs, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts." *Id.* at 37,078-79. But it is exceedingly difficult under this standard for an ordinary individual to know if a ditch will be covered. Even if the individual has the capability to conduct this research, it is unclear how far back in history the individual must look for the presence of a previously existing tributary.

The Rule's case-by-case waters category presents similar problems for ordinary landowners. That category instructs the Agencies to look at any water that is "[at least partially] located within the 100-year floodplain of a" primary water or "waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water, impoundment, or tributary, 33 C.F.R. § 328.3(a)(8), and then to apply a largely unguided case-by-case analysis, looking at whether the water "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]” based on “any single function or combination of functions performed by the water,” *id.* § 328.3(c)(5) (emphasis added). Given the number of factors that staff are instructed to consider in terms of “chemical,” “physical” or “biological” impact, *see, e.g.*, 80 Fed. Reg. at 37,093 (referencing sediment trapping, nutrient recycling, food export, flood control, and multiple other factors), it will not be possible for ordinary people to know how any particular jurisdictional inquiry will turn out under the Rule.

Second, for many of the same reasons, the Rule is unconstitutionally vague because it “authorize[s] and even encourage[s] arbitrary and discriminatory enforcement.” *Morales*, 527 U.S. at 56. “[W]here the legislature fails to provide . . . minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotations omitted). The Supreme Court has concluded that a statute requiring an individual to provide “‘credible and reliable’ identification” was vague because it failed “to establish standards by which the officers may determine whether the suspect has complied.” *Id.* at 360-61.

The Rule does not provide the Agencies’ field staffs with “minimal guidelines” for assessing whether waters are subject to the CWA. For example, with regard to the tributaries category, the Rule does not define bed and banks

precisely, including allowing the Agencies to arbitrarily determine that a bed and banks exist through remote imaging. Moreover, even the presence of a bed, banks, and OHWM provide insufficient restraint against arbitrary enforcement because “OHWM indicators are distributed randomly throughout the [arid west] landscape and are not related to specific channel characteristics.” AMA Comments 11, ID-13951 (JA__) (quoting Lindsey Lefebvre, et al., U.S. Army Corps of Eng’rs, *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* 17 (2013), http://acwc.sdp.sirsi.net/client/en_US/search/asset/1017540). And the case-by-case waters category involves the application of numerous different considerations, without clear indication of how any inquiry should turn out.

In many situations, a person subject to the law has no way to know whether his or her land contains a water of the United States before an enforcement action is commenced, unless he or she requests a jurisdictional determination. And the jurisdictional determination process is not required by the CWA. *Hawkes*, 136 S. Ct. at 1816-17 (Kennedy, J., concurring).

D. The Agencies’ Repeated Unlawful Interpretations Of “Waters Of The United States” Threaten The Constitutionality Of That Term.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court invalidated the residual clause of the Armed Career Criminal Act—“involves conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)—after several decades of attempting to give that term a

definite meaning. The Supreme Court explained: “the failure of persistent efforts . . . to establish a standard” under a broadly worded statutory phrase can lead the courts to declare that phrase unconstitutional. *Johnson*, 135 S. Ct. at 2558 (quotation omitted).

The Agencies’ repeated failures to provide a lawful definition for the statutory term “waters of the United States” threaten that term’s legality. As Justice Kennedy has noted in a recent opinion joined by Justices Thomas and Alito, “the [CWA’s] reach is ‘notoriously unclear’ and the consequences to landowners . . . can be crushing.” *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring) (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)). This lack of clarity “raise[s] troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.” *Id.* at 1817.

For the third time now, the Agencies have adopted an interpretation of the term “waters of the United States” that cannot withstand constitutional scrutiny, including because it is vague and “essentially limitless,” *Rapanos*, 547 U.S. at 757 (Roberts, C.J., concurring). The States join Chief Justice Roberts in urging the Agencies, in the strongest possible terms, to stop their repeated unlawful practice and to issue a definitional rule that ordinary people can understand and that is consistent with “the clearly limiting terms Congress employed in the Clean Water

Act.” *Id.* at 758. If the Agencies persist in their pattern of unlawful conduct, the Supreme Court may well choose to invalidate the term “waters of the United States,” just as it did with the residual clause in *Johnson*.

IV. THE RULE VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT.

“NEPA is a procedural statute, designed to ensure that federal agencies consider the environmental impact of their actions.” *Friends of Tims Ford v. Tennessee Valley Auth.*, 585 F.3d 955, 968 (6th Cir. 2009) (quotations and citation omitted). Unless exempted by statute, all agencies must comply with NEPA. *See Pac. Legal Found. v. Andrus*, 657 F.2d 829, 833 (6th Cir. 1981); 42 U.S.C. § 4332; 40 C.F.R. § 1507.1. EPA enjoys such an exemption for certain activities under the CWA, *see* 33 U.S.C. § 1371(c), but the Corps does not.

NEPA requires the preparation of an environmental impact statement (“EIS”) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This includes the promulgation of federal regulations. 40 C.F.R. § 1502.4(b).

As one of the most far-reaching regulations ever adopted in the environmental arena, the Rule easily qualifies as a major federal action significantly affecting the quality of the human environment. The Corps, however, elected not to prepare an EIS for the Rule, and instead issued a Finding of No Significant Impact (“FONSI”) after preparing a legally deficient Environmental

Assessment (“EA”).¹¹ That finding—that the Rule has no significant impact on the human environment—is arbitrary and capricious and must be set aside. *See Crounse Corp. v. I.C.C.*, 781 F.2d 1176, 1193 (6th Cir. 1986).

The Corps also violated NEPA by evaluating an unreasonably restricted range of alternatives, considering only two—the Rule and a “no action” alternative in which the Corps would continue regulating under the existing rule and post-*Rapanos* agency guidance. The failure to consider a reasonable range of alternatives to the proposed agency action violates NEPA. *Partners in Forestry Co-op., Northwood Alliance, Inc. v. U.S. Forest Serv.*, 638 F. App’x 456, 464-65 (6th Cir. 2015).

A. The Corps Failed To Prepare An Environmental Impact Statement.

The Corps’ implausible conclusion that the Rule does not significantly affect the quality of the human environment was reached without considering legally-prescribed, mandatory factors for such assessments. “NEPA’s regulations state that whether a project is ‘significant’ requires agencies to consider both the ‘context’ and the ‘intensity’ of the project.” *Partners in Forestry Co-op.*, 638 F. App’x at 462 (quoting 40 C.F.R. § 1508.27). “Context” focuses “on the affected geographical region and its interests,” while “intensity” looks “to the severity of

¹¹ Agencies may prepare EAs as an initial step in the NEPA process to determine whether an EIS is warranted. *See* 40 C.F.R. § 1508.9; *Charter Twp. of Huron, Mich. v. Richards*, 997 F.2d 1168, 1174 (6th Cir. 1993).

the proposal's environmental impact." *Hodges v. Abraham*, 300 F.3d 432, 438 (4th Cir. 2002).

The Corps did not consider either the "context" or the "intensity" factors in its NEPA analysis. That alone should invalidate the Corps' determination. *See State Farm*, 463 U.S. at 43 (vacatur is required if the agency "entirely failed to consider an important aspect of the problem"). In addition, both factors overwhelmingly support a finding that the Rule will significantly affect the quality of the human environment.

Context. "The significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). The Rule is nationwide in scope, affecting all fifty States. In fact, it was the sweeping national effect of this regulation that partially prompted this Court to assert jurisdiction. *See In re U.S. Dep't of Def., U.S. E.P.A. Final Rule*, 817 F.3d at 274.

By the Agencies' own estimates, the Rule will result in "an increase of between 2.8 and 4.6 percent in the waters found to be jurisdictional." Final EA 21, ID-20867 (JA__). Even if these estimates were accurate, they would have profound implications on federal and state regulatory programs, private landowners, and the regulated community. For example, the Agencies have performed more than 400,000 jurisdictional determinations since 2008. 80 Fed.

Reg. at 37,065. Small increases in jurisdiction trigger thousands of additional federal regulatory interactions between the public and private sector each year.

But the Agencies' estimates are grossly understated, and significantly mislead the public regarding the true regulatory and economic implications of the Final Rule. For example, Kansas estimated a 460% increase in federal jurisdiction in that State alone under the Proposed Rule, with an additional 133,000 miles of ephemeral streams subject to per se jurisdiction under the new tributary definition. KS Comments App. A, ID-14794 (JA__). Alaska is concerned that the Rule will regulate "nearly all waters and wetlands" within that State. AK Gov. Comments 1, ID-19465 (JA__). So too is New Mexico. NM ED Comments 10, ID-16552 (JA__) (the Rule "would in effect engulf all streams, drainage systems, and watersheds within the State"). Ninety-six percent of Arizona's streams "flow only part of the time or only in direct response to precipitation events," AZ DEQ Comments 2, ID-16437 (JA__), and "approximately 80% of Wyoming's stream miles are intermittent or ephemeral." WY DEQ Comments 4, ID-18020 (JA__); *see also* KY Ag. Comm. Comments 1, ID-14055 (JA__) (expressing concern regarding 92,000 stream miles in Kentucky).

The Corps simply ignored this "context" when proclaiming the Rule lacks significant effect. If the Corps had attempted to accurately quantify the actual impacts of the Rule, there is no way it could have articulated a "rational

connection” between these impacts and its FONSI. *See Bowman Transp.*, 419 U.S. at 285. Indeed, as the Corps’ own staff recognizes, absent an EIS “it is not possible to estimate” or “verify” the percentage of water bodies that would be effected by the Rule, and particularly by the changes made between the Proposed Rule and Final Rule. Moyer Memorandum 2, ID-20882 (JA___). Rather, “[t]his is precisely the type of research and analysis that would be undertaken in completing an Environmental Impact Statement (EIS).” *Id.* at 3.

The Corps also ignored the very large regional variations in the nation’s waterways when analyzing the potential effects of its Rule. For example, the Corps believes that the largest expansion of its regulatory program will likely be in the “other waters” category. Final EA 21-22, ID-20967 (JA___) (estimating a 34.5% increase in positive federal jurisdictional determinations for other waters). Geographical and hydrological features—including those covered by the “other waters category”—are not evenly distributed across the United States. *See, e.g.*, 33 C.F.R. § 328.3(a)(7). Although the Agencies were well aware of that fact, and were reminded of it during the public comment period, *see, e.g.*, AK DEC Comments 12, ID-19465 (JA___), they unreasonably failed to address this “context” in the EA. Instead, they relied on broad national averages to estimate the total costs and benefits associated with the Rule, marginalizing the potentially disparate treatment for individual States. *See, e.g.*, Final EA 25, ID-20867 (JA___) (“To

estimate annual costs and benefits, the agencies uniformly applied the 2.8 and 4.6 percent incremental change in jurisdiction to the total costs and benefits for the Sections 311, 401, 402, . . . and 404 programs to account for an estimated increase in permitting and regulatory activities that would result.”).

Intensity. The “intensity” factors also support a finding that the Final Rule “significantly” affects the human environment. These factors measure the “severity of impact” associated with a federal action, and include:

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

. . .

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

. . .

(10) Whether the action threatens a violation of Federal, State, or local law

40 C.F.R. § 1508.27(b). The EA does not discuss or address these, or *any* of the ten available factors, a failure that alone supports a finding of arbitrary and capricious decision-making. *See State Farm*, 463 U.S. at 43 (the agency “entirely failed to consider an important aspect of the problem”).

Focusing on just a few of the ten factors, it is clear that the Rule rises to the level of significance that warrants full analysis in an EIS. For example, the Rule is without a doubt highly controversial. *See* 40 C.F.R. § 1508.27(b)(4). “Controversy in the NEPA context does not necessarily denote public opposition to

a proposed action, but a substantial dispute as to the size, nature, or effect of the action.” *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002) (wide disputes regarding the loss of farmland acreage sufficiently controversial to warrant EIS). This case is nothing if not a dispute over the “size, nature, or effect” of the Rule. This factor alone warrants the preparation of an EIS.

The Rule also establishes a precedent for future actions with significant effects and represents a decision in principle about future considerations, *see* 40 C.F.R. § 1508.27(b)(6), because it sets controlling guidelines for hundreds of thousands of future regulatory decisions, *see* 80 Fed. Reg. at 37,065. Each positive jurisdictional determination rendered pursuant to the Rule will have substantial legal, economic, and environmental impacts on the property where it is made and any projects planned for that property. *See Hawkes Co.*, 136 S. Ct. at 1814-15. Expanding federal jurisdiction necessarily increases this burden. In *Hawkes*, for example, the required environmental analysis for a CWA permit was estimated at \$100,000, and it can be much more. *Id* at 1815.

Finally, as already discussed, the Rule “threatens a violation of Federal, State, or local law,” 40 C.F.R. § 1508.28(b)(10), as dozens of organizations and States informed the Agencies during the public comment period on the Proposed Rule. *See, e.g.*, Multi-State Comments 2, ID-7988 (JA__); WAC Comments 3-4, ID-14568 (JA__). Many of those same legal concerns were recognized by this

Court and the District Court for the District of North Dakota in temporarily staying the Final Rule. *See In re EPA*, 803 F.3d 804 (6th Cir. 2015); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

Taking all of these factors into consideration, there is no plausible explanation for failing to prepare an EIS in support of the Final Rule, a fatal flaw the Corps should have easily identified during the EA development process.

