Case No. 15-3751 and consolidated cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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 (June 29, 2015)

MURRAY ENERGY CORP., et al.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petitions for Review of a Final Rule of the United States Environmental Protection Agency and the United States Army

BRIEF FOR RESPONDENTS

Of Counsel:
AVI S. GARBOW, General Counsel
KARYN I. WENDELOWSKI
U.S. Environmental Protection Agency

ALISSA STARZAK, General Counsel
CRAIG R. SCHMAUDER,
Deputy General Counsel
Department of the Army

DAVID COOPER, Chief Counsel
DANIEL INKELAS
U.S. Army Corps of Engineers

JOHN C. CRUDEN
Assistant Attorney General
DANIEL R. DERTKE
AMY J. DONA
ANDREW J. DOYLE
MARTHA C. MANN
KEVIN McARDLE
DEVON LEHMAN McCUNE
JESSICA O'DONNELL
Environment & Natural Res. Div.
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 305-0851

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

CASES

STATUTES

GLOSSARY

2005 RGL	U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-05, Subject: Ordinary High Water Mark Identification (Dec. 7, 2005)
2006 Study	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* (2006)
Agencies	U.S. Environmental Protection Agency and U.S. Army
Amicus Br. of ACWA	Amicus Curiae Brief in Support of Petitioners (ECF No. 135)
Amicus Br. of Members of Congress	Brief of Members of Congress as Amici Curiae in Support of State Petitioners and Business and Municipal Petitioners (ECF No. 138)
Amicus Br. of Nat'l Rural Water Ass'n	Brief of Amicus Curiae National Rural Water Association Supporting State Petitioners (ECF No. 141)
Amicus Br. of Wash. Legal Found.	Brief of Washington Legal Foundation as Amicus Curiae in Support of the Business and Municipal Petitioners and the State Petitioners, Urging that the Rule be Vacated (ECF No. 142)
APA	Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706
AR	Agency Record[1]
Army	U.S. Army

[1] Throughout this brief, documents in EPA's Corrected Certified Index (ECF No. 122) will be identified using the last four- or five-digits of the Docket Document ID, as "AR-_____." The Docket Document ID refers to the unique docket ID number given to each record in the docket for this rulemaking, which may be found on regulations.gov.

Ass'n Br.	Brief of Petitioners National Wildlife Federation, Natural Resources Defense Council, One Hundred Miles, Puget Soundkeeper Alliance, Sierra Club, and the South Carolina Coastal Conservation League (ECF No. 130)
Bus. Br.	Opening Brief for the Business and Municipal Petitioners (ECF No. 129-1)
Corps	U.S. Army Corps of Engineers
Clean Water Rule or Rule	Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015), AR-20862
CWA or Act	Clean Water Act, 33 U.S.C. §§ 1251-1388
Draft Science Report	Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September, 2013 External Review Draft, EPA/600/R-11/098B), AR-0004
EA/FONSI	Environmental Assessment: Finding of No Significant Impact for the Clean Water Rule, AR-20867
Economic Analysis	Economic Analysis of the EPA-Army Clean Water Rule, AR-20866
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act, 16 U.S.C. §§ 1531-1544
FEMA	Federal Emergency Management Agency
GAO	Government Accountability Office
JA	Joint Appendix
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321-4347
NPDES	National Pollutant Discharge Elimination System

Primary waters	Traditional navigable waters, interstate waters, and the territorial seas, as identified in 33 C.F.R. § 328.3(a)(1)-(a)(3)
Proposed Rule	Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule, 76 Fed. Reg. 22,188 (Apr. 21, 2014), AR-0001
Rapanos Guidance	Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*," (June 5, 2007), superseded December 2, 2008
RFA	Regulatory Flexibility Act, 5 U.S.C. §§ 601-612
RTC	Response to Comments for the Clean Water Rule, AR-20872
SAB	Science Advisory Board
SAB Proposed Rule Review	Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act," AR-7531
SAB Science Report Review	SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, AR-8046
SBA	Small Business Administration
Science Report	Connectivity of Streams and Wetlands to Downstream Waters: A Review of the Scientific Evidence, AR-20859
States Br.	Opening Brief of State Petitioners (ECF No. 141)
Traditional navigable waters	All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide
TSD	Technical Support Document for the Clean Water Rule: Definition of Waters of the United States, May 27, 2015, AR-20869

Waterkeeper Br.	Opening Brief of Petitioners Waterkeeper Alliance, et al. (ECF No. 131)

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Fed. R. App. Proc. 34 and Sixth Cir. R. 34(a), Respondents hereby request oral argument because it would be useful to the Court in understanding the multiple issues in this case.

INTRODUCTION

The Clean Water Act ("CWA" or "Act") was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act protects "navigable waters," which is defined as "waters of the United States." 33 U.S.C. § 1362(7). The agencies charged with implementing the CWA—the United States Environmental Protection Agency and the United States Army (the "Agencies")—"must necessarily choose some point at which water ends and land begins," which is no easy task because "[w]here on this continuum to find the limit of 'waters' is far from obvious." *United States v. Riverside Bayview Homes,* 474 U.S. 121, 132 (1985). After three Supreme Court decisions and years of determining CWA jurisdiction on a case-by-case basis, and in response to suggestions by Supreme Court Justices, Congress, and the public, the Agencies conducted a multi-year rulemaking culminating in the Clean Water Rule, a regulation interpreting the scope of "waters of the United States."

The foundation of the Agencies' interpretation is the significant nexus standard. The overwhelming scientific evidence—virtually unchallenged here—demonstrates a continuum of chemical, physical, and biological connections between important downstream waters and streams, ponds, wetlands, and other waters. The Agencies' task in interpreting the statutory term "waters of the United States" was to identify where on that continuum the nexus is "significant" enough to bring waters within the Act's jurisdictional reach and under what circumstances the Act does not

apply notwithstanding a possible nexus. The Agencies' overarching goal was to make identification of waters protected under the CWA easier to understand and more predictable, while protecting the streams, wetlands, and other waters at the core of our Nation's water resources.

The Clean Water Rule is a carefully tailored response to Supreme Court precedent, peer-reviewed science, and the Agencies' long experience in implementing the Act. The Rule establishes a three-tiered framework: First, traditional navigable waters, interstate waters, and the territorial seas—collectively referred to in this brief as "primary waters"—are jurisdictional. Jurisdictional waters also include "tributaries" and "adjacent waters," as defined, based on the Agencies' determinations that a significant nexus exists between those waters and primary waters. Second, the Rule identifies narrow categories of waters that may be found jurisdictional only upon a case-specific demonstration of significant nexus with a primary water. Third, the Rule expressly excludes certain waters and features from CWA jurisdiction.

Four sets of petitioners challenge the Rule. State and Business Petitioners contend that the Rule is a "transformative expansion" of CWA jurisdiction, States Br. 43, purportedly extending to "countless miles of previously unregulated features." Bus. Br. 58. At the same time, Waterkeeper and Associational Petitioners contend that the Rule "abandon[s] crucial federal protections for potentially huge swaths" of waters, Waterkeeper Br. 1, and that "the Agencies lack statutory authority to deny protection categorically to several classes of water." Ass'n Br. 18. None of these

characterizations is accurate. The record demonstrates that jurisdiction under the Rule is narrower than the historical scope of CWA jurisdiction under the prior regulation, and slightly broader than the Agencies' practices under pre-Rule guidance.

More importantly, Petitioners' characterizations have little to do with whether the Agencies reasonably interpreted the term "waters of the United States." The Agencies established a balanced regulatory framework that provides protection for primary waters and categories of waters with a significant nexus to primary waters, clearly defined exclusions for waters and features that historically have not generally been considered jurisdictional, and a middle ground for a narrowly defined set of waters that science shows may have the requisite nexus but require a case-specific analysis. The Rule is consistent with the CWA and Supreme Court precedent and is supported by the extensive administrative record.

While the Rule is obviously important to the administration of the CWA, this case presents ordinary issues of statutory interpretation and exercise of agency discretion, matters entitled to deferential judicial review. The Rule is consistent with constitutional authority to protect the Nation's waters from pollution, and it does not alter states' authority to regulate land use, protect water resources, or participate in the Act's cooperative federalism framework. The Agencies provided exhaustive public participation and outreach, receiving over one million comments, and complied with all applicable procedural requirements. Petitioners' attempts to impose additional

requirements under the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") are not cognizable and lack merit.

For all these reasons, the Rule should be upheld.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015) ("Clean Water Rule" or "Rule"), AR-20862. 33 U.S.C. § 1369(b)(1); *In re U.S. Dep't of Def., U.S. EPA Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261 (6th Cir. 2016), *petition for cert. filed*, 2016 WL 4698748 (U.S. Sept. 2, 2016) (No. 16-299).

ISSUES PRESENTED

1. In interpreting the CWA, did the Agencies reasonably rely on the significant nexus standard set forth in Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), because it: (a) represents a rule of law notwithstanding the fractured nature of the *Rapanos* decision; and (b) reasonably interprets the Act's broad and ambiguous text in light of the Act's structure, protective purpose, and other relevant considerations?

2. Did the Agencies reasonably interpret the CWA to protect tributaries that contribute flow to primary waters and possess physical indicators of sufficient volume, frequency, and duration of flow to establish a significant nexus with primary waters?

3. Did the Agencies reasonably interpret the CWA to protect adjacent waters given their demonstrated significant nexus with primary waters?

4. When the Agencies made no changes to the definition of "waters of the United States" with respect to primary waters, should the Court consider a challenge to the Rule's retention of CWA jurisdiction over interstate waters, and, if so, is the Agencies' interpretation required by the language and structure of the Act or at least reasonable and consistent with Supreme Court precedent?

5. Was it reasonable for the Agencies to provide for case-specific analysis of significant nexus for certain waters that science and the Agencies' experience show may have significant effects on primary waters?

6. Did the Agencies reasonably interpret the CWA in adding certain exclusions from the definition of "waters of the United States," where those exclusions are consistent with the goals of the Act and the Agencies' past practices?

7. Does the Rule comport with the Constitution?

8. Did the rulemaking process, which included a lengthy and detailed proposal and extensive public participation, comport with the Administrative Procedure Act?

9. Did the Agencies satisfy the Regulatory Flexibility Act by certifying that the Rule does not directly impose regulatory requirements or costs on small entities and, in any event, by conferring with small entities and revising the Rule in response to their comments?

10. Was the rulemaking exempt from NEPA's requirements under 33 U.S.C. § 1371(c)(1) and, if not, did the Agencies adequately assess the Rule's environmental impacts and analyze a reasonable range of alternatives?

11. Have Waterkeeper Petitioners waived their ESA arguments by not raising them during the rulemaking, and do their arguments lack merit in any event because the rulemaking does not trigger the ESA's consultation requirements?

STATEMENT OF THE CASE

I. Statutory and regulatory background

A. The Clean Water Act

The Clean Water Act began with the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, which addressed the shortcomings of earlier, more limited statutes. As this Court observed, the CWA was enacted after "two of the important rivers of this circuit, the Rouge River in Dearborn, Michigan, and the Cuyahoga River in Cleveland, Ohio, reached a point of pollution by flammable materials in the last ten years that they repeatedly caught fire." *United States. v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974). With the 1972 amendments, Congress established a number of cooperative state-federal programs to meet the Act's "ambitious goals." *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 704 (1994).

Two such programs are key to implementing the Act's prohibition on the unauthorized discharge of pollutants to "navigable waters." 33 U.S.C. §§ 1311(a),

1362(12). The Environmental Protection Agency ("EPA") or authorized states may issue National Pollutant Discharge Elimination System ("NPDES" or "section 402") permits for the discharge of pollutants other than dredged or fill material. *Id.* § 1342. For discharges of dredged or fill material, the Secretary of the Army acting through the Army Corps of Engineers ("Corps"), or a state with an approved program, may issue "section 404" permits. *Id.* § 1344(a), (d), (g). EPA, the Corps, and states each have implementation responsibilities and enforcement authority. *See, e.g.*, 33 U.S.C. §§ 1319, 1344(b)-(c), (s). EPA serves as the Act's chief administrator, 33 U.S.C. § 1251(d), "prescrib[ing] such regulations as are necessary" to carry out its functions. *Id.* § 1361.

The CWA defines "navigable waters" to mean "the waters of the United States, including the territorial seas," *id.* § 1362(7), but does not define the term "waters of the United States." However, this broad term reflects Congress's intent "to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486, n.6 (1987).

B. Prior regulations interpreting "waters of the United States"

EPA and the Corps have separate regulations defining the statutory term "waters of the United States," but their interpretations are identical and have

remained largely unchanged since 1977. *See* 42 Fed. Reg. 37,122, 37,124, 37,127 (July 19, 1977). In 1986, the Corps consolidated and recodified its regulations to align with clarifications EPA had previously promulgated; the 1986 regulation neither reduced nor expanded the Agencies' jurisdiction. 51 Fed. Reg. 41,206, 41,216-217 (Nov. 13, 1986).[2] For convenience we generally cite the Corps' regulations.