B. The Corps Rejected The Need For An Environmental Impact Statement Based On A Flawed Environmental Assessment.

The purpose of an EA is to assess the “environmental impacts of proposed actions and alternatives” to determine whether an EIS is required. *Richards*, 997 F.2d at 1174 (citing 40 C.F.R. § 1508.9). In making that assessment, NEPA requires “a ‘hard look’ at the environmental consequences” of agency action. *Crouse Corp.*, 781 F.2d at 1193. “A proper consideration of the . . . impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993-94 (9th Cir. 2004) (finding an EA inadequate) (quotation omitted). The EA prepared by the Corps falls far short of the “hard look” that NEPA requires.

For example, the “Environmental Consequences” section of the EA provides a brief, two-page description of how much the Rule will cause federal jurisdiction

to expand, but then makes no serious attempt to assess the environmental and socioeconomic effects of that new federal jurisdiction. Final EA 21-23, ID-20867 (JA__). Instead, the EA's "analysis" of environmental consequences, comprising only four pages, has sections relating to wildlife, recreation, and flood risk reduction. *Id.* at 24-27 (JA__). Each of those sections contains only *one* or *two* short paragraphs, and only *one sentence* of analysis, each of which is conclusory and virtually identical. Those single sentences of "analysis" assert that the extension of federal jurisdiction is expected to benefit the environment, but the Corps fails to support this assertion with any evidence or effort to quantify the benefits.

This is but one example: "The additional protections associated with the incremental increase in the amount of waters subject to Clean Water Act jurisdiction is expected to have a beneficial impact on recreation, based on the increase in wildlife available for hunting, fishing, bird watching, and photography." *Id.* at 25 (JA__). Nowhere does the Corps describe why it believes the Rule will lead to an increase in wildlife or attempt to quantify that increase. And most importantly, the Corps fails to mention whether the States are already regulating the same waters under state law and whether the net effect of duplicative regulation would have any positive or negative effect on wildlife. This is precisely

the kind of drive-by analysis the courts have rejected under NEPA. *See, e.g., Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 996.

The fundamental purpose of NEPA is to force federal agencies to genuinely consider the environmental costs and benefits of major federal actions. That purpose is thwarted here by the Corps' refusal to make any effort to analyze or quantify the environmental, socioeconomic or other effects of its sweeping new Rule, including potential effects on the States, their regulatory programs, or their regulated communities. And the Corps' decision to avoid preparing an EIS, based on the flawed EA, prohibited the States from participating in the NEPA process for the Rule as "cooperating agencies," *see* 40 C.F.R. §§ 1501.6 and 1508.5, further eroding the cooperative federalism principles enshrined in our nation's laws. *See* George T. Frampton, *Memorandum for Heads of Federal Agencies: Designation of Non-Federal Agencies To Be Cooperating Agencies 2* (July 28, 1999), available at <https://ceq.doe.gov/nepa/regs/ceqcoop.pdf> ("Considering NEPA's mandate and the authority granted in federal regulation to allow for cooperating agency status for state, tribal and local agencies, cooperator status for appropriate non-federal agencies should be routinely solicited.").

C. The Corps Failed To Consider A Reasonable Range Of Alternatives.

The flawed EA and the resultant failure to prepare an EIS fundamentally undermined the Corps' NEPA analysis of the Rule, but it was not the only fatal

defect. Agencies are required to consider alternatives to their proposed actions to fulfill the mandates of NEPA. 42 U.S.C. § 4332(2)(C)(iii). The Corps' alternatives analysis in the EA fails any objective review of that important requirement.

“An agency is required to ‘consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.’” *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 242 (D.C. Cir. 2008) (citation omitted). The same holds true whether an agency is preparing an EA or an EIS. *Partners in Forestry Co-op.*, 638 F. App'x at 464. “[T]he purpose of an EA, which is defined in regulations of the Council on Environmental Quality (CEQ) as a concise document describing the environmental impacts of *proposed actions and alternatives*, 40 C.F.R. § 1508.9 (1992), is to provide the agency with the basic information needed to decide on the next step.” *Richards*, 997 F.2d at 1174 (emphasis added). Agencies do not fulfill their obligation to consider alternatives when—as here—they artificially limit themselves to the two options of the proposed action and a no-action alternative without considering obvious variations. *See Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 345 (6th Cir. 2006).

The Corps considered only one alternative to the Rule, a “no action” alternative, where “the current procedures, processes, and definitions used by the

USACE to complete jurisdictional determinations would continue to be utilized and the process and procedures would not be impacted by the changes to jurisdiction with the adoption of the final proposed rule.” Final EA 23, ID-20867 (JA__). Oddly, the Corps did not consider the Proposed Rule as an option in its NEPA analysis. Apparently, the Corps “considered whether to analyze the draft rule in th[e] Environmental Assessment, but removed it from further consideration because it is no longer a viable option to accomplish the purpose and need for action.” *Id.* at 13 (JA__). The Corps did not explain why it was not a “viable option” except that the decision was made “upon a review of the substantive comments received during the public comment period.” *Id.*

What is most troubling about the Corps’ limited alternatives analysis is that several other perfectly feasible alternatives were available. Many State Petitioners, for example, submitted comments favoring an alternative that would adopt a narrower definition of “waters of the United States” that would enable them to implement their own state laws and policies to protect their own lands and waters using their on-the-ground expertise—such as permitting programs that are capable of issuing necessary permits in a reasonable timeframe and at a reasonable cost. *See, e.g.*, ND Comments 14-15, ID-15365 (JA__); TX CEQ Comments 4, ID-14279 (JA__). The EA was obligated to address the alternative of limiting CWA jurisdiction to traditional navigable waterways and waters that are closely tied to

those waters: “continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.” *Rapanos*, 547 U.S. at 733 (Scalia, J., plurality). Such an approach would enable state governments to tailor their own laws and regulations more closely to the topography of their land and to make local land use decisions more responsive to the local community directly affected, while still leaving genuine interstate waterways under federal regulation. *See* TX CEQ Comments 4, ID-14279 (JA__); WY DEQ Comments 7, ID-18020 (JA__). Although the purpose of the rulemaking was to respond to a series of Supreme Court decisions holding that the Agencies had been using too broad a definition of “waters of the United States,” the Corps did not even consider the possibility of a narrower definition in its EA.

Several commenters also suggested that instead of adopting a single, unitary definition for the entire country, separate definitions could be adopted on a regional or state-by-state basis. *See, e.g.*, AK DEC Comments 11-12, ID-19465 (JA__); PA DOA Comments 2, ID-14465 (JA__) (“Administering a detailed and specific but ‘one-size-fits-all’ definition applicable nationwide in states with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics will be difficult, and such a rule will undermine existing state law protections.”). Separate definitions would take into account the fact that a bed and banks may be indicia of streams in the wetter parts

of the country, but that in other regions beds and banks are often found in bone-dry washes. Regions with extensive farmland that becomes flooded only in rare wet years, such as the northern plains, could have a definition that takes this into account. ND Comments 6, ID-15365 (JA__). And the definition of “waters of the United States” applicable to Alaska could specifically address the complications caused by widespread permafrost. AK DEC Comments 11-12, ID-19465 (JA__). Separate state or regional “waters of the United States” definitions are a perfectly reasonable and feasible alternative that should have been addressed in the EA.

The Corps failed “to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives,” *Am. Radio Relay League, Inc.*, 524 F.3d at 242. The Corps’ decision to ignore—without comment—the principle alternatives that had been advocated by the States is arbitrary, capricious and contrary to the fundamental objectives of NEPA.

CONCLUSION

For all the reasons articulated above, the Rule should be vacated.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 20,939 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). By order of this Court, State Petitioners' Opening Brief was not to exceed 21,000 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font size 14.

Date: November 1, 2016

/s/ Eric E. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2016, a true and correct copy of the State Petitioner's Opening Brief was served via the Court's CM/ECF system to the parties registered to receive notice of the filings in this case.

/s/ Eric E. Murphy

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CODIFICATION

The Federal Water Pollution Control Act, comprising this chapter, was originally enacted by act June 30, 1948, ch. 758, 62 Stat. 1155, and amended by acts July 17, 1952, ch. 927, 66 Stat. 755; July 9, 1956, ch. 518, §§1, 2, 70 Stat. 498-507; June 25, 1959, Pub. L. 86-70, 73 Stat. 141; July 12, 1960, Pub. L. 86-624, 74 Stat. 411; July 20, 1961, Pub. L. 87-88, 75 Stat. 204; Oct. 2, 1965, Pub. L. 89-234, 79 Stat. 903; Nov. 3, 1966, Pub. L. 89-753, 80 Stat. 1246; Apr. 3, 1970, Pub. L. 91-224, 84 Stat. 91; Dec. 31, 1970, Pub. L. 91-611, 84 Stat. 1818; July 9, 1971, Pub. L. 92-50, 85 Stat. 124; Oct. 13, 1971, Pub. L. 92-137, 85 Stat. 379; Mar. 1, 1972, Pub. L. 92-240, 86 Stat. 47, and was formerly classified first to section 466 et seq. of this title and later to section 1151 et seq. of this title. The act is shown herein, however, as having been added by Pub. L. 92-500 without reference to such intervening amendments because of the extensive amendment, reorganization, and expansion of the act's provisions by Pub. L. 92-500.

SUBCHAPTER I—RESEARCH AND RELATED PROGRAMS

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal 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;
- (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
- (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
- (5) it is the national policy that areawide waste treatment management planning proc-

esses be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy 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 chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the

States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and inter-agency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

(June 30, 1948, ch. 758, title I, § 101, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 816; amended Pub. L. 95-217, §§ 5(a), 26(b), Dec. 27, 1977, 91 Stat. 1567, 1575; Pub. L. 100-4, title III, § 316(b), Feb. 4, 1987, 101 Stat. 60.)

AMENDMENTS

1987—Subsec. (a)(7). Pub. L. 100-4 added par. (7).

1977—Subsec. (b). Pub. L. 95-217, § 26(b), inserted provisions expressing Congressional policy that the States manage the construction grant program under this chapter and implement the permit program under sections 1342 and 1344 of this title.

Subsec. (g). Pub. L. 95-217, § 5(a), added subsec. (g).

SHORT TITLE OF 2008 AMENDMENT

Pub. L. 110-365, § 1, Oct. 8, 2008, 122 Stat. 4021, provided that: “This Act [amending sections 1268 and 1271a of this title] may be cited as the ‘Great Lakes Legacy Reauthorization Act of 2008’.”

Pub. L. 110-288, § 1, July 29, 2008, 122 Stat. 2650, provided that: “This Act [amending sections 1322, 1342, and 1362 of this title] may be cited as the ‘Clean Boating Act of 2008’.”

SHORT TITLE OF 2002 AMENDMENT

Pub. L. 107-303, § 1(a), Nov. 27, 2002, 116 Stat. 2355, provided that: “This Act [enacting section 1271a of this title, amending sections 1254, 1266, 1268, 1270, 1285, 1290, 1324, 1329, 1330, and 1375 of this title, enacting provisions set out as notes under this section, section 1254 of this title, and section 1113 of Title 31, Money and Finance, and repealing provisions set out as a note under section 50 of Title 20, Education] may be cited as the ‘Great Lakes and Lake Champlain Act of 2002’.”

Pub. L. 107-303, title I, § 101, Nov. 27, 2002, 116 Stat. 2355, provided that: “This title [enacting section 1271a of this title and amending section 1268 of this title] may be cited as the ‘Great Lakes Legacy Act of 2002’.”

Pub. L. 107-303, title II, § 201, Nov. 27, 2002, 116 Stat. 2358, provided that: “This title [amending section 1270 of this title] may be cited as the ‘Daniel Patrick Moynihan Lake Champlain Basin Program Act of 2002’.”

SHORT TITLE OF 2000 AMENDMENTS

Pub. L. 106-457, title II, § 201, Nov. 7, 2000, 114 Stat. 1967, provided that: “This title [amending section 1267

of this title and enacting provisions set out as a note under section 1267 of this title] may be cited as the ‘Chesapeake Bay Restoration Act of 2000’.”

Pub. L. 106-457, title IV, § 401, Nov. 7, 2000, 114 Stat. 1973, provided that: “This title [amending section 1269 of this title] may be cited as the ‘Long Island Sound Restoration Act’.”

Pub. L. 106-457, title V, § 501, Nov. 7, 2000, 114 Stat. 1973, provided that: “This title [enacting section 1273 of this title] may be cited as the ‘Lake Pontchartrain Basin Restoration Act of 2000’.”

Pub. L. 106-457, title VI, § 601, Nov. 7, 2000, 114 Stat. 1975, provided that: “This title [enacting section 1300 of this title] may be cited as the ‘Alternative Water Sources Act of 2000’.”

Pub. L. 106-284, § 1, Oct. 10, 2000, 114 Stat. 870, provided that: “This Act [enacting sections 1346 and 1375a of this title and amending sections 1254, 1313, 1314, 1362, and 1377 of this title] may be cited as the ‘Beaches Environmental Assessment and Coastal Health Act of 2000’.”

SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103-431, § 1, Oct. 31, 1994, 108 Stat. 4396, provided that: “This Act [amending section 1311 of this title] may be cited as the ‘Ocean Pollution Reduction Act’.”

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101-596, § 1, Nov. 16, 1990, 104 Stat. 3000, provided that: “This Act [enacting sections 1269 and 1270 of this title, amending sections 1268, 1324, and 1416 of this title, and enacting provisions set out as notes under this section and section 1270 of this title] may be cited as the ‘Great Lakes Critical Programs Act of 1990’.”

Pub. L. 101-596, title II, § 201, Nov. 16, 1990, 104 Stat. 3004, provided that: “This part [probably means title, enacting section 1269 of this title and amending section 1416 of this title] may be cited as the ‘Long Island Sound Improvement Act of 1990’.”

Pub. L. 101-596, title III, § 301, Nov. 16, 1990, 104 Stat. 3006, provided that: “This title [enacting section 1270 of this title, amending section 1324 of this title, and enacting provisions set out as a note under section 1270 of this title] may be cited as the ‘Lake Champlain Special Designation Act of 1990’.”

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100-653, title X, § 1001, Nov. 14, 1988, 102 Stat. 3835, provided that: “This title [amending section 1330 of this title and enacting provisions set out as notes under section 1330 of this title] may be cited as the ‘Massachusetts Bay Protection Act of 1988’.”

SHORT TITLE OF 1987 AMENDMENT

Section 1(a) of Pub. L. 100-4 provided that: “This Act [enacting sections 1254a, 1267, 1268, 1281b, 1329, 1330, 1377, 1381 to 1387, and 1414a of this title, amending this section and sections 1254, 1256, 1262, 1281, 1282 to 1285, 1287, 1288, 1291, 1311 to 1313, 1314, 1317 to 1322, 1324, 1342, 1344, 1345, 1361, 1362, 1365, 1369, 1375, and 1376 of this title, and enacting provisions set out as notes under this section, sections 1284, 1311, 1317, 1319, 1330, 1342, 1345, 1362, 1375, and 1414a of this title, and section 1962d-20 of Title 42, The Public Health and Welfare] may be cited as the ‘Water Quality Act of 1987’.”

SHORT TITLE OF 1981 AMENDMENT

Pub. L. 97-117, § 1, Dec. 29, 1981, 95 Stat. 1623, provided that: “This Act [enacting sections 1298, 1299, and 1313a of this title, amending sections 1281 to 1285, 1287, 1291, 1292, 1296, 1311, and 1314 of this title, and enacting provisions set out as notes under sections 1311 and 1375 of this title] may be cited as the ‘Municipal Wastewater Treatment Construction Grant Amendments of 1981’.”

SHORT TITLE OF 1977 AMENDMENT

Section 1 of Pub. L. 95-217 provided: “That this Act [enacting sections 1281a, 1294 to 1296, and 1297 of this

title, amending this section and sections 1252, 1254 to 1256, 1259, 1262, 1263, 1281, 1282 to 1288, 1291, 1292, 1311, 1314, 1315, 1317 to 1319, 1321 to 1324, 1328, 1341, 1342, 1344, 1345, 1362, 1364, 1375, and 1376 of this title, enacting provisions set out as notes under this section and sections 1284, 1286, 1314, 1321, 1342, 1344, and 1376 of this title, and amending provisions set out as a note under this section] may be cited as the ‘Clean Water Act of 1977.’”

SHORT TITLE

Section 1 of Pub. L. 92-500 provided that: “That this Act [enacting this chapter, amending section 24 of Title 12, Banks and Banking, sections 633 and 636 of Title 15, Commerce and Trade, and section 711 of former Title 31, Money and Finance, and enacting provisions set out as notes under this section and sections 1281 and 1361 of this title] may be cited as the ‘Federal Water Pollution Control Act Amendments of 1972.’”

Section 519, formerly section 518, of Act June 30, 1948, ch. 758, title V, as added Oct. 18, 1972, Pub. L. 92-500, § 2, 86 Stat. 896, and amended Dec. 27, 1977, Pub. L. 95-217, § 2, 91 Stat. 1566, and renumbered § 519, Feb. 4, 1987, Pub. L. 100-4, title V, § 506, 101 Stat. 76, provided that: “This Act [this chapter] may be cited as the ‘Federal Water Pollution Control Act’ (commonly referred to as the Clean Water Act).”

SAVINGS PROVISION

Pub. L. 92-500, § 4, Oct. 18, 1972, 86 Stat. 896, provided that:

“(a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall abate by reason of the taking effect of the amendment made by section 2 of this Act [which enacted this chapter]. The court may, on its own motion or that of any party made at any time within twelve months after such taking effect, allow the same to be maintained by or against the Administrator or such officer or employee.

“(b) All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972], and pertaining to any functions, powers, requirements, and duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall continue in full force and effect after the date of enactment of this Act [Oct. 18, 1972] until modified or rescinded in accordance with the Federal Water Pollution Control Act as amended by this Act [this chapter].

“(c) The Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall remain applicable to all grants made from funds authorized for the fiscal year ending June 30, 1972, and prior fiscal years, including any increases in the monetary amount of any such grant which may be paid from authorizations for fiscal years beginning after June 30, 1972, except as specifically otherwise provided in section 202 of the Federal Water Pollution Control Act as amended by this Act [section 1282 of this title] and in subsection (c) of section 3 of this Act.”

SEPARABILITY

Act June 30, 1948, ch. 758, title V, § 512, as added by Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 894, provided that: “If any provision of this Act [this chapter], or the application of any provision of this Act [this chapter] to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act [this chapter], shall not be affected thereby.”

NATIONAL SHELLFISH INDICATOR PROGRAM

Pub. L. 102-567, title III, § 308, Oct. 29, 1992, 106 Stat. 4286; as amended by Pub. L. 105-362, title II, § 201(b), Nov. 10, 1998, 112 Stat. 3282, provided that:

“(a) ESTABLISHMENT OF A RESEARCH PROGRAM.—The Secretary of Commerce, in cooperation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, shall establish and administer a 5-year national shellfish research program (hereafter in this section referred to as the ‘Program’) for the purpose of improving existing classification systems for shellfish growing waters using the latest technological advancements in microbiology and epidemiological methods. Within 12 months after the date of enactment of this Act [Oct. 29, 1992], the Secretary of Commerce, in cooperation with the advisory committee established under subsection (b) and the Consortium, shall develop a comprehensive 5-year plan for the Program which shall at a minimum provide for—

“(1) an environmental assessment of commercial shellfish growing areas in the United States, including an evaluation of the relationships between indicators of fecal contamination and human enteric pathogens;

“(2) the evaluation of such relationships with respect to potential health hazards associated with human consumption of shellfish;

“(3) a comparison of the current microbiological methods used for evaluating indicator bacteria and human enteric pathogens in shellfish and shellfish growing waters with new technological methods designed for this purpose;

“(4) the evaluation of current and projected systems for human sewage treatment in eliminating viruses and other human enteric pathogens which accumulate in shellfish;

“(5) the design of epidemiological studies to relate microbiological data, sanitary survey data, and human shellfish consumption data to actual hazards to health associated with such consumption; and

“(6) recommendations for revising Federal shellfish standards and improving the capabilities of Federal and State agencies to effectively manage shellfish and ensure the safety of shellfish intended for human consumption.

“(b) ADVISORY COMMITTEE.—(1) For the purpose of providing oversight of the Program on a continuing basis, an advisory committee (hereafter in this section referred to as the ‘Committee’) shall be established under a memorandum of understanding between the Interstate Shellfish Sanitation Conference and the National Marine Fisheries Service.

“(2) The Committee shall—

“(A) identify priorities for achieving the purpose of the Program;

“(B) review and recommend approval or disapproval of Program work plans and plans of operation;

“(C) review and comment on all subcontracts and grants to be awarded under the Program;

“(D) receive and review progress reports from the Consortium and program subcontractors and grantees; and

“(E) provide such other advice on the Program as is appropriate.

“(3) The Committee shall consist of at least ten members and shall include—

“(A) three members representing agencies having authority under State law to regulate the shellfish industry, of whom one shall represent each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions;

“(B) three members representing persons engaged in the shellfish industry in the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions (who shall be appointed from among at least six recommendations by the industry members of the Interstate Shellfish Sanitation Conference Executive Board), of whom one shall represent the shellfish industry in each region;

“(C) three members, of whom one shall represent each of the following Federal agencies: the National Oceanic and Atmospheric Administration, the Environmental Protection Agency, and the Food and Drug Administration; and

“(D) one member representing the Shellfish Institute of North America.

“(4) The Chairman of the Committee shall be selected from among the Committee members described in paragraph (3)(A).

“(5) The Committee shall establish and maintain a subcommittee of scientific experts to provide advice, assistance, and information relevant to research funded under the Program, except that no individual who is awarded, or whose application is being considered for, a grant or subcontract under the Program may serve on such subcommittee. The membership of the subcommittee shall, to the extent practicable, be regionally balanced with experts who have scientific knowledge concerning each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions. Scientists from the National Academy of Sciences and appropriate Federal agencies (including the National Oceanic and Atmospheric Administration, Food and Drug Administration, Centers for Disease Control, National Institutes of Health, Environmental Protection Agency, and National Science Foundation) shall be considered for membership on the subcommittee.

“(6) Members of the Committee and its scientific subcommittee established under this subsection shall not be paid for serving on the Committee or subcommittee, but shall receive travel expenses as authorized by section 5703 of title 5, United States Code.

“(c) CONTRACT WITH CONSORTIUM.—Within 30 days after the date of enactment of this Act [Oct. 29, 1992], the Secretary of Commerce shall seek to enter into a cooperative agreement or contract with the Consortium under which the Consortium will—

“(1) be the academic administrative organization and fiscal agent for the Program;

“(2) award and administer such grants and subcontracts as are approved by the Committee under subsection (b);

“(3) develop and implement a scientific peer review process for evaluating grant and subcontractor applications prior to review by the Committee;

“(4) in cooperation with the Secretary of Commerce and the Committee, procure the services of a scientific project director;

“(5) develop and submit budgets, progress reports, work plans, and plans of operation for the Program to the Secretary of Commerce and the Committee; and

“(6) make available to the Committee such staff, information, and assistance as the Committee may reasonably require to carry out its activities.

“(d) AUTHORIZATION OF APPROPRIATIONS.—(1) Of the sums authorized under section 4(a) of the National Oceanic and Atmospheric Administration Marine Fisheries Program Authorization Act (Public Law 98-210; 97 Stat. 1409), there are authorized to be appropriated to the Secretary of Commerce \$5,200,000 for each of the fiscal years 1993 through 1997 for carrying out the Program. Of the amounts appropriated pursuant to this authorization, not more than 5 percent of such appropriation may be used for administrative purposes by the National Oceanic and Atmospheric Administration. The remaining 95 percent of such appropriation shall be used to meet the administrative and scientific objectives of the Program.

“(2) The Interstate Shellfish Sanitation Conference shall not administer appropriations authorized under this section, but may be reimbursed from such appropriations for its expenses in arranging for travel, meetings, workshops, or conferences necessary to carry out the Program.

“(e) DEFINITIONS.—As used in this section, the term—

“(1) ‘Consortium’ means the Louisiana Universities Marine Consortium; and

“(2) ‘shellfish’ means any species of oyster, clam, or mussel that is harvested for human consumption.”

LIMITATION ON PAYMENTS

Section 2 of Pub. L. 100-4 provided that: “No payments may be made under this Act [see Short Title of 1987 Amendment note above] except to the extent provided in advance in appropriation Acts.”

SEAFOOD PROCESSING STUDY; SUBMITTAL OF RESULTS TO CONGRESS NOT LATER THAN JANUARY 1, 1979

Pub. L. 95-217, §74, Dec. 27, 1977, 91 Stat. 1609, provided that the Administrator of the Environmental Protection Agency conduct a study to examine the geographical, hydrological, and biological characteristics of marine waters to determine the effects of seafood processes which dispose of untreated natural wastes into such waters and to include in this study an examination of technologies which may be used in such processes to facilitate the use of the nutrients in these wastes or to reduce the discharge of such wastes into the marine environment and to submit the result of this study to Congress not later than Jan. 1, 1979.

STANDARDS

For provisions relating to the responsibility of the head of each Executive agency for compliance with applicable pollution control standards, see Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of Title 42, The Public Health and Welfare.

OVERSIGHT STUDY

Pub. L. 92-500, §5, Oct. 18, 1972, 86 Stat. 897, authorized the Comptroller General of the United States to conduct a study and review of the research, pilot, and demonstration programs related to prevention and control of water pollution conducted, supported, or assisted by any Federal agency pursuant to any Federal law or regulation and assess conflicts between these programs and their coordination and efficacy, and to report to Congress thereon by Oct. 1, 1973.

INTERNATIONAL TRADE STUDY

Pub. L. 92-500, §6, Oct. 18, 1972, 86 Stat. 897, provided that:

“(a) The Secretary of Commerce, in cooperation with other interested Federal agencies and with representatives of industry and the public, shall undertake immediately an investigation and study to determine—

“(1) the extent to which pollution abatement and control programs will be imposed on, or voluntarily undertaken by, United States manufacturers in the near future and the probable short- and long-range effects of the costs of such programs (computed to the greatest extent practicable on an industry-by-industry basis) on (A) the production costs of such domestic manufacturers, and (B) the market prices of the goods produced by them;

“(2) the probable extent to which pollution abatement and control programs will be implemented in foreign industrial nations in the near future and the extent to which the production costs (computed to the greatest extent practicable on an industry-by-industry basis) of foreign manufacturers will be affected by the costs of such programs;

“(3) the probable competitive advantage which any article manufactured in a foreign nation will likely have in relation to a comparable article made in the United States if that foreign nation—

“(A) does not require its manufacturers to implement pollution abatement and control programs.

“(B) requires a lesser degree of pollution abatement and control in its programs, or

“(C) in any way reimburses or otherwise subsidizes its manufacturers for the costs of such program;

“(4) alternative means by which any competitive advantage accruing to the products of any foreign nation as a result of any factor described in paragraph (3) may be (A) accurately and quickly determined, and (B) equalized, for example, by the imposition of

a surcharge or duty, on a foreign product in an amount necessary to compensate for such advantage; and

“(5) the impact, if any, which the imposition of a compensating tariff of other equalizing measure may have in encouraging foreign nations to implement pollution and abatement control programs.