The 1986 regulation, which the Rule replaces, identified the following as "waters of the United States":

- All traditional navigable waters,[3] interstate waters, and the territorial seas, i.e. "primary waters";
- All impoundments of jurisdictional waters;
- All "other waters" such as lakes, ponds, and sloughs the "use, degradation or destruction of which could affect interstate or foreign commerce";
- Tributaries of traditional navigable waters, interstate waters, impoundments, or "other waters"; and,

[2] Multiple C.F.R. provisions interpret the phrases "waters of the United States" and "navigable waters" for purposes of implementing the CWA, 33 U.S.C. § 1362(7), and other water pollution protection statutes such as the Oil Pollution Act, 33 U.S.C. § 2701(21). Some EPA definitions were added after 1986, but each conformed to the 1986 regulation except for minor variations in the waste treatment system exclusions. *See, e.g.*, 55 Fed. Reg. 8666 (Mar. 8, 1990); 73 Fed. Reg. 71,941 (Nov. 26, 2008). The Clean Water Rule revises these regulations but does not alter the waste treatment system exclusion provisions. 80 Fed. Reg. at 37,099, 37,104-27.

[3] "Traditional navigable waters" refers to all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide.

- Wetlands adjacent to primary waters, impoundments, tributaries, or "other waters."

33 C.F.R. § 328.3(a)(1)-(7) (1987). The 1986 regulation also specified that "prior converted cropland" and "waste treatment systems" were not waters of the United States. *Id.* §§ 328.3(a)(7), (b) (1987).

C. Court decisions

Three Supreme Court decisions have considered the scope of waters of the United States as defined by prior regulations: *Riverside Bayview*; *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs ("SWANCC")*, 531 U.S. 159 (2001); and *Rapanos*.

In *Riverside Bayview*, a unanimous Court upheld the Agencies' assertion of CWA jurisdiction over wetlands adjacent to traditional navigable waters.[4] After noting the Agencies' scientific judgment that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality," 474 U.S. at 133, the Court concluded:

> In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

[4] The regulation that included "wetlands adjacent to" certain jurisdictional waters was at that time codified at 33 C.F.R. § 323.2(a)(7) (1985).

Id. at 134. Although the Court noted that this categorical definition covering "adjacent wetlands" could result in the regulation of some wetlands that "are not significantly intertwined with the ecosystem of adjacent waterways," the Court reasoned that the Corps could protect all adjacent wetlands so long as it reasonably concludes that "in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem." *Id.* at 135 n.9. Thus, the Court held that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135. The Court further found that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." *Id.* at 133 (citations omitted).

Sixteen years later, in *SWANCC*, a closely divided Court rejected the Agencies' assertion of CWA jurisdiction over "nonnavigable, isolated, intrastate" ponds under 33 C.F.R. § 328.3(a)(3) (1987) (jurisdictional "other waters") based solely on their use by migratory birds. 531 U.S. at 171-72. The Court explained that although the term "navigable" is of limited import, if migratory bird use by itself were a sufficient basis for CWA jurisdiction, the word "navigable" would be rendered meaningless. 531 U.S. at 172. The Court noted that, in *Riverside Bayview*, "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA." *Id.* at 167.

The majority of federal court decisions after *SWANCC* upheld assertions of CWA jurisdiction over surface waters that have a hydrologic connection to and that form part of the tributary system of a traditional navigable water (the only primary water at issue in these decisions), including intermittent or ephemeral streams, ditches, and wetlands adjacent to any such surface water. For example, the Fourth Circuit found "the Corps' unremarkable interpretation of the term 'waters of the United States' as including wetlands adjacent to tributaries of navigable waters" to be "permissible under the CWA because pollutants added to any of these tributaries will inevitably find their way to the very waters that Congress has sought to protect." *Treacy v. Newdunn Assoc., LLP,* 344 F. 3d 407, 416-17 (4th Cir. 2003), *cert. denied sub nom, Newdunn Assoc., LLP v. U.S. Army Corps of Eng'rs,* 541 U.S. 972 (2004). Courts generally held that CWA jurisdiction was present even when the tributaries in question flowed for a significant distance before reaching a primary water or were several times removed from the primary waters (*i.e.*, "tributaries of tributaries"). *See, e.g., United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *cert. denied,* 541 U.S. 972 (2004) (affirming CWA jurisdiction over wetlands bordering a "roadside ditch" that took a "winding, thirty-two mile path to the Chesapeake Bay," flowing through roadside ditches, a creek, and a traditional navigable water).

Five years after *SWANCC*, in *Rapanos,* the Supreme Court issued a fractured decision vacating and remanding for further consideration the Agencies' assertion of CWA jurisdiction over wetlands adjacent to nonnavigable tributaries of traditional

navigable waters under 33 C.F.R. § 328.3(a)(7) (1987). A plurality of four Justices concluded that Congress intended to protect only "relatively permanent" waters that connect to traditional navigable waters, and wetlands that have a "continuous surface connection" to such relatively permanent waters. 547 U.S. at 742.

Justice Kennedy, while supporting the judgment, took a different approach. In his view, the plurality's reading of "waters of the United States" lacked support "in the language and purposes of the Act or in our cases interpreting it." 547 U.S. at 768. Justice Kennedy concluded that CWA jurisdiction extends to wetlands that, either alone or in combination with "similarly situated lands in the region," have a "significant nexus" to traditional navigable waters. *Id.* at 779-80. He explained that "[t]he required nexus must be assessed in terms of the statute's goals and purposes," in particular the objective set forth at 33 U.S.C. § 1251(a), *id.* at 779, and that this relationship must be more than "speculative or insubstantial." *Id.* at 780.

The four dissenters in *Rapanos* would have upheld the assertion of jurisdiction over the wetlands in question, explaining their view that waters of the United States encompass (at least) waters that satisfy "either the plurality's test or Justice Kennedy's." *Id.* at 810 & n.14 (Stevens, J., dissenting). They remarked, however, that "[Justice Kennedy's] approach is far more faithful to our precedents and to principles of statutory interpretation than is the plurality's." *Id.* at 788.