“(b) The Secretary shall make an initial report to the President and Congress within six months after the date of enactment of this section [Oct. 18, 1972] of the results of the study and investigation carried out pursuant to this section and shall make additional reports thereafter at such times as he deems appropriate taking into account the development of relevant data, but not less than once every twelve months.”

INTERNATIONAL AGREEMENTS

Pub. L. 92-500, §7, Oct. 18, 1972, 86 Stat. 898, provided that: “The President shall undertake to enter into international agreement to apply uniform standards of performance for the control of the discharge and emission of pollutants from new sources, uniform controls over the discharge and emission of toxic pollutants, and uniform controls over the discharge of pollutants into the ocean. For this purpose the President shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums.”

NATIONAL POLICIES AND GOAL STUDY

Pub. L. 92-500, §10, Oct. 18, 1972, 86 Stat. 899, directed President to make a full and complete investigation and study of all national policies and goals established by law to determine what the relationship should be between these policies and goals, taking into account the resources of the Nation, and to report results of his investigation and study together with his recommendations to Congress not later than two years after Oct. 18, 1972.

EFFICIENCY STUDY

Pub. L. 92-500, §11, Oct. 18, 1972, 86 Stat. 899, directed President, by utilization of the General Accounting Office, to conduct a full and complete investigation and study of ways and means of most effectively using all of the various resources, facilities, and personnel of the Federal Government in order to most efficiently carry out the provisions of this chapter and to report results of his investigation and study together with his recommendations to Congress not later than two hundred and seventy days after Oct. 18, 1972.

SEX DISCRIMINATION

Pub. L. 92-500, §13, Oct. 18, 1972, 86 Stat. 903, provided that: “No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance under this Act [see Short Title note above] the Federal Water Pollution Control Act [this chapter], or the Environmental Financing Act [set out as a note under section 1281 of this title]. This section shall be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964 [section 2000d et seq. of Title 42, The Public Health and Welfare]. However, this remedy is not exclusive and will not prejudice or cut off any other legal remedies available to a discriminatee.”

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

PREVENTION, CONTROL, AND ABATEMENT OF ENVIRONMENTAL POLLUTION AT FEDERAL FACILITIES

Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of Title 42, The Public

Health and Welfare, provides for the prevention, control, and abatement of environmental pollution at federal facilities.

EXECUTIVE ORDER NO. 11548

Ex. Ord. No. 11548, July 20, 1970, 35 F.R. 11677, which related to the delegation of Presidential functions, was superseded by Ex. Ord. No. 11735, Aug. 3, 1973, 38 F.R. 21243, formerly set out as a note under section 1321 of this title.

EX. ORD. NO. 11742. DELEGATION OF FUNCTIONS TO SECRETARY OF STATE RESPECTING THE NEGOTIATION OF INTERNATIONAL AGREEMENTS RELATING TO THE ENHANCEMENT OF THE ENVIRONMENT

Ex. Ord. No. 11742, Oct. 23, 1973, 38 F.R. 29457, provided:

Under and by virtue of the authority vested in me by section 301 of title 3 of the United States Code and as President of the United States, I hereby authorize and empower the Secretary of State, in coordination with the Council on Environmental Quality, the Environmental Protection Agency, and other appropriate Federal agencies, to perform, without the approval, ratification, or other action of the President, the functions vested in the President by Section 7 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 898) with respect to international agreements relating to the enhancement of the environment.

RICHARD NIXON.

DEFINITION OF “ADMINISTRATOR”

Pub. L. 100-4, §1(d), Feb. 4, 1987, 101 Stat. 8, provided that: “For purposes of this Act [see Short Title of 1987 Amendment note above], the term ‘Administrator’ means the Administrator of the Environmental Protection Agency.”

§ 1252. Comprehensive programs for water pollution control

(a) Preparation and development

The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes. For the purpose of this section, the Administrator is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.

(b) Planning for reservoirs; storage for regulation of streamflow

(1) In the survey or planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a

tion, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.

(2) Permits

(A) No reasonable relationship

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.

(B) Reasonable progress

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for toxic pollutants for a single period not to exceed 5 years if the applicant demonstrates to the satisfaction of the Administrator that such modified requirements (i) will represent the maximum degree of control within the economic capability of the owner and operator of the source, and (ii) will result in reasonable further progress beyond the requirements of section 1311(b)(2) of this title toward the requirements of subsection (a) of this section.

(c) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

(June 30, 1948, ch. 758, title III, §302, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 846; amended Pub. L. 100-4, title III, §308(e), Feb. 4, 1987, 101 Stat. 39.)

AMENDMENTS

1987—Subsec. (a). Pub. L. 100-4, §308(e)(2), inserted “or as identified under section 1314(l) of this title” after “Administrator” and “public health,” after “protection of”.

Subsec. (b). Pub. L. 100-4, §308(e)(1), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows:

“(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

“(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this

chapter), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.”

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant

to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such

calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(4) LIMITATIONS ON REVISION OF CERTAIN EFFLUENT LIMITATIONS.—

(A) STANDARD NOT ATTAINED.—For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative ef-

fect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) STANDARD ATTAINED.—For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term “water quality standards” includes thermal water quality standards.

(i) Coastal recreation water quality criteria

(1) Adoption by States

(A) Initial criteria and standards

Not later than 42 months after October 10, 2000, each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 1314(a) of this title.

(B) New or revised criteria and standards

Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 1314(a)(9) of this title, each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt

(A) In general

If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception

If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B) of this section, the Administrator shall publish any revised or

new standard under this subsection not later than 42 months after October 10, 2000.

(3) Applicability

Except as expressly provided by this subsection, the requirements and procedures of subsection (c) of this section apply to this subsection, including the requirement in subsection (c)(2)(A) of this section that the criteria protect public health and welfare.

(June 30, 1948, ch. 758, title III, §303, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 846; amended Pub. L. 100-4, title III, §308(d), title IV, §404(b), Feb. 4, 1987, 101 Stat. 39, 68; Pub. L. 106-284, §2, Oct. 10, 2000, 114 Stat. 870.)

REFERENCES IN TEXT

This Act, referred to in subsecs. (a)(1), (2), (3)(B), (C) and (b)(1), means act June 30, 1948, ch. 758, 62 Stat. 1155, prior to the supersedure and reenactment of act June 30, 1948 by act Oct. 18, 1972, Pub. L. 92-500, 86 Stat. 816. Act June 30, 1948, ch. 758, as added by act Oct. 18, 1972, Pub. L. 92-500, 86 Stat. 816, enacted this chapter.

AMENDMENTS

2000—Subsec. (i). Pub. L. 106-284 added subsec. (i).
1987—Subsec. (c)(2). Pub. L. 100-4, §308(d), designated existing provision as subpar. (A) and added subpar. (B).
Subsec. (d)(4). Pub. L. 100-4, §404(b), added par. (4).

§ 1313a. Revised water quality standards

The review, revision, and adoption or promulgation of revised or new water quality standards pursuant to section 303(c) of the Federal Water Pollution Control Act [33 U.S.C. 1313(c)] shall be completed by the date three years after December 29, 1981. No grant shall be made under title II of the Federal Water Pollution Control Act [33 U.S.C. 1281 et seq.] after such date until water quality standards are reviewed and revised pursuant to section 303(c), except where the State has in good faith submitted such revised water quality standards and the Administrator has not acted to approve or disapprove such submission within one hundred and twenty days of receipt. (Pub. L. 97-117, §24, Dec. 29, 1981, 95 Stat. 1632.)

REFERENCES IN TEXT

The Federal Water Pollution Control Act, referred to in text, is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 816. Title II of the Act is classified generally to subchapter II (§1281 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of this title and Tables.

CODIFICATION

Section was enacted as part of the Municipal Wastewater Treatment Construction Grant Amendments of 1981, and not as part of the Federal Water Pollution Control Act which comprises this chapter.

§ 1314. Information and guidelines

(a) Criteria development and publication

(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare

(b) Availability to public; trade secrets exception; penalty for disclosure of confidential information

Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18. Any authorized representative of the Administrator (including an authorized contractor acting as a representative of the Administrator) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both. Nothing in this subsection shall prohibit the Administrator or an authorized representative of the Administrator (including any authorized contractor acting as a representative of the Administrator) from disclosing records, reports, or information to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

(c) Application of State law

Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States).

(d) Access by Congress

Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the Administrator (or any representative of the Administrator) under this chapter shall be made available, upon written request of any duly authorized committee of Congress, to such committee.

(June 30, 1948, ch. 758, title III, §308, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 858; amended Pub. L. 95-217, §67(c)(1), Dec. 27, 1977, 91 Stat. 1606; Pub. L. 100-4, title III, §310, title IV, §406(d)(1), Feb. 4, 1987, 101 Stat. 41, 73.)

AMENDMENTS

1987—Subsec. (a). Pub. L. 100-4, §406(d)(1), substituted “1345, and 1364” for “and 1364” in cl. (4).

Subsec. (a)(B). Pub. L. 100-4, §310(a)(2), inserted “(including an authorized contractor acting as a representative of the Administrator)” after “representative”.

Subsec. (b). Pub. L. 100-4, §310(a)(1), substituted a period and “Any authorized representative of the Administrator (including an authorized contractor acting as a representative of the Administrator) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both. Nothing in this subsection shall prohibit the Administrator or an authorized representative of the Administrator (including any authorized contractor acting as a representative of the Administrator) from disclosing records, reports, or information to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.” for “, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.”

Subsec. (d). Pub. L. 100-4, §310(b), added subsec. (d). 1977—Subsec. (a)(4). Pub. L. 95-217 inserted “1344 (relating to State permit programs),” after “sections 1315, 1321, 1342,” in provisions preceding subpar. (A).

§ 1319. Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator’s notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of “federally assumed enforcement”), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

- (A) by issuing an order to comply with such condition or limitation, or
- (B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that

any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this

chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than \$1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph—

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was con-

sent to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste

the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State,¹ or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(e) State liability for judgments and expenses

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutant into treatment works

Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the

district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed \$10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed \$25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed \$10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed \$125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on

¹So in original.

the record in accordance with section 554 of title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which—

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection

If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

(June 30, 1948, ch. 758, title III, §309, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 859; amended Pub. L. 95-217, §§54(b), 55, 56, 67(c)(2), Dec. 27, 1977, 91 Stat. 1591, 1592, 1606; Pub. L. 100-4, title III, §§312, 313(a)(1), (b)(1), (c), 314(a), Feb. 4, 1987, 101 Stat. 42, 45, 46; Pub. L. 101-380, title IV, §4301(c), Aug. 18, 1990, 104 Stat. 537.)

REFERENCES IN TEXT

The Solid Waste Disposal Act, referred to in subsec. (c)(7), is title II of Pub. L. 89-272, Oct. 20, 1965, 79 Stat. 997, as amended generally by Pub. L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2795, which is classified generally to chapter 82 (§6901 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of Title 42 and Tables.

AMENDMENTS

1990—Subsec. (c)(1)(A), (2)(A), (3)(A). Pub. L. 101-380 inserted “1321(b)(3),” after “1318.”

1987—Subsec. (c). Pub. L. 100-4, §312, amended subsec. (c) generally, revising provisions of par. (1), adding pars. (2), (3), (5), and (7), redesignating former pars. (2) and (4) as (3) and (6), respectively, and revising provisions of redesignated par. (4).

Subsec. (d). Pub. L. 100-4, §313(a)(1), inserted “, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title,” after second reference to “State.”

Pub. L. 100-4, §313(b)(1), substituted “\$25,000 per day for each violation” for “\$10,000 per day of such violation”.

Pub. L. 100-4, §313(c), inserted at end “In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.”

Subsec. (g). Pub. L. 100-4, §314(a), added subsec. (g).

1977—Subsec. (a)(1). Pub. L. 95-217, §§55(a), 67(c)(2)(A), substituted “1318, 1328, or 1345 of this title” for “or 1318 of this title” and “1342 or 1344 of this title” for “1342 of this title”.

Subsec. (a)(2). Pub. L. 95-217, §56(a), substituted “except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation” for “the Administrator shall enforce any permit condition or limitation”.

Subsec. (a)(3). Pub. L. 95-217, §§55(b), 67(c)(2)(B), substituted “1318, 1328, or 1345 of this title” for “or 1318 of this title” and inserted “or in a permit issued under section 1344 of this title by a State” after “in a permit issued under section 1342 of this title by him or by a State”.

Subsec. (a)(4). Pub. L. 95-217, §56(b), struck out provision that any order issued under this subsection had to be by personal service and had to state with reasonable specificity the nature of the violation and a time for compliance, not to exceed thirty days, which the Administrator determined to be reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. See section subsec. (a)(5) of this section.

Subsec. (a)(5), (6). Pub. L. 95-217, §56(c), added pars. (5) and (6).

Subsec. (c)(1). Pub. L. 95-217, §67(c)(2)(C), substituted “by a State or in a permit issued under section 1344 of this title by a State, shall be punished” for “by a State, shall be punished”.

Subsec. (d). Pub. L. 95-217, §§55(c), 67(c)(2)(D), substituted “1318, 1328, or 1345 of this title” for “or 1318 of this title” and inserted “or in a permit issued under section 1344 of this title by a State.” after “permit issued under section 1342 of this title by the Administrator, or by a State.”.

Subsec. (f). Pub. L. 95-217, §54(b), added subsec. (f).

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-380 applicable to incidents occurring after Aug. 18, 1990, see section 1020 of Pub. L. 101-380, set out as an Effective Date note under section 2701 of this title.

SAVINGS PROVISION

Pub. L. 100-4, title III, §313(a)(2), Feb. 4, 1987, 101 Stat. 45, provided that: “No State shall be required before July 1, 1988, to modify a permit program approved or submitted under section 402 of the Federal Water Pollution Control Act [33 U.S.C. 1342] as a result of the amendment made by paragraph (1) [amending this section].”

DEPOSIT OF CERTAIN PENALTIES INTO OIL SPILL LIABILITY TRUST FUND

Penalties paid pursuant to subsection (c) of this section and sections 1321 and 1501 et seq. of this title to be deposited in the Oil Spill Liability Trust Fund created under section 9509 of Title 26, Internal Revenue Code, see section 4304 of Pub. L. 101-380, set out as a note under section 9509 of Title 26.

INCREASED PENALTIES NOT REQUIRED UNDER STATE PROGRAMS

Pub. L. 100-4, title III, §313(b)(2), Feb. 4, 1987, 101 Stat. 45, provided that: “The Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.] shall not be construed as requiring a State to have a civil penalty for violations described in section 309(d) of such Act [33 U.S.C. 1319(d)] which has the same monetary amount as the civil penalty established by such section, as amended by paragraph (1) [amending this section]. Nothing in this paragraph shall affect the Administrator’s authority to establish or adjust by regulation a minimum acceptable State civil penalty.”

ACTIONS BY SURGEON GENERAL RELATING TO INTERSTATE POLLUTION

Act July 9, 1956, ch. 518, §5, 70 Stat. 507, provided that actions by the Surgeon General with respect to water pollutants under section 2(d) of act June 30, 1948, ch. 758, 62 Stat. 1155, as in effect prior to July 9, 1956, which had been completed prior to such date, would still be subject to the terms of section 2(d) of act June 30, 1948, in effect prior to the July 9, 1956 amendment, but that actions with respect to such pollutants would nevertheless subsequently be possible in accordance with the terms of act June 30, 1948, as amended by act July 9, 1956.

§ 1320. International pollution abatement

(a) Hearing; participation by foreign nations

Whenever the Administrator, upon receipts of reports, surveys, or studies from any duly constituted international agency, has reason to believe that pollution is occurring which endangers the health or welfare of persons in a foreign country, and the Secretary of State requests him to abate such pollution, he shall give formal notification thereof to the State water pollution control agency of the State or States in which such discharge or discharges originate and to

the appropriate interstate agency, if any. He shall also promptly call such a hearing, if he believes that such pollution is occurring in sufficient quantity to warrant such action, and if such foreign country has given the United States essentially the same rights with respect to the prevention and control of pollution occurring in that country as is given that country by this subsection. The Administrator, through the Secretary of State, shall invite the foreign country which may be adversely affected by the pollution to attend and participate in the hearing, and the representative of such country shall, for the purpose of the hearing and any further proceeding resulting from such hearing, have all the rights of a State water pollution control agency. Nothing in this subsection shall be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States or the Water Utilization Treaty of 1944 between Mexico and the United States (59 Stat. 1219), relative to the control and abatement of pollution in waters covered by those treaties.

(b) Functions and responsibilities of Administrator not affected

The calling of a hearing under this section shall not be construed by the courts, the Administrator, or any person as limiting, modifying, or otherwise affecting the functions and responsibilities of the Administrator under this section to establish and enforce water quality requirements under this chapter.

(c) Hearing board; composition; findings of fact; recommendations; implementation of board’s decision

The Administrator shall publish in the Federal Register a notice of a public hearing before a hearing board of five or more persons appointed by the Administrator. A majority of the members of the board and the chairman who shall be designated by the Administrator shall not be officers or employees of Federal, State, or local governments. On the basis of the evidence presented at such hearing, the board shall within sixty days after completion of the hearing make findings of fact as to whether or not such pollution is occurring and shall thereupon by decision, incorporating its findings therein, make such recommendations to abate the pollution as may be appropriate and shall transmit such decision and the record of the hearings to the Administrator. All such decisions shall be public. Upon receipt of such decision, the Administrator shall promptly implement the board’s decision in accordance with the provisions of this chapter.

(d) Report by alleged polluter

In connection with any hearing called under this subsection, the board is authorized to require any person whose alleged activities result in discharges causing or contributing to pollution to file with it in such forms as it may prescribe, a report based on existing data, furnishing such information as may reasonably be required as to the character, kind, and quantity of such discharges and the use of facilities or other means to prevent or reduce such discharges by the person filing such a report. Such report shall

amended Pub. L. 95–217, §§61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

AMENDMENTS

1977—Subsec. (a). Pub. L. 95–217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal agency be deemed an applicant for purposes of this subsection, and redesignated par. (7) as (6).

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to

such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Admin-

istrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS.—A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such applica-

tion has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement**(1) Agricultural return flows**

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities

(A) NPDES PERMIT REQUIREMENTS FOR SILVICULTURAL ACTIVITIES.—The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) OTHER REQUIREMENTS.—Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 1344 of this title, existing permitting requirements under section 1342 of this title, or from any other federal law.

(C) The authorization provided in Section¹ 1365(a) of this title does not apply to any non-permitting program established under 1342(p)(6)² of this title for the silviculture activities listed in 1342(l)(3)(A)² of this title, or to any other limitations that might be deemed

¹So in original. Probably should not be capitalized.

²So in original. Probably should be preceded by "section".

to apply to the silviculture activities listed in 1342(l)(3)(A)² of this title.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if—

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if—

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if—

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers—

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater dis-

charges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the “CSO control policy”).

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels

No permit shall be required under this chapter by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

(June 30, 1948, ch. 758, title IV, §402, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 880; amended Pub. L. 95-217, §§33(c), 50, 54(c)(1), 65, 66, Dec. 27, 1977, 91 Stat. 1577, 1588, 1591, 1599, 1600; Pub. L. 100-4, title IV, §§401-404(a), 404(c), formerly 404(d), 405, Feb. 4, 1987, 101 Stat. 65-67, 69, renumbered §404(c), Pub. L. 104-66, title II, §2021(e)(2), Dec. 21, 1995, 109 Stat. 727; Pub. L. 102-580, title III, §364, Oct. 31, 1992, 106 Stat. 4862; Pub. L. 106-554, §1(a)(4) [div. B, title I, §112(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A-224; Pub. L. 110-288, §2, July 29, 2008, 122 Stat. 2650; Pub. L. 113-79, title XII, §12313, Feb. 7, 2014, 128 Stat. 992.)

AMENDMENTS

2014—Subsec. (l)(3). Pub. L. 113-79 added par. (3).
2008—Subsec. (r). Pub. L. 110-288 added subsec. (r).

2000—Subsec. (q). Pub. L. 106-554 added subsec. (q).
1992—Subsec. (p)(1), (6). Pub. L. 102-580 substituted “October 1, 1994” for “October 1, 1992” in par. (1) and “October 1, 1993” for “October 1, 1992” in par. (6).
1987—Subsec. (a)(1). Pub. L. 100-4, §404(c), inserted cl. (A) and (B) designations.

Subsec. (c)(1). Pub. L. 100-4, §403(b)(2), substituted “as to those discharges” for “as to those navigable waters”.

Subsec. (c)(4). Pub. L. 100-4, §403(b)(1), added par. (4).
Subsec. (l). Pub. L. 100-4, §401, inserted “Limitation on permit requirement” as subsec. heading designated existing provisions as par. (1) and inserted par. heading, added par. (2), and aligned pars. (1) and (2).

Subsecs. (m) to (p). Pub. L. 100-4, §§402, 403(a), 404(a), 405, added subsecs. (m) to (p).

1977—Subsec. (a)(5). Pub. L. 95-217, §50, substituted “section 1314(i)(2)” for “section 1314(h)(2)”.

Subsec. (b). Pub. L. 95-217, §50, substituted in provisions preceding par. (1) “subsection (i)(2) of section 1314” for “subsection (h)(2) of section 1314”.

Subsec. (b)(8). Pub. L. 95-217, §54(c)(1), inserted reference to identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into treatment works and programs to assure compliance with pretreatment standards by each source.

Subsec. (c)(1), (2). Pub. L. 95-217, §50, substituted “section 1314(i)(2)” for “section 1314(h)(2)”.

Subsec. (d)(2). Pub. L. 95-217, §65(b), inserted provision requiring that, whenever the Administrator objects to the issuance of a permit under subsec. (d)(2) of this section, the written objection contain a statement of the reasons for the objection and the effluent limitations and conditions which the permit would include if it were issued by the Administrator.

Subsec. (d)(4). Pub. L. 95-217, §65(a), added par. (4).
Subsec. (e). Pub. L. 95-217, §50, substituted “subsection (i)(2) of section 1314” for “subsection (h)(2) of section 1314”.

Subsec. (h). Pub. L. 95-217, §66, substituted “where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit,” for “where no State program is approved.”

Subsec. (l). Pub. L. 95-217, §33(c), added subsec. (l).

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Enforcement functions of Administrator or other official of the Environmental Protection Agency under this section relating to compliance with national pollutant discharge elimination system permits with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy sub-

sequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

PERMIT REQUIREMENTS FOR DISCHARGES FROM CERTAIN VESSELS

Pub. L. 110-299, §§ 1, 2, July 31, 2008, 122 Stat. 2995, as amended by Pub. L. 111-215, § 1, July 30, 2010, 124 Stat. 2347; Pub. L. 112-213, title VII, § 703, Dec. 20, 2012, 126 Stat. 1580; Pub. L. 113-281, title VI, § 602, Dec. 18, 2014, 128 Stat. 3061, provided that:

“SECTION 1. DEFINITIONS.

“In this Act:

“(1) ADMINISTRATOR.—The term ‘Administrator’ means the Administrator of the Environmental Protection Agency.

“(2) COVERED VESSEL.—The term ‘covered vessel’ means a vessel that is—

“(A) less than 79 feet in length; or

“(B) a fishing vessel (as defined in section 2101 of title 46, United States Code), regardless of the length of the vessel.

“(3) OTHER TERMS.—The terms ‘contiguous zone’, ‘discharge’, ‘ocean’, and ‘State’ have the meanings given the terms in section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362).

“SEC. 2. DISCHARGES INCIDENTAL TO NORMAL OPERATION OF VESSELS.

“(a) NO PERMIT REQUIREMENT.—Except as provided in subsection (b), during the period beginning on the date of the enactment of this Act [July 31, 2008] and ending on December 18, 2017, the Administrator, or a State in the case of a permit program approved under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342), shall not require a permit under that section for a covered vessel for—

“(1) any discharge of effluent from properly functioning marine engines;

“(2) any discharge of laundry, shower, and galley sink wastes; or

“(3) any other discharge incidental to the normal operation of a covered vessel.

“(b) EXCEPTIONS.—Subsection (a) shall not apply with respect to—

“(1) rubbish, trash, garbage, or other such materials discharged overboard;

“(2) other discharges when the vessel is operating in a capacity other than as a means of transportation, such as when—

“(A) used as an energy or mining facility;

“(B) used as a storage facility or a seafood processing facility;

“(C) secured to a storage facility or a seafood processing facility; or

“(D) secured to the bed of the ocean, the contiguous zone, or waters of the United States for the purpose of mineral or oil exploration or development;

“(3) any discharge of ballast water; or

“(4) any discharge in a case in which the Administrator or State, as appropriate, determines that the discharge—

“(A) contributes to a violation of a water quality standard; or

“(B) poses an unacceptable risk to human health or the environment.”

STORMWATER PERMIT REQUIREMENTS

Pub. L. 102-240, title I, § 1068, Dec. 18, 1991, 105 Stat. 2007, provided that:

“(a) GENERAL RULE.—Notwithstanding the requirements of sections 402(p)(2)(B), (C), and (D) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(B), (C), (D)], permit application deadlines for stormwater discharges associated with industrial activities from facilities that are owned or operated by a municipality shall be established by the Administrator of the Environmental Protection Agency (hereinafter

in this section referred to as the ‘Administrator’) pursuant to the requirements of this section.

“(b) PERMIT APPLICATIONS.—

“(1) INDIVIDUAL APPLICATIONS.—The Administrator shall require individual permit applications for discharges described in subsection (a) on or before October 1, 1992; except that any municipality that has participated in a timely part I group application for an industrial activity discharging stormwater that is denied such participation in a group application or for which a group application is denied shall not be required to submit an individual application until the 180th day following the date on which the denial is made.

“(2) GROUP APPLICATIONS.—With respect to group applications for permits for discharges described in subsection (a), the Administrator shall require—

“(A) part I applications on or before September 30, 1991, except that any municipality with a population of less than 250,000 shall not be required to submit a part I application before May 18, 1992; and

“(B) part II applications on or before October 1, 1992, except that any municipality with a population of less than 250,000 shall not be required to submit a part II application before May 17, 1993.

“(c) MUNICIPALITIES WITH LESS THAN 100,000 POPULATION.—The Administrator shall not require any municipality with a population of less than 100,000 to apply for or obtain a permit for any stormwater discharge associated with an industrial activity other than an airport, powerplant, or uncontrolled sanitary landfill owned or operated by such municipality before October 1, 1992, unless such permit is required by section 402(p)(2)(A) or (E) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(A), (E)].

“(d) UNCONTROLLED SANITARY LANDFILL DEFINED.—For the purposes of this section, the term ‘uncontrolled sanitary landfill’ means a landfill or open dump, whether in operation or closed, that does not meet the requirements for run-on and run-off controls established pursuant to subtitle D of the Solid Waste Disposal Act [42 U.S.C. 6941 et seq.].