After *Rapanos*, the Agencies evaluated jurisdiction under the 1986 regulation and guidance issued jointly by EPA and the Corps. *See* "Clean Water Act Jurisdiction

Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*," (June 5, 2007), superseded December 2, 2008 (the "*Rapanos* Guidance"), JAxxxx-xxxx. Under the *Rapanos* Guidance, which focuses only on 33 C.F.R. § 328.3(a)(1), (5), and (7) (1987), the Agencies have asserted jurisdiction over traditional navigable waters, wetlands adjacent to traditional navigable waters, nonnavigable tributaries of traditional navigable waters that typically flow year-round or have continuous flow at least seasonally, and wetlands that directly abut such tributaries. *Id.* at 4-7, JAxxxx-xxxx. The Agencies have used the *Rapanos* Guidance to determine on a case-by-case basis whether the following waters have a significant nexus with a traditional navigable water: nonnavigable tributaries that are not relatively permanent, wetlands adjacent to nonnavigable tributaries that are not relatively permanent, and wetlands adjacent to but not directly abutting a relatively permanent nonnavigable tributary. *Id.* at 8-12, JAxxxx-xxxx. The Agencies generally have not asserted jurisdiction over non-wetland swales or erosional features (e.g., gullies and small washes characterized by low volume or infrequent or short duration flow) or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. *Id.* at 11-12, JAxxxx-xxxx. The Agencies' assertions of jurisdiction after *Rapanos* have almost universally been upheld when legally challenged. Technical Support Document ("TSD"), AR-20869, at 40-47, JAxxxx-xxxx.

Although the Supreme Court has not revisited the scope of "waters of the United States" since *Rapanos*, it has issued two decisions regarding the government's assertion of CWA jurisdiction. In *Sackett v. EPA*, 132 S. Ct. 1367 (2012), and in *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016), the Court held that EPA's assertion of CWA jurisdiction in an administrative compliance order, and the Corps' position on CWA jurisdiction in an approved jurisdictional determination, were subject to judicial review under the Administrative Procedure Act ("APA").

Several Justices have suggested that the Agencies should more clearly define the term "waters of the United States." *Rapanos*, 547 U.S. at 811-812 (Breyer, J. dissenting); *Sackett*, 132 S. Ct. at 1375-76 (Alito, J., concurring); *Hawkes*, 136 S. Ct. at 1816-17 (Kennedy, J., concurring). The Chief Justice noted that the Agencies have "generous leeway" in interpreting the CWA under their delegated rulemaking authority, but that jurisdictional determinations would proceed "on a case-by-case basis" unless and until the Agencies finalized a clarifying rule on the scope of their authority. *Rapanos*, 547 U.S. at 757-58 (Roberts, C.J., concurring).

II. The rulemaking

The Agencies' goal was to promulgate "a rule that is clear and understandable and protects the Nation's waters, supported by the science and consistent with the law." 79 Fed. Reg. 22,188, 22,198/2 (April 21, 2014). By providing greater predictability to the regulated community and regulators, the Agencies also sought to

reduce the time and documentation required to make jurisdictional determinations. *Id.* at 22,190/3.

The rulemaking process was extensive. The Agencies analyzed the best available science to determine the degree to which streams, wetlands and other aquatic features in a watershed, either singly or in the aggregate, affect the physical, chemical, and biological integrity of downstream waters. *See* Science Report, AR-20859, at 1-5, JAxxxx (watershed diagram). The Agencies were further guided by the decisions of the Supreme Court and the Agencies' experience implementing the CWA. Given the importance of the Rule and the broad public interest, the Agencies solicited external scientific review, provided many opportunities for public comment, and engaged in extensive outreach to states, local governments, industry, and non-governmental organizations. The key elements of the rulemaking process are described below.

A. The science

Consistent with Supreme Court precedent, the Agencies developed much of the Rule around the significant nexus standard. In determining where a "significant nexus" exists, the Agencies began with the science addressing the relationship between primary waters and their associated upstream waters. The Agencies ultimately considered more than 1,200 peer-reviewed scientific papers and other historical data and information, including individual jurisdictional determinations, agency guidance, and federal and state reports. TSD at 93, JAxxxx. EPA's Office of Research and Development prepared a draft report (the "Draft Science Report") that

reviewed and synthesized the peer-reviewed scientific literature on the connectivity of streams and wetlands to large water bodies, such as rivers, lakes, estuaries, and oceans. AR-0004, JAxxxx-xxxx.

The Draft Science Report examined the foundational scientific concept of connectivity within and between aquatic systems, i.e., the role of transport mechanisms that link components of aquatic ecosystems. The scientific literature does not use the terms "nexus" or "significant nexus," but it does address the strength of the connection to and effects of streams, wetlands, and other waterbodies on the chemical, physical, and biological functioning of downstream waters. 79 Fed. Reg. at 22,295/2-3. Based on the literature, the Agencies concluded that waters in floodplains and in riparian areas have a strong influence on downstream waters, and that waters outside of floodplains and riparian areas provide many benefits to downstream waters.[5] *Id.* at 22,196/1-2. The Agencies also concluded that small water bodies in a watershed should be considered in the aggregate to understand their effects on the health of downstream waters. *Id.*

[5] A "floodplain" is "a level area bordering a stream or river channel that was built by sediment deposition from the stream or river under present climatic conditions and is inundated during moderate to high flow events." Science Report at A-4, JAxxxx. Riparian zones are "[t]ransition areas or zones between terrestrial and aquatic ecosystems that are distinguished by gradients in biophysical conditions, ecological processes, and organisms. They are areas through which surface hydrology and subsurface hydrology connect water bodies with their uplands. They include those portions of terrestrial ecosystems that significantly influence exchanges of energy and matter with aquatic ecosystems." *Id.* at A-10, JAxxxx.

B. The Proposed Rule

The Proposed Rule retained the same general structure as the 1986 regulation and many of the same provisions. Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule, 76 Fed. Reg. 22,188, 22,198/3 (Apr. 21, 2014), AR-001. The Agencies did not propose to change the status of primary waters (traditional navigable waters, interstate waters, and the territorial seas) or impoundments. *Id.*; *id.* at 22,200-01. Nor did the Agencies propose any revisions to the existing exclusions for waste treatment systems, prior converted cropland, or any of the exemptions from CWA permitting requirements. *Id.* at 22,199/2. The Agencies did propose clarifying "bright line categories" of waters that would be covered, additional categories of waters that would not be covered, and waters that would be protected only after case-specific analyses. *Id.* at 22,198/2. The Agencies also proposed to define several terms relevant to the significant nexus standard. *Id.*

Significant Nexus. For purposes of a significant nexus analysis, the Agencies discussed and solicited comment on: (1) what waters are "similarly situated" because they function alike and are sufficiently close to function together in affecting the nearest primary water; (2) what is the "region" where similarly situated waters should be considered together, and (3) the types of functions that should be analyzed to determine whether waters significantly affect the chemical, physical, or biological integrity of a primary water. *Id.* at 22,211-14.