“(e) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to affect any application or permit requirement, including any deadline, to apply for or obtain a permit for stormwater discharges subject to section 402(p)(2)(A) or (E) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(A), (E)].

“(f) REGULATIONS.—The Administrator shall issue final regulations with respect to general permits for stormwater discharges associated with industrial activity on or before February 1, 1992.”

PHOSPHATE FERTILIZER EFFLUENT LIMITATION

Pub. L. 100-4, title III, § 306(c), Feb. 4, 1987, 101 Stat. 36, provided that:

“(1) ISSUANCE OF PERMIT.—As soon as possible after the date of the enactment of this Act [Feb. 4, 1987], but not later than 180 days after such date of enactment, the Administrator shall issue permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 U.S.C. 1342(a)(1)(B)] with respect to facilities—

“(A) which were under construction on or before April 8, 1974, and

“(B) for which the Administrator is proposing to revise the applicability of the effluent limitation established under section 301(b) of such Act [33 U.S.C. 1311(b)] for phosphate subcategory of the fertilizer manufacturing point source category to exclude such facilities.

“(2) LIMITATIONS ON STATUTORY CONSTRUCTION.—Nothing in this section [amending section 1311 of this title and enacting this note] shall be construed—

“(A) to require the Administrator to permit the discharge of gypsum or gypsum waste into the navigable waters,

“(B) to affect the procedures and standards applicable to the Administrator in issuing permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 U.S.C. 1342(a)(1)(B)], and

“(C) to affect the authority of any State to deny or condition certification under section 401 of such Act [33 U.S.C. 1341] with respect to the issuance of permits under section 402(a)(1)(B) of such Act.”

LOG TRANSFER FACILITIES

Pub. L. 100-4, title IV, §407, Feb. 4, 1987, 101 Stat. 74, provided that:

“(a) AGREEMENT.—The Administrator and Secretary of the Army shall enter into an agreement regarding coordination of permitting for log transfer facilities to designate a lead agency and to process permits required under sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344], where both such sections apply, for discharges associated with the construction and operation of log transfer facilities. The Administrator and Secretary are authorized to act in accordance with the terms of such agreement to assure that, to the maximum extent practicable, duplication, needless paperwork and delay in the issuance of permits, and inequitable enforcement between and among facilities in different States, shall be eliminated.

“(b) APPLICATIONS AND PERMITS BEFORE OCTOBER 22, 1985.—Where both of sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344] apply, log transfer facilities which have received a permit under section 404 of such Act before October 22, 1985, shall not be required to submit a new application for a permit under section 402 of such Act. If the Administrator determines that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act satisfies the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act [33 U.S.C. 1311, 1312, 1316, 1317, 1318, and 1343], a separate application for a permit under section 402 of such Act shall not thereafter be required. In any case where the Administrator demonstrates, after an opportunity for a hearing, that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act do not satisfy the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act, modifications to the existing permit under section 404 of such Act to incorporate such applicable requirements shall be issued by the Administrator as an alternative to issuance of a separate new permit under section 402 of such Act.

“(c) LOG TRANSFER FACILITY DEFINED.—For the purposes of this section, the term ‘log transfer facility’ means a facility which is constructed in whole or in part in waters of the United States and which is utilized for the purpose of transferring commercially harvested logs to or from a vessel or log raft, including the formation of a log raft.”

ALLOWABLE DELAY IN MODIFYING EXISTING APPROVED STATE PERMIT PROGRAMS TO CONFORM TO 1977 AMENDMENT

Pub. L. 95-217, §54(c)(2), Dec. 27, 1977, 91 Stat. 1591, provided that any State permit program approved under this section before Dec. 27, 1977, which required modification to conform to the amendment made by section 54(c)(1) of Pub. L. 95-217, which amended subsec. (b)(8) of this section, not be required to be modified before the end of the one year period which began on Dec. 27, 1977, unless in order to make the required modification a State must amend or enact a law in which case such modification not be required for such State before the end of the two year period which began on Dec. 27, 1977.

§ 1343. Ocean discharge criteria

(a) Issuance of permits

No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior

to the promulgation of such guidelines, a permit may be issued under such section 1342 of this title if the Administrator determines it to be in the public interest.

(b) Waiver

The requirements of subsection (d) of section 1342 of this title may not be waived in the case of permits for discharges into the territorial sea.

(c) Guidelines for determining degradation of waters

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972 (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal of varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

(June 30, 1948, ch. 758, title IV, §403, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 883.)

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION; CONDITIONS

Discharges from point sources in the United States Virgin Islands in existence on Aug. 5, 1983, attributable to the manufacture of rum not to be subject to the requirements of this section under certain conditions, see section 214(g) of Pub. L. 98-67, set out as a note under section 1311 of this title.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the dis-

“(C) to affect the authority of any State to deny or condition certification under section 401 of such Act [33 U.S.C. 1341] with respect to the issuance of permits under section 402(a)(1)(B) of such Act.”

LOG TRANSFER FACILITIES

Pub. L. 100-4, title IV, §407, Feb. 4, 1987, 101 Stat. 74, provided that:

“(a) **AGREEMENT.**—The Administrator and Secretary of the Army shall enter into an agreement regarding coordination of permitting for log transfer facilities to designate a lead agency and to process permits required under sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344], where both such sections apply, for discharges associated with the construction and operation of log transfer facilities. The Administrator and Secretary are authorized to act in accordance with the terms of such agreement to assure that, to the maximum extent practicable, duplication, needless paperwork and delay in the issuance of permits, and inequitable enforcement between and among facilities in different States, shall be eliminated.

“(b) **APPLICATIONS AND PERMITS BEFORE OCTOBER 22, 1985.**—Where both of sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344] apply, log transfer facilities which have received a permit under section 404 of such Act before October 22, 1985, shall not be required to submit a new application for a permit under section 402 of such Act. If the Administrator determines that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act satisfies the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act [33 U.S.C. 1311, 1312, 1316, 1317, 1318, and 1343], a separate application for a permit under section 402 of such Act shall not thereafter be required. In any case where the Administrator demonstrates, after an opportunity for a hearing, that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act do not satisfy the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act, modifications to the existing permit under section 404 of such Act to incorporate such applicable requirements shall be issued by the Administrator as an alternative to issuance of a separate new permit under section 402 of such Act.

“(c) **LOG TRANSFER FACILITY DEFINED.**—For the purposes of this section, the term ‘log transfer facility’ means a facility which is constructed in whole or in part in waters of the United States and which is utilized for the purpose of transferring commercially harvested logs to or from a vessel or log raft, including the formation of a log raft.”

ALLOWABLE DELAY IN MODIFYING EXISTING APPROVED STATE PERMIT PROGRAMS TO CONFORM TO 1977 AMENDMENT

Pub. L. 95-217, §54(c)(2), Dec. 27, 1977, 91 Stat. 1591, provided that any State permit program approved under this section before Dec. 27, 1977, which required modification to conform to the amendment made by section 54(c)(1) of Pub. L. 95-217, which amended subsec. (b)(8) of this section, not be required to be modified before the end of the one year period which began on Dec. 27, 1977, unless in order to make the required modification a State must amend or enact a law in which case such modification not be required for such State before the end of the two year period which began on Dec. 27, 1977.

§ 1343. Ocean discharge criteria

(a) Issuance of permits

No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior

to the promulgation of such guidelines, a permit may be issued under such section 1342 of this title if the Administrator determines it to be in the public interest.

(b) Waiver

The requirements of subsection (d) of section 1342 of this title may not be waived in the case of permits for discharges into the territorial sea.

(c) Guidelines for determining degradation of waters

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972 (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal of varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

(June 30, 1948, ch. 758, title IV, §403, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 883.)

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION; CONDITIONS

Discharges from point sources in the United States Virgin Islands in existence on Aug. 5, 1983, attributable to the manufacture of rum not to be subject to the requirements of this section under certain conditions, see section 214(g) of Pub. L. 98-67, set out as a note under section 1311 of this title.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the dis-

charge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five

years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are

susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent

reduction or elimination of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Ad-

ministrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator

intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E) of this section, or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(l) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(o) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including

consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action¹ shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material

¹So in original. Probably should be "action".

in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

(June 30, 1948, ch. 758, title IV, §404, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 884; amended Pub. L. 95-217, §67(a), (b), Dec. 27, 1977, 91 Stat. 1600; Pub. L. 100-4, title III, §313(d), Feb. 4, 1987, 101 Stat. 45.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (r), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

AMENDMENTS

1987—Subsec. (s). Pub. L. 100-4 redesignated par. (5) as (4), substituted “\$25,000 per day for each violation” for “\$10,000 per day of such violation”, inserted provision specifying factors to consider in determining the penalty amount, and struck out former par. (4) which read as follows:

“(A) Any person who willfully or negligently violates any condition or limitation in a permit issued by the Secretary under this section shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or by both.

“(B) For the purposes of this paragraph, the term ‘person’ shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.”

1977—Subsec. (a). Pub. L. 95-217, §67(a)(1), substituted “The Secretary” for “The Secretary of the Army, acting through the Chief of Engineers,” and inserted provision that, not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary publish the notice required by this subsection.

Subsecs. (b), (c). Pub. L. 95-217, §67(a)(2), substituted “the Secretary” for “the Secretary of the Army”.

Subsecs. (d) to (t). Pub. L. 95-217, §67(b), added subsecs. (d) to (t).

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Enforcement functions of Administrator or other official of the Environmental Protection Agency and of Secretary or other official in Department of the Interior relating to review of the Corps of Engineers’ dredged and fill material permits and such functions of Secretary of the Army, Chief of Engineers, or other official in Corps of Engineers of the United States Army

relating to compliance with dredged and fill material permits issued under this section with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(a), (b), (e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

MITIGATION AND MITIGATION BANKING REGULATIONS

Pub. L. 108-136, div. A, title III, §314(b), Nov. 24, 2003, 117 Stat. 1431, provided that:

“(1) To ensure opportunities for Federal agency participation in mitigation banking, the Secretary of the Army, acting through the Chief of Engineers, shall issue regulations establishing performance standards and criteria for the use, consistent with section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section. To the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, provide flexibility for regional variations in wetland conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation.

“(2) Final regulations shall be issued not later than two years after the date of the enactment of this Act [Nov. 24, 2003].”

REGULATORY PROGRAM

Pub. L. 106-377, §1(a)(2) [title I], Oct. 27, 2000, 114 Stat. 1441, 1441A-63, provided in part that: “For expenses necessary for administration of laws pertaining to regulation of navigable waters and wetlands, \$125,000,000, to remain available until expended: *Provided*, That the Secretary of the Army, acting through the Chief of Engineers, is directed to use funds appropriated herein to: (1) by March 1, 2001, supplement the report, Cost Analysis For the 1999 Proposal to Issue and Modify Nationwide Permits, to reflect the Nationwide Permits actually issued on March 9, 2000, including changes in the acreage limits, preconstruction notification requirements and general conditions between the rule proposed on July 21, 1999, and the rule promulgated and published in the Federal Register; (2) after consideration of the cost analysis for the 1999 proposal to issue and modify nationwide permits and the supplement prepared pursuant to this Act [H.R. 5483, as enacted by section 1(a)(2) of Pub. L. 106-377, see Tables for classification] and by September 30, 2001, prepare, submit to Congress and publish in the Federal Register a Permit Processing Management Plan by which the Corps of Engineers will handle the additional work associated with all projected increases in the number of individual permit applications and preconstruction notifications related to the new and replacement permits and general conditions. The Permit Processing Management Plan shall include specific objective goals and criteria by which the Corps of Engineers’ progress towards reducing any permit backlog can be measured; (3) beginning on December 31, 2001, and on a biannual basis thereafter, report to Congress and publish in the Federal

Register, an analysis of the performance of its program as measured against the criteria set out in the Permit Processing Management Plan; (4) implement a 1-year pilot program to publish quarterly on the U.S. Army Corps of Engineer's Regulatory Program website all Regulatory Analysis and Management Systems (RAMS) data for the South Pacific Division and North Atlantic Division beginning within 30 days of the enactment of this Act [Oct. 27, 2000]; and (5) publish in Division Office websites all findings, rulings, and decisions rendered under the administrative appeals process for the Corps of Engineers Regulatory Program as established in Public Law 106-60 [113 Stat. 486]: *Provided further*, That, through the period ending on September 30, 2003, the Corps of Engineers shall allow any appellant to keep a verbatim record of the proceedings of the appeals conference under the aforementioned administrative appeals process: *Provided further*, That within 30 days of the enactment of this Act, the Secretary of the Army, acting through the Chief of Engineers, shall require all U.S. Army Corps of Engineers Divisions and Districts to record the date on which a section 404 individual permit application or nationwide permit notification is filed with the Corps of Engineers: *Provided further*, That the Corps of Engineers, when reporting permit processing times, shall track both the date a permit application is first received and the date the application is considered complete, as well as the reason that the application is not considered complete upon first submission."

AUTHORITY TO DELEGATE TO STATE OF WASHINGTON FUNCTIONS OF THE SECRETARY RELATING TO LAKE CHELAN, WASHINGTON

Pub. L. 95-217, §76, Dec. 27, 1977, 91 Stat. 1610, provided that: "The Secretary of the Army, acting through the Chief of Engineers, is authorized to delegate to the State of Washington upon its request all or any part of those functions vested in such Secretary by section 404 of the Federal Water Pollution Control Act [this section] and by sections 9, 10, and 13 of the Act of March 3, 1899 [sections 401, 403, and 407 of this title], relating to Lake Chelan, Washington, if the Secretary determines (1) that such State has the authority, responsibility, and capability to carry out such functions, and (2) that such delegation is in the public interest. Such delegation shall be subject to such terms and conditions as the Secretary deems necessary, including, but not limited to, suspension and revocation for cause of such delegation."

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

§ 1345. Disposal or use of sewage sludge

(a) Permit

Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) Issuance of permit; regulations

The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such dis-

posal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) State permit program

Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

(d) Regulations

(1) Regulations

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27, 1977, and from time to time thereafter, regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall—

(A) identify uses for sludge, including disposal;

(B) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(C) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

(2) Identification and regulation of toxic pollutants

(A) On basis of available information

(i) Proposed regulations

Not later than November 30, 1986, the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

(ii) Final regulations

Not later than August 31, 1987, and after opportunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

(B) Others

(i) Proposed regulations

Not later than July 31, 1987, the Administrator shall identify those toxic pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limita-

“(B) an aggregate aboveground storage capacity greater than or equal to 20,000 gallons; or
 “(C) a reportable oil discharge history; or
 “(2) allow certification by the owner or operator of the farm (via self-certification) for a farm with—

“(A) an aggregate aboveground storage capacity less than 20,000 gallons and greater than the lesser of—

“(i) 6,000 gallons; and

“(ii) the adjustment quantity established under subsection (d)(2); and

“(B) no reportable oil discharge history; and

“(3) not require compliance with the rule by any farm—

“(A) with an aggregate aboveground storage capacity greater than 2,500 gallons and less than the lesser of—

“(i) 6,000 gallons; and

“(ii) the adjustment quantity established under subsection (d)(2); and

“(B) no reportable oil discharge history; and

“(4) not require compliance with the rule by any farm with an aggregate aboveground storage capacity of less than 2,500 gallons.

“(c) CALCULATION OF AGGREGATE ABOVEGROUND STORAGE CAPACITY.—For purposes of subsection (b), the aggregate aboveground storage capacity of a farm excludes—

“(1) all containers on separate parcels that have a capacity that is 1,000 gallons or less; and

“(2) all containers holding animal feed ingredients approved for use in livestock feed by the Commissioner of Food and Drugs.

“(d) STUDY.—

“(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act [June 10, 2014], the Administrator, in consultation with the Secretary of Agriculture, shall conduct a study to determine the appropriate exemption under paragraphs (2) and (3) of subsection (b), which shall be not more than 6,000 gallons and not less than 2,500 gallons, based on a significant risk of discharge to water.

“(2) ADJUSTMENT.—Not later than 18 months after the date on which the study described in paragraph (1) is complete, the Administrator, in consultation with the Secretary of Agriculture, shall promulgate a rule to adjust the exemption levels described in paragraphs (2) and (3) of subsection (b) in accordance with the study.”

ENVIRONMENTAL COURT FEASIBILITY STUDY

Pub. L. 92-500, §9, Oct. 18, 1972, 86 Stat. 899, authorized the President, acting through the Attorney General, to study the feasibility of establishing a separate court or court system with jurisdiction over environmental matters and required him to report the results of his study, together with his recommendations, to Congress not later than one year after Oct. 18, 1972.

TRANSFER OF PUBLIC HEALTH SERVICE OFFICERS

Pub. L. 89-234, §2(b)-(k), Oct. 2, 1965, 79 Stat. 904, 905, authorized the transfer of certain commissioned officers of the Public Health Service to classified positions in the Federal Water Pollution Control Administration, now the Environmental Protection Agency, where such transfer was requested within six months after the establishment of the Administration and made certain administrative provisions relating to pension and retirement rights of the transferees, sick leave benefits, group life insurance, and certain other miscellaneous provisions.

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

(1) The term “State water pollution control agency” means the State agency designated by the Governor having responsibility for enforcing

State laws relating to the abatement of pollution.

(2) The term “interstate agency” means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term “municipality” means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term “person” means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) 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. This term does not mean (A) “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces” within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term “navigable waters” means the waters of the United States, including the territorial seas.

(8) The term “territorial seas” means 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.

(9) The term “contiguous zone” means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term “ocean” means any portion of the high seas beyond the contiguous zone.

(11) The term “effluent limitation” means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term “toxic pollutant” means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm-water discharges and return flows from irrigated agriculture.

(15) The term “biological monitoring” shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term “discharge” when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term “schedule of compliance” means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term “industrial user” means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of “Division D—Manufacturing” and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term “pollution” means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term “medical waste” means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) COASTAL RECREATION WATERS.—

(A) IN GENERAL.—The term “coastal recreation waters” means—

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 1313(c) of this title by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) EXCLUSIONS.—The term “coastal recreation waters” does not include—

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) FLOATABLE MATERIAL.—

(A) IN GENERAL.—The term “floatable material” means any foreign matter that may float or remain suspended in the water column.

(B) INCLUSIONS.—The term “floatable material” includes—

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) PATHOGEN INDICATOR.—The term “pathogen indicator” means a substance that indicates the potential for human infectious disease.

(24) OIL AND GAS EXPLORATION AND PRODUCTION.—The term “oil and gas exploration, production, processing, or treatment operations or transmission facilities” means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) RECREATIONAL VESSEL.—

(A) IN GENERAL.—The term “recreational vessel” means any vessel that is—

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) EXCLUSION.—The term “recreational vessel” does not include a vessel that is subject to Coast Guard inspection and that—

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(26) TREATMENT WORKS.—The term “treatment works” has the meaning given the term in section 1292 of this title.

(June 30, 1948, ch. 758, title V, §502, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 886; amended Pub. L. 95-217, §33(b), Dec. 27, 1977, 91 Stat. 1577; Pub. L. 100-4, title V, §§502(a), 503, Feb. 4, 1987, 101 Stat. 75; Pub. L. 100-688, title III, §3202(a), Nov. 18, 1988, 102 Stat. 4154; Pub. L. 104-106, div. A, title III, §325(c)(3), Feb. 10, 1996, 110 Stat. 259; Pub. L. 106-284, §5, Oct. 10, 2000, 114 Stat. 875; Pub. L. 109-58, title III, §323, Aug. 8, 2005, 119 Stat. 694; Pub. L. 110-288, §3, July 29, 2008, 122 Stat. 2650; Pub. L. 113-121, title V, §5012(b), June 10, 2014, 128 Stat. 1328.)

AMENDMENTS

2014—Par. (26). Pub. L. 113-121 added par. (26).

2008—Par. (25). Pub. L. 110-288 added par. (25).
 2005—Par. (24). Pub. L. 109-58 added par. (24).
 2000—Pars. (21) to (23). Pub. L. 106-284 added pars. (21) to (23).
 1996—Par. (6)(A). Pub. L. 104-106 substituted “‘sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces’” for “‘sewage from vessels’”.
 1988—Par. (20). Pub. L. 100-688 added par. (20).
 1987—Par. (3). Pub. L. 100-4, § 502(a), inserted “the Commonwealth of the Northern Mariana Islands,” after “Samoa.”
 Par. (14). Pub. L. 100-4, § 503, inserted “agricultural stormwater discharges and” after “does not include”.
 1977—Par. (14). Pub. L. 95-217 inserted provision that “point source” does not include return flows from irrigated agriculture.

EFFECTIVE DATE OF 2014 AMENDMENT

Amendment by Pub. L. 113-121 effective Oct. 1, 2014, see section 5012(c) of Pub. L. 113-121, set out as a note under section 1292 of this title.

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

DEFINITION OF “POINT SOURCE”

Pub. L. 100-4, title V, § 507, Feb. 4, 1987, 101 Stat. 78, provided that: “For purposes of the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], the term ‘point source’ includes a landfill leachate collection system.”

§ 1363. Water Pollution Control Advisory Board

(a) Establishment; composition; terms of office

(1) There is hereby established in the Environmental Protection Agency a Water Pollution Control Advisory Board, composed of the Administrator or his designee, who shall be Chairman, and nine members appointed by the President, none of whom shall be Federal officers or employees. The appointed members, having due regard for the purposes of this chapter, shall be selected from among representatives of various State, interstate, and local governmental agencies, of public or private interests contributing to, affected by, or concerned with pollution, and of other public and private agencies, organizations, or groups demonstrating an active interest in the field of pollution prevention and control, as well as other individuals who are expert in this field.

(2)(A) Each member appointed by the President shall hold office for a term of three years, except that (i) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (ii) the terms of office of the members first taking office after June 30, 1956, shall expire as follows: three at the end of one year after such date, three at the end of two years after such date, and three at the end of three years after such date, as designated by the President

at the time of appointment, and (iii) the term of any member under the preceding provisions shall be extended until the date on which his successor’s appointment is effective. None of the members appointed by the President shall be eligible for reappointment within one year after the end of his preceding term.

(B) The members of the Board who are not officers or employees of the United States, while attending conferences or meetings of the Board or while serving at the request of the Administrator, shall be entitled to receive compensation at a rate to be fixed by the Administrator, but not exceeding \$100 per diem, including travel-time, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons in the Government service employed intermittently.

(b) Functions

The Board shall advise, consult with, and make recommendations to the Administrator on matters of policy relating to the activities and functions of the Administrator under this chapter.

(c) Clerical and technical assistance

Such clerical and technical assistance as may be necessary to discharge the duties of the Board shall be provided from the personnel of the Environmental Protection Agency.

(June 30, 1948, ch. 758, title V, § 503, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 887.)

REFERENCES IN TEXT

Travel expenses, including per diem in lieu of subsistence as authorized by law, referred to in subsec. (a)(2)(B), probably means the allowances authorized by section 5703 of Title 5, Government Organization and Employees.

CONTINUATION OF TERM OF OFFICE

Pub. L. 87-88, § 6(c), July 20, 1961, 75 Stat. 207, provided that members of the Water Pollution Control Advisory Board holding office immediately preceding July 20, 1961 were to remain in office as members of the Board as established by section 6(a) of Pub. L. 87-88 until the expiration of the terms of office for which they were originally appointed.

TERMS OF OFFICE OF MEMBERS OF WATER POLLUTION CONTROL ADVISORY BOARD

Act July 9, 1956, ch. 518, § 3, 70 Stat. 507, provided that the terms of office of members of the Water Pollution Control Advisory Board, holding office on July 9, 1956, were to terminate at the close of business on that date.

TERMINATION OF ADVISORY BOARDS

Advisory boards in existence on Jan. 5, 1973, to terminate not later than the expiration of the 2-year period following Jan. 5, 1973, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law. See sections 3(2) and 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, 776, set out in the Appendix to Title 5, Government Organization and Employees.

§ 1364. Emergency powers

(a) Emergency powers

Notwithstanding any other provision of this chapter, the Administrator upon receipt of evi-

litical subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) 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.

(June 30, 1948, ch. 758, title V, § 510, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 893.)

§ 1371. Authority under other laws and regulations

(a) Impairment of authority or functions of officials and agencies; treaty provisions

This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899, (30 Stat. 1112); except that any permit issued under section 1344 of this title shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 403 of this title, or (3) affecting or impairing the provisions of any treaty of the United States.

(b) Discharges of pollutants into navigable waters

Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1910 (36 Stat. 593; 33 U.S.C. 421) and the Supervisory Harbors Act of 1888 (25 Stat. 209; 33 U.S.C. 441-451b) shall be regulated pursuant to this chapter, and not subject to such Act of 1910 and the Act of 1888 except as to effect on navigation and anchorage.

(c) Action of the Administrator deemed major Federal action; construction of the National Environmental Policy Act of 1969

(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852) [42 U.S.C. 4321 et seq.]; and

(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to—

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

(d) Consideration of international water pollution control agreements

Notwithstanding this chapter or any other provision of law, the Administrator (1) shall not require any State to consider in the development of the ranking in order of priority of needs for the construction of treatment works (as defined in subchapter II of this chapter), any water pollution control agreement which may have been entered into between the United States and any other nation, and (2) shall not consider any such agreement in the approval of any such priority ranking.

(June 30, 1948, ch. 758, title V, § 511, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 893; amended Pub. L. 93-243, § 3, Jan. 2, 1974, 87 Stat. 1069.)

REFERENCES IN TEXT

Act of March 3, 1899, referred to in subsec. (a), is act Mar. 3, 1899, ch. 425, 30 Stat. 1121, as amended, which enacted sections 401, 403, 404, 406, 407, 408, 409, 411 to 416, 418, 502, 549, and 687 of this title and amended section 686 of this title. For complete classification of this Act to the Code, see Tables.

The Rivers and Harbors Act of 1910, referred to in subsec. (b), probably means act June 23, 1910, ch. 359, 36 Stat. 593.

The Supervisory Harbors Act of 1888, referred to in subsec. (b), probably means act June 29, 1888, ch. 496, 25 Stat. 209, as amended, which is classified generally to subchapter III (§ 441 et seq.) of chapter 9 of this title. For complete classification of this Act to the Code, see Tables.

The National Environmental Policy Act of 1969, referred to in subsec. (c), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

AMENDMENTS

1974—Subsec. (d). Pub. L. 93-243 added subsec. (d).

§ 1372. Labor standards

The Administrator shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on treatment works for which grants are made under this chapter shall be paid wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality, as determined by the Secretary of Labor, in accordance with sections 3141-3144, 3146, and 3147 of title 40. The Secretary of Labor shall have, with respect to the labor standards specified in this subsection,¹ the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176) and section 3145 of title 40.

(June 30, 1948, ch. 758, title V, § 513, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 894.)