Tributaries. The Agencies proposed to define "tributary," which no regulation had previously defined, as "a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 C.F.R. § 328.3(e), which contributes flow, either directly or through another water," to a primary water or impoundment. 79 Fed. Reg. at 22,263/2. Continuing their longstanding practice, the Agencies indicated that a tributary could be natural or man-made, and that natural or man-made breaks would not change the jurisdictional status of a water meeting the proposed definition of tributary. *Id.*

Adjacent waters. CWA regulations have long defined "adjacent" as "bordering, contiguous, or neighboring," but the Agencies proposed to define the term "neighboring" for the first time, 79 Fed. Reg. at 22,206-07, as a water located within the riparian area or floodplain of a primary water, impoundment, or tributary, or a water with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a water. *Id.* at 22,208/1. Noting that adjacency has always included an element of reasonable proximity, the Agencies sought comment on other options for defining "neighboring," including: waters with a shallow subsurface or confined surface connection "regardless of distance"; waters within a floodplain or riparian area; waters with confined surface connections but not shallow subsurface connections; and "specific geographic limits" related to hydrologic connections or other distance limits. *Id.* at 22,207-08.

Case-specific waters. The Proposed Rule did not retain the 1986 regulation's coverage of "other waters" the "use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1987). Recognizing that there are waters that the Agencies could not by rule determine either have or lack a significant nexus to primary waters, 79 Fed. Reg. at 22,198/2-3, the Agencies instead proposed a category of waters that would be protected only on a case-specific basis. These waters, either individually or in combination with similarly situated waters in the same region, must have a significant nexus to a primary water in order to be jurisdictional. *Id.* at 22,263/1. To be "significant," the effect on the primary water must be "more than speculative or insubstantial." *Id.* at 22,263/3. The proposal discussed subcategories of waters that the Agencies were considering identifying as similarly situated, such as by region or by type (e.g., Texas coastal prairie wetlands). *Id.* at 22,215-16. The Agencies also requested comment on the proposal's use of "similar functions" and "sufficiently close," and on other options, including not having a category of case-specific waters. *Id.* at 22,216-17.

Exclusions. The Agencies proposed to explicitly exclude, for the first time by rule, waters and features that under longstanding practice generally had not been considered to be covered by the CWA. *Id.* at 22,216/3, 22,218-19. The Proposed Rule also retained the pre-existing exclusions for waste treatment systems and prior converted cropland, *id.* at 22,217/3, and did not affect longstanding exemptions from permitting requirements under 33 U.S.C. §§ 1342, 1344, and 1362. *Id.* at 22,193.

On the same day the Proposed Rule was published, the Agencies posted to the rulemaking docket supporting materials, including the Draft Science Report and an Economic Analysis (AR-20866, JAxxxx-xxxx). Submissions from the public and supporting and related materials gathered or generated by the Agencies were placed in the docket on a rolling basis.

C. Science Advisory Board Review

Prior to being added to the rulemaking docket for comment, the Draft Science Report underwent peer review by EPA and Corps staff, as well as external independent peer review by scientists in government, academic, nonprofit, and private industry organizations. Draft Science Report at xvi, JAxxxx. Following those reviews, the Agencies requested a public peer review of the Draft Science Report by the Science Advisory Board ("SAB"), an independent scientific and technical advisor to the EPA Administrator. 80 Fed. Reg. at 37,057/2. The SAB formed a panel of 27 technical experts from an array of relevant fields—including hydrology, wetland and stream ecology, biology, geomorphology, biogeochemistry, and freshwater science—to review the Draft Science Report. *Id.* at 37,062/1-2. That panel held public meetings, released the Draft Science Report for public review, and solicited public comments for the SAB's consideration. 78 Fed. Reg. 58,536-37 (Sept. 24, 2013).

In October 2014, prior to the close of the comment period on the Proposed Rule, the SAB completed its peer review and concluded that the Draft Science Report "is a thorough and technically accurate review of the literature on the connectivity of

streams and wetlands to downstream waters." SAB Science Report Review, AR-8046, at 1, JAxxxx. The SAB found "[s]trong scientific support" for the Draft Science Report's conclusions regarding streams and riparian and floodplain waters, and recommended strengthening the conclusion regarding non-floodplain waters to include a more definitive statement of how numerous functions of such waters sustain the integrity of downstream waters. *Id.* at 1-3, 5 JAxxxx-xxxx, xxxx.

The SAB separately reviewed and commented on the scientific and technical bases of the Proposed Rule. SAB Proposed Rule Review, AR-7531, JAxxxx-xxxx. The SAB found that the available science provides an adequate basis for the Proposed Rule's key components. *Id.* at 1, JAxxxx. The SAB noted that although water bodies differ in degree of connectivity to downstream waters (i.e., they exist on a "connectivity gradient" or continuum), the available science supports the conclusion that the types of water bodies identified as waters of the United States in the Proposed Rule exert strong influence on the chemical, physical, and biological integrity of downstream waters. *Id.* In particular, the SAB expressed support for the Proposed Rule's inclusion of tributaries and adjacent waters, and other waters on a case-specific basis, at the same time noting that additional types of waters could be determined to be similarly situated. *Id.* at 2-3, JAxxxx-xxxx. To the extent the SAB disagreed with the proposal, it was to recommend the inclusion of additional waters. The SAB advised the Agencies to reconsider defining "tributary" without reference to the ordinary high water mark because not all streams have one (e.g., ephemeral

streams in low gradient landscapes). *Id.* at 2, JAxxxx. The SAB also questioned the scientific basis for excluding certain waters and features, such as groundwater and certain ditches. *Id.* at 3-4, JAxxxx-xxxx.

D. The Science Report

EPA revised the Draft Science Report based on the SAB's recommendations and public comments. 80 Fed. Reg. at 37,064. The final Science Report did not substantively alter the content, key findings, or conclusions of the Draft Science Report, but it did clarify and expand upon certain topics and adopt recommendations regarding organization and the use of consistent terminology and visual aids.

The final Science Report reached five major conclusions, the first three of which were unchanged in substance from the Draft Science Report and the last two of which were elevated in importance from the Draft Science Report:

(1) Perennial, intermittent, and ephemeral streams are physically, chemically, and biologically connected to downstream rivers and individually or cumulatively exert a strong influence on the integrity of those downstream waters. Science Report at ES-2, JAxxxx.

(2) Wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers and serve an important role in the integrity of those downstream waters. *Id.* at ES-2 to ES-3, JAxxxx-xxxx.

(3) Wetlands and open waters in non-floodplain landscape settings provide numerous functions that benefit downstream water integrity and occur on a gradient of connectivity to those downstream waters. *Id.* at ES-3 to ES-4, JAxxxx-xxxx.

(4) Connectivity of streams and wetlands to downstream waters occurs along a continuum that can be described in terms of the frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters. Stream channels and riparian and floodplain waters together are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The connectivity and effects of non-floodplain waters are more variable and thus more difficult to address solely from evidence available in peer-reviewed studies. *Id.* at ES-4 to ES-5, JAxxxx-xxxx.

(5) The incremental effects of individual streams and wetlands are cumulative across entire watersheds and therefore must be evaluated in combination with other streams and wetlands. When considering the effect of an individual stream or wetland, all contributions of that stream or wetland should be evaluated cumulatively. *Id.* at ES-5 to ES-6, JAxxxx-xxxx.

E. The Agencies' experience

In addition to considering the Science Report and the SAB review, the Agencies applied their experience implementing the CWA. The Agencies have worked closely with states and the regulated community for more than 40 years issuing permits, reviewing state programs, developing numerous guidance documents

and, when necessary, pursuing enforcement actions against polluters. Since *Rapanos*, the Corps has made more than 400,000 jurisdictional determinations, resulting in a broad array of data points. Determinations have been made in all 50 states, and in settings as varied as the arid West, the tropics of Hawaii, the Appalachian Mountains, and the forests of the Northwest. 80 Fed. Reg. at 37,065/1-2.

F. Outreach and public involvement

The Agencies engaged in an extensive public outreach effort that, in several ways, exceeded the procedural requirements required by law. The Agencies provided the public more than 200 days to submit comments and other input on the Proposed Rule. Response to Comments ("RTC"), AR-20872, Topic 13 at 124, JAxxxx. At the same time, the Agencies convened over 400 meetings with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, tribes, and many others to provide an enhanced opportunity for these stakeholders to provide input on the Proposed Rule. 80 Fed. Reg. at 37,057/1; RTC Topic 13 at 124, JAxxxx; 2014 EPA Regional Proposed Rule Meetings/Events, AR-13182, JAxxxx-xxxx; 2014 EPA Headquarters Proposed Rule Meetings/Events, AR-13183, JAxxx-xxxx.

At the end of the rulemaking process, the administrative record comprised over 20,400 documents and 350,000 pages. The record contains, *inter alia*, over one million comments and the Agencies' 17-volume Response to Comments; a Technical Support Document; the Science Report and thousands of scientific references; the SAB's

review of the Draft Science Report and its separate comments on the technical and scientific basis of the Rule; the Economic Analysis and supporting files; an environmental justice report; an Environmental Assessment; a report on discretionary outreach to small entities; a summary of tribal consultation; a report on the outreach to state, local, and county governments; and lists of stakeholder meetings held during and after the comment period.

III. The Rule

The Rule reflects the Agencies' goal of protecting the Nation's waters while "providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA" by defining significant nexus and by grouping waters and features in three tiers: (1) waters that are jurisdictional; (2) waters that will be found jurisdictional only upon a case-specific showing of a significant nexus with a primary water; and (3) waters and aquatic features that are expressly excluded from jurisdiction. 80 Fed. Reg. at 37,057/3.

A. The significant nexus standard

The Agencies developed much of the Rule around the significant nexus standard. The Rule defines "significant nexus" to mean 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 primary water. 33 C.F.R. § 328.3(c)(5). A significant nexus is based on the cumulative incremental effects of individual waters, *Rapanos,* 547 U.S. at 780, *see also* TSD at 166,

JAxxxx, and determining which waters have a significant nexus involves scientific and policy judgment and legal interpretation. 80 Fed. Reg. at 37,057/2-3. Science shows that "waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters," and the Agencies' task was to determine where along that continuum to "draw lines of jurisdiction under the CWA." *Id.* In establishing the boundaries, the Agencies relied on science, the statute's text and goals, the case law, public comment, and their own technical expertise and experience. *Id.* at 37,061/3. The Agencies were also guided by the compelling need for clearer, more consistent, and easily implementable standards to govern determinations of jurisdiction. *Id.* at 37,057/3.

The Agencies determined that the appropriate "region" is the drainage basin, or watershed, within which all precipitation ultimately flows to the nearest single primary water (referred to as the "single point of entry watershed."). A watershed includes all streams, wetlands, lakes, and open waters within its boundaries, and is generally regarded as the most appropriate spatial unit for water resource management. *Id.* at 37,066-77.

The Agencies defined "similarly situated" waters as waters that are similar in their form and the functions they provide for downstream waters. For tributaries and adjacent waters, the Agencies defined each category so that the functions the waters provide are similar, and the waters are situated so as to provide those functions in combination to significantly affect downstream waters. *Id.* at 37,065-66. The

Agencies also identified the specific functions that can significantly affect the chemical, physical, or biological integrity of a primary water, such as sediment trapping and nutrient recycling. *Id.* at 37,067-68.

B. Waters that are jurisdictional under the Rule

1. Primary waters and impoundments

The Rule leaves unchanged from the 1986 regulation the protection of all primary waters (traditional navigable waters, interstate waters, and the territorial seas) and impoundments of jurisdictional waters. *Id.* at 37,058/1.

2. Tributaries

As in the 1986 regulation and its predecessor, the Rule identifies tributaries as jurisdictional. The Rule defines "tributary" as a water that contributes flow, either directly or through another water," to a primary water and that has the "physical indicators of a bed and banks and an ordinary high water mark." 33 C.F.R. § 328.3(a)(5), (c)(3). Because a bed and banks can itself be an indicator of the ordinary high water mark, the Agencies explained that their intent is to limit the tributary definition to waters "that have both a bed and banks and *another* indicator of ordinary high water mark." 80 Fed. Reg. at 37,068/3 (emphasis added); *see also* TSD at 245, JAxxxx, *id.* at 236-37, JAxxxx-xxxx ("The definition of 'tributary' in the rule also requires another indicator of ordinary high water mark."). The Agencies included these physical indicators to ensure that only streams with sufficient volume, frequency, and duration are regulated. The Agencies determined that all waters

meeting this definition are similarly situated in the region, i.e., they perform similar functions and work together in affecting downstream primary waters.

The great majority of tributaries as defined by the Rule are headwater streams; the Agencies relied on the scientific studies showing that those streams play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream primary waters. 80 Fed. Reg. at 37,058/1-2. Tributaries acting together in a watershed exert a strong cumulative influence on the integrity of downstream primary waters. *Id.* at 37,068-69.

3. Adjacent waters

"Waters of the United States" include "wetlands, ponds, lakes, oxbows, impoundments, and similar waters" that are "adjacent to" a primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(6). The term "adjacent" continues to be defined as in the 1986 regulation to mean "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c)(1). Based upon the connectivity continuum discussed in the scientific literature, and in response to public comment seeking greater clarity, the Agencies included for the first time a definition of "neighboring" that provides clear geographic limits. 80 Fed. Reg. at 37,058/2-3. "Neighboring" waters are those located: (i) within 100 feet of the ordinary high water mark of a jurisdictional water; (ii) within the 100-year floodplain of a jurisdictional water but not more than 1,500 feet from the ordinary high water mark of such water; or (iii) within 1,500 feet of the high tide line of a primary water or the ordinary high water mark of

the Great Lakes. 33 C.F.R. § 328.3(c)(2). Adjacent waters do not include waters used for established normal farming, ranching, and silviculture activities. 33 C.F.R. § 328.3(c)(1).