REFERENCES IN TEXT

Reorganization Plan Numbered 14 of 1950, referred to in text, is Reorg. Plan No. 14 of 1950, eff. May 24, 1950,

¹So in original. Probably should be "section,".

(aa) “zero emission vehicle” means a vehicle that produces zero exhaust emissions of any criteria pollutant (or precursor pollutant) or greenhouse gas under any possible operational modes or conditions.

SEC. 20. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA.

SUBCHAPTER I—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Pub. L. 91–190, title I, §101, Jan. 1, 1970, 83 Stat. 852.)

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

Pub. L. 91–213, §§1–9, Mar. 16, 1970, 84 Stat. 67–69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America’s future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91–213.

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use

of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment

of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.¹

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91-190, title I, §102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

AMENDMENTS

1975—Subpars. (D) to (I). Pub. L. 94-83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104-88, title IV, §401, Dec. 29, 1995, 109 Stat. 955, provided that: "The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

"(1) the Department of the Army has issued a permit for the activity; and

"(2) the Army Corps of Engineers has found that the activity has no significant impact."

EX. ORD. NO. 13352. FACILITATION OF COOPERATIVE CONSERVATION

Ex. Ord. No. 13352, Aug. 26, 2004, 69 F.R. 52989, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. *Purpose.* The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appro-

¹So in original. The period probably should be a semicolon.

priate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

SEC. 2. *Definition.* As used in this order, the term “cooperative conservation” means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

SEC. 3. *Federal Activities.* To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

SEC. 4. *White House Conference on Cooperative Conservation.* The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

SEC. 5. *General Provision.* This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

§ 4332a. Repealed. Pub. L. 114-94, div. A, title I, § 1304(j)(2), Dec. 4, 2015, 129 Stat. 1386

Section, Pub. L. 112-141, div. A, title I, § 1319, July 6, 2012, 126 Stat. 551, related to accelerated decisionmaking in environmental reviews.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 2015, see section 1003 of Pub. L. 114-94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, admin-

istrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

(Pub. L. 91-190, title I, § 103, Jan. 1, 1970, 83 Stat. 854.)

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

(Pub. L. 91-190, title I, § 104, Jan. 1, 1970, 83 Stat. 854.)

§ 4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

(Pub. L. 91-190, title I, § 105, Jan. 1, 1970, 83 Stat. 854.)

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

§ 4341. Omitted

CODIFICATION

Section, Pub. L. 91-190, title II, § 201, Jan. 1, 1970, 83 Stat. 854, which required the President to transmit to Congress annually an Environmental Quality Report, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, item 1 on page 41 of House Document No. 103-7.

§ 4342. Establishment; membership; Chairman; appointments

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the “Council”). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

human health or environmental effects on minority or low-income populations, because it does not adversely affect the level of protection provided to human health or the environment.

The rule defines the scope of waters protected under the CWA. The increased clarity regarding the definition of “waters of the United States” is intended to benefit all regulators, stakeholders, and interested parties. In addition, this rule is national in scope and, therefore, is not specific to a particular geographic area.

In the spirit of E.O. 12898, input from environmental justice stakeholders was requested during the rule development process, through a series of stakeholder meetings between April and November 2014. On May 12, 2014, EPA held a focused teleconference with non-traditional stakeholders, including environmental justice and faith-based stakeholders, to solicit their individual input on the proposed rule. The agencies have used the feedback from public outreach as the source of early guidance and recommendations for refining the proposed rule. Stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in today’s rule, and incorporate increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as “waters of the United States.”

The agencies prepared a report summarizing their outreach to the environmental justice community, analysis of potential impacts, and how these results informed the development of the rule. This report, *Environmental Justice Report for the Clean Water Rule: Definition of “Waters of the United States” Under the Clean Water Act; Final Rule* (Docket Id. No. EPA–HQ–OW–2011–0880), is available in the docket for this rule.

K. Congressional Review Act

This action is subject to the Congressional Review Act (CRA), and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a “major rule” as defined by 5 U.S.C. 804(2) based on potential indirect costs.

L. Environmental Documentation

In this joint rulemaking, the agencies establish a definitional rule that clarifies the scope of the Clean Water Act. The definition will apply to all provisions of the Act, and this regulation specifically amends EPA regulations implementing

sections 301, 304, 306, 311, 402 and 404, while the Army is making substantively identical revisions to its regulations under section 404 of the CWA. Section 511(c) of the Clean Water Act provides that, except for certain actions not relevant here, no action by EPA constitutes “a major federal action significantly affecting the quality of the human environment within the meaning of [NEPA]”.

The Army has prepared a final environmental assessment and Findings of No Significant Impact consistent with the National Environmental Policy Act (NEPA). The Army has determined that the rule is not a major federal action significantly affecting the quality of the human environment that would require the preparation of an environmental impact statement. The assessment is contained in the record for this rulemaking. Furthermore, appropriate environmental documentation, including an EIS when required, is prepared by the Corps for general permits and specifically for each and every standard individual permit application before making final permit decisions.

M. Judicial Review

Section 509(b)(1) of the CWA provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator. The Supreme Court and lower courts have reached different conclusions on the types of actions that fall within section 509. *Compare, E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977); *NRDC v. EPA*, 673 F.2d 400 (D.C. Cir. 1982); *National Cotton Council of Amer. v. EPA*, 553 F.3d 927(6th Cir. 2009) *cert denied* 559 U.S. 936 (2010) *with, Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008); *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012) *cert denied* 559 U.S. 936 (2010).

See **DATES** section for information regarding the timing for seeking judicial review of this rule.

List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 301, and 401

Environmental protection, Water pollution control.

Dated: May 27, 2015.

Gina McCarthy,

Administrator, Environmental Protection Agency.

Dated: May 27, 2015.

Jo-Ellen Darcy,

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

Title 33—Navigation and Navigable Waters

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

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

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

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

■ 2. Section 328.3 is amended by revising paragraphs (a) through (c), removing paragraphs (d) and (e), and redesignating paragraph (f) as paragraph (d) to read as follows:

§ 328.3 Definitions.

* * * * *

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

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

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

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

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1)

through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

(iv) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

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

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

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

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

(3) The following ditches:

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

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

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

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

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

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

(iv) Small ornamental waters created in dry land;

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

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

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

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

(1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this

section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) *Neighboring*. The term *neighboring* means:

(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this

section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

- (i) Sediment trapping,
- (ii) Nutrient recycling,

(iii) Pollutant trapping, transformation, filtering, and transport,

(iv) Retention and attenuation of flood waters,

(v) Runoff storage,

(vi) Contribution of flow,

(vii) Export of organic matter,

(viii) Export of food resources, and

(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

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

* * * * *

Title 40—Protection of Environment

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

PART 110—DISCHARGE OF OIL

■ 3. The authority citation for part 110 is revised to read as follows:

Authority: 33 U.S.C. 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 removing the definition of “wetlands” and revising the definition of “navigable waters” to read as follows:

§ 110.1 Definitions.

* * * * *

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

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

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

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

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

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

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

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

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

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

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

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

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

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

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

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

(iii) The following ditches:

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

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

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

(iv) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

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

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(1) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank,

shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

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

* * * * *

PART 112—OIL POLLUTION PREVENTION

- 5. The authority citation for part 112 is revised to read as follows:

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

- 6. Section 112.2 is amended by removing the definition of “wetlands” and 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 definition, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

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

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

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

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

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

(D) *Western vernal pools*. *Western vernal pools* are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

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

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the

100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

(i) The following ditches:

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

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

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

(ii) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

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

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow

sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the

chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
 (B) Nutrient recycling,
 (C) Pollutant trapping, transformation, filtering, and transport,
 (D) Retention and attenuation of flood waters,

(E) Runoff storage,
 (F) Contribution of flow,
 (G) Export of organic matter,
 (H) Export of food resources, and
 (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

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

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PART 116—DESIGNATION OF HAZARDOUS SUBSTANCE

■ 7. The authority citation for part 116 is revised 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 is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

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

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

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

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

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

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

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

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

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

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

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

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

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

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

(ii) The following ditches:

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

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

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

(iii) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

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

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire

water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal

circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
 (B) Nutrient recycling,
 (C) Pollutant trapping, transformation, filtering, and transport,
 (D) Retention and attenuation of flood waters,
 (E) Runoff storage,
 (F) Contribution of flow,
 (G) Export of organic matter,
 (H) Export of food resources, and
 (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider

the characteristics of the surrounding areas.

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

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

■ 9. The authority citation for part 117 is revised 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) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

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

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

(vi) All waters adjacent to a water identified in paragraphs (i)(1)(i) through

(v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

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

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

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

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

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

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

(viii) All waters located within the 100-year floodplain of a water identified in (i)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (i)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (iii) of this

section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (i)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (i)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

(i) Waste treatment systems, (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

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

(iii) The following ditches:

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

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

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

(iv) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

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

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (i)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (i)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (i)(1)(i) through (v) or are located at the head of a water identified in paragraphs (i)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (i)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (i)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (i)(1)(iv) of this section), to

a water identified in paragraphs (i)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (i)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (i)(1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (i)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in

paragraphs (i)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

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

* * * * *

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

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

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

■ 12. Section 122.2 is amended by:

■ a. Lifting the suspension of the last sentence of the definition of “Waters of the United States” published July 21, 1980 (45 FR 48620);

■ b. Removing the definition of “wetlands” and revising the definition of “Waters of the United States” and

■ c. Suspending the last sentence of the definition of “Waters of the United States” published July 21, 1980 (45 FR 48620).

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

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

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

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

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters

identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

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

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

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

(i) Waste treatment systems, including treatment ponds or lagoons designed to

meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

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

(iii) The following ditches:

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

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

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

(iv) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water tributary structures built for wastewater recycling.

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

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus

to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified

in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

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

* * * * *

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

■ 13. The authority citation for part 230 is revised to read as follows:

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

■ 14. Section 230.3 is amended by:
■ a. Removing paragraph (b) and reserved paragraphs (f), (g), (j) and (l).

- b. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d).
- c. Redesignating paragraphs (h) and (i) as paragraphs (e) and (f).
- d. Redesignating paragraph (k) as paragraph (g).
- e. Redesignating paragraphs (m) through (q) as paragraphs (h) through (l).
- f. Redesignating paragraph (q-1) as paragraph (m).
- g. Redesignating paragraph (r) as paragraph (n).
- h. Redesignating paragraph (s) as paragraph (o).
- i. Revising newly redesignated paragraph (o).
- j. Removing paragraph (t).

The revision reads 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)(2) of this section, the term “waters of the United States” means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

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

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

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

(vii) All waters in paragraphs (o)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (o)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis.

If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

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

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

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

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

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

(iii) The following ditches:

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

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

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

(iv) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

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

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (o)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of

adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (o)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (o)(1)(i) through (v) or are located at the head of a water identified in paragraphs (o)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (o)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (o)(1)(iv) of this section), to a water identified in paragraphs (o)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (o)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for

any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

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

(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (o)(1) through (3) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

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

* * * * *

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

■ 15. The authority citation for part 230 is revised to read as follows:

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

■ 16. Section 232.2 is amended by removing the definition of “wetlands” and 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) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

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

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

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

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

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

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

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

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges,

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

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

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

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

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

(iii) The following ditches:

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

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

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

(iv) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for

rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

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

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands

generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the

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

* * * * *

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 17. The authority citation for part 300 is revised 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) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;
- (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
- (vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition

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

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

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

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

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

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

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of

this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

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

(iii) The following ditches:

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

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

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

(iv) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater

recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

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

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is

characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant

nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

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

* * * * *

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

Appendix E to Part 300—Oil Spill Response

* * * * *

1.5 Definitions. * * *

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

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

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

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

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

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

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

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands

found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

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

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

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

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

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

(iii) The following ditches:

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

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

(C) Ditches that do not flow, either directly or through another water, into

a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

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

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified

in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
 (B) Nutrient recycling,
 (C) Pollutant trapping, transformation, filtering, and transport,
 (D) Retention and attenuation of flood waters,
 (E) Runoff storage,
 (F) Contribution of flow,
 (G) Export of organic matter,
 (H) Export of food resources, and
 (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by

physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

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

* * * * *

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

■ 20. The authority citation for part 302 is revised 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) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of

waters identified in paragraphs (1)(i) through (iii) of this definition;

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

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

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

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

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

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

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

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus,

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

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

(i) The following ditches:

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

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

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

(ii) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary

structures built for wastewater recycling.

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

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These

physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with

similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

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

* * * * *

PART 401—GENERAL PROVISIONS

■ 22. The authority citation for part 401 is revised to read as follows:

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

■ 23. Section 401.11 is amended by revising paragraph (I) to read as follows:

§ 401.11 General definitions.

* * * * *

(I) The term *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 (I)(2) of this section, the term “waters of the United States” means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

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

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

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

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

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

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

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

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

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

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

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

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

(ii) The following ditches:

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

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

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

(iii) The following features:

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

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

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (l), the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (l)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (l)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (l)(1)(i) through (v) or are located at the head of a water identified in paragraphs (l)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (l)(1)(i) through (v) of this section. The entire water is neighboring if a portion is

located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (l)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (l)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (l)(1)(iv) of this section), to a water identified in paragraphs (l)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (l)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence

of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

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

(A) Sediment trapping,
 (B) Nutrient recycling,
 (C) Pollutant trapping, transformation, filtering, and transport,
 (D) Retention and attenuation of flood waters,
 (E) Runoff storage,
 (F) Contribution of flow,
 (G) Export of organic matter,
 (H) Export of food resources, and
 (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the

foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure

from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

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