The inclusion of adjacent waters as jurisdictional is based upon the Agencies' science-based conclusion, supported by the SAB's review, that adjacent waters have a significant nexus to primary waters "based upon their hydrological and ecological connections to, and interactions with, those waters." 80 Fed. Reg. at 37,057/1 to 37,058/2; *see* SAB Proposed Rule Review at 2, JAxxxx. Adjacent waters are shown to help reduce floods; trap or filter sediment; influence stream flow; transport dissolved organic carbon; remove excess nitrogen, phosphorus, and other nutrients; provide habitat for aquatic and water-tolerant plants, invertebrates, and larger species; and provide feeding, refuge, and breeding areas for fish and wildlife. TSD at 307-20, JAxxxx-xxxx. *See also* Science Report at 4-4 to 4-5, JAxxxx-xxxx (examples of mechanisms by which floodplain waters influence downstream waters).

C. Waters subject to case-specific analysis

The Rule provides that some waters are jurisdictional only if they are found on a case-specific basis to have a "significant nexus" to a primary water. 80 Fed. Reg. at 37,059/1. The significant nexus determination will most typically be made on a water individually, but can, when warranted, be made in combination with other waters that are similarly situated, i.e., they "function alike and are sufficiently close to function together in affecting downstream waters." 33 C.F.R. § 328.3(c)(3); 80 Fed. Reg. at

37,059/1. While the Proposed Rule would have authorized a significant nexus analysis for any water not falling within the definition of "tributary" or "adjacent" water and not specifically excluded, the Rule adopts a narrower approach, identifying two categories of waters subject to a case-specific significant nexus determination.

First, the Agencies identified specific types of waters located in particular regions that are always to be analyzed in combination: (1) prairie potholes, (2) Carolina and Delmarva bays, (3) pocosins, (4) western vernal pools in California, and (5) Texas coastal prairie wetlands. 33 C.F.R. § 328.3(a)(7). These categories of waters were selected based upon the available scientific literature and data, the SAB review, public input, and the Agencies' experience in assessing these waters. 80 Fed. Reg. at 37,071-73.

Second, the Agencies identified a geographic scope within which waters may be assessed, either alone or in combination with other similarly situated waters, for purposes of a significant nexus determination. With the exception of waters falling into one of the five subcategories described above, the significant nexus analysis will be applied only to those waters that are located within the 100-year floodplain of a primary water or 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). The Agencies selected these distance limitations based on a number of factors: the scientific literature; the SAB's review of the Draft Science Report and its comments on the Proposed Rule; the utility of using a floodplain interval, i.e., 100 years, that is readily

available, well-known, and well-understood; the numerous comments seeking greater clarity; and the Agencies' extensive experience and expertise in making significant nexus determinations.

Case-specific waters will be evaluated based on nine aquatic functions. 33 C.F.R. § 328.3(c)(5). These functions are drawn from the scientific literature and the Agencies' experience in implementing the Act. 80 Fed. Reg. at 37,086/3.

D. Waters excluded from CWA jurisdiction

The Rule retains without modification the pre-existing exclusions for waste treatment systems and prior converted cropland. 33 C.F.R. § 328.3(b)(1), (2). The Rule also reflects established Agency guidance and the Agencies' consideration of public input by providing exclusions for erosional features, certain ditches not located in tributaries or that do not drain wetlands, and groundwater. *Id.* § 328.3(b)(3)-(5). And the Agencies created exclusions for certain waters and features generally considered not to be jurisdictional, e.g., stormwater control features created in dry land. *Id.* § 328.3(b)(6), (7). All of the exclusions are consistent with the Agencies' practices and provide greater clarity regarding what waters are and what waters are not protected under the CWA. 80 Fed. Reg. at 37,097-100.

E. The scope of covered waters under the Rule

The Rule has narrowed the scope of "waters of the United States" in a number of ways. Prior to the Rule, almost all waters across the country theoretically could be subject to a case-specific significant nexus determination of jurisdiction. The Rule

expressly excludes certain waters and features, *see* 33 C.F.R. §§ 328.3(b) (exclusions) and 328.3(a)(8) (providing distance limits on case-specific waters), and requires specific physical characteristics for tributaries for the first time, 33 C.F.R. § 328.3(a)(5), which will have the effect of excluding some waters that contribute flow downstream. The Rule also eliminates the prior regulatory provision that defined "waters of the United States" to include all other the waters the use, degradation or destruction of which could affect interstate or foreign commerce. TSD at 30, JAxxxx. At the same time, some waters that post-*Rapanos* were determined to be jurisdictional only after a case-specific analysis are now considered jurisdictional by rule.

It is not possible to determine precisely the number of waters that will be jurisdictional under the Rule as compared to either the 1986 regulation or to the post-*Rapanos* period. The Agencies estimated that the Rule will result in a small overall increase in positive jurisdictional determinations compared to those made under the *Rapanos* Guidance. Economic Analysis at 5, JAxxxx.[6] However, there will be fewer waters within the scope of the CWA under the Rule compared to the 1986 regulation.

[6] The Economic Analysis only considered jurisdictional determinations that were negative under the *Rapanos* Guidance but that might be positive under the Rule, and calculated a 2.84-4.65 percent potential increase. Economic Analysis at 7-13, JAxxxx-xxxx. A separate analysis of 199 approved randomly selected jurisdictional determinations assessed the potential reduction in CWA jurisdiction due to the distance limitation for case-specific waters in § 328.2(a)(8), and found two instances where waters previously found jurisdictional under the *Rapanos* Guidance would not be jurisdictional under the Rule. Jurisdictional Determination Review Memorandum,

Cont.

SUMMARY OF ARGUMENT

Backed by a robust scientific record and the Agencies' decades of experience implementing the Clean Water Act, the Rule reasonably interprets the broad and ambiguous term "waters of the United States" in a manner that fully comports with the Act and relevant Supreme Court decisions. The Agencies also complied with all applicable procedural requirements and laws. Thus, the Rule deserves this Court's deference.

I. The Rule's use of the significant nexus standard is valid.

The "significant nexus" standard, as first informed by the ecological connections the Supreme Court described in *Riverside Bayview*, developed in *SWANCC*, and further refined in Justice Kennedy's concurrence in *Rapanos* is foundational to the Agencies' interpretation. Although *Rapanos* was a fractured decision, it generated a governing rule of law that "waters of the United States" include nonnavigable tributaries and their adjacent waters and wetlands that, either alone or in combination with similarly situated waters, have a significant nexus to a traditional navigable water. Justice Kennedy and four additional Justices expressly agreed that Congress intended to protect such waters under the CWA.

The CWA is unquestionably ambiguous on the precise reach of regulable waters, and therefore the Rule interpreting that reach is owed deference under *Chevron*.

AR-20877, at 1, JAxxxx. The net effect of positive-to-negative and negative-to-positive jurisdiction is uncertain, but the Agencies believe it to be marginal at most.

The Agencies' interpretation of "waters of the United States" to include primary waters and waters with a significant nexus to primary waters is a reasonable construction of the Act's scope in light of its text and purposes and Supreme Court precedent.

II. The Rule reasonably identifies certain waters as waters of the United States.

A. Tributaries have a significant nexus to primary waters.

The Agencies reasonably found that "tributaries," either alone or in combination with other similarly situated tributaries in a watershed, have a significant nexus to primary waters. The scientific underpinning of this finding, which Petitioners do not dispute, is unassailable. State and Business Petitioners rely on an overly constrained view of significant nexus that focuses on individual waterbodies, as opposed to the cumulative effect of similarly situated waterbodies in the watershed of a primary water. Further, Petitioners ask the Court to substitute its judgment for the Agencies' regarding the significance of the nexus between tributaries and primary waters. Petitioners' arguments fail because the Agencies' determination that tributaries are waters of the United States is supported by the law and science.

The Rule reasonably defines "tributary" as a water that contributes flow to a primary water and that is characterized by the physical indicators of a bed and banks and an ordinary high water mark." 33 C.F.R. § 328.3(c)(3). The definition of "ordinary high water mark" has not changed from the 1986 regulation, and the

additional requirement of a second physical indicator further cabins tributaries to those that are similarly situated. Business and State Petitioners' hyperbolic assertions of a vast expansion of jurisdiction are based on false assumptions and fail to consider the pre-existing regulation's scope and the Rule's limitations and exclusions.

B. Adjacent waters have a significant nexus to primary waters.

As with tributaries, the Agencies relied on the scientific evidence and the law to determine that adjacent waters, as defined, have a significant nexus and therefore are properly included as waters of the United States. The science demonstrates that adjacent waters work together to perform important functions, including flow contribution, water retention, and pollutant processing and retention, that significantly affect the chemical, physical, and biological integrity of downstream primary waters. This is true not just of wetlands, but also of ponds, lakes, oxbows, impoundments and similar waters. Again, State and Business Petitioners do not dispute the Agencies' highly-detailed findings, but rather ask the Court to substitute its judgment for that of the Agencies as to whether adjacent waters possess the requisite nexus.

The Rule's treatment of adjacent waters does not represent a sweeping change to CWA jurisdiction. To the contrary, waters defined by the Rule as adjacent waters were covered under the Rule's predecessor if they were actually navigable, flowed to other waters, crossed state lines, impounded other regulated waters, or, broadly, their "use, degradation or destruction … could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1987).

The Rule's new definition of "neighboring" accords with *Rapanos*. The Rule's numeric and floodplain-based distance limitations for adjacent waters reasonably implement the Agencies' objective to establish bright lines based on the Act, science, and the Agencies' experience.

C. The Rule does not change the covered status of interstate waters.

State and Business Petitioners' challenge to the inclusion of interstate waters as jurisdictional is untimely. Interstate waters have been a distinct regulatory category of jurisdictional waters since at least 1977, and the Rule merely retains that status. The Agencies expressly declined to reconsider the status of interstate waters and did not restart the time period for judicial review.

In any event, the Agencies' interpretation that the CWA protects all interstate waters flows inexorably from the Act's language and structure. Until 1972, the Act expressly protected interstate waters independent of their navigability. That the term "interstate waters" does not appear in the 1972 definition of "navigable waters" is of little import because Congress demonstrated its intent to maintain their protection by keeping in effect pre-1972 water quality standards that applied only to interstate waters. Further, because water pollution in one state can adversely affect the quality of waters in another and has obvious effects on interstate commerce, protecting the quality of interstate waters falls squarely within the federal government's traditional role.

III. The Rule reasonably includes categories of waters that should be assessed for a significant nexus on a case-specific basis.

The Agencies followed science and the law in concluding that waters of the United States includes a middle ground consisting of two narrow categories of waters that are jurisdictional only upon a case-specific significant nexus determination. The science shows that these waters have important hydrologic, water quality, and habitat functions that may affect downstream primary waters, but that the connectivity of these waters to downstream primary waters may vary. Petitioners' challenges to the scope of case-specific waters as arbitrary are unavailing, as the Agencies reasonably limited case-specific waters to five defined subcategories of similarly situated waters and waters within certain distance limitations, establishing for the first time outer geographic limits on CWA jurisdiction.

Petitioners misread the CWA and Justice Kennedy's concurring opinion in *Rapanos*. Congress plainly intended to protect the "chemical, physical, *and* biological integrity" of the Nation's waters, 33 U.S.C. § 1251(a) (emphasis added), and the Agencies' determination that a "significant nexus" may be found based on a significant effect on any of the three forms of integrity is entirely proper. The criteria to be considered in making a significant nexus determination, *see* 33 C.F.R. § 328.3(c)(5), are reasonable and relevant to the assessment of a water's functions and its effects on primary waters.

IV. The Rule reasonably excludes certain waters and erosional features.

The Agencies reasonably exercised their discretion in interpreting "waters of the United States" to exclude certain waters and features, 33 C.F.R. § 328.3(b), based on the CWA's text and structure, public comments, and the Agencies' experience.

Each of the Rule's exclusions is well-supported. In contrast to tributaries, excluded erosional features lack physical indicators of sufficient, regular flow to be considered similarly situated, and thus, when considered in combination, have a significant nexus with a primary water. The ditch exclusions are consistent with the Agencies' historical practices and the CWA and give due consideration to public comments and the SAB's views. The groundwater exclusion reflects the Agencies' permissible and long-established interpretation of the Act and its legislative history. Associational Petitioners' challenge to the waste treatment system exclusion is unfounded, as the Agencies made clear that they were neither reconsidering that exclusion nor taking comment on it, and in any event, the exclusion is both permissible and reasonable.

V. The Rule is constitutional.

The Rule fits squarely within Congress's power to regulate the channels of commerce and activities having a substantial effect on interstate commerce. As such, the Rule comports with the Commerce Clause and the Tenth Amendment.

The Rule also comports with the Due Process Clause. By clearly defining waters that are jurisdictional and waters that are excluded, and by providing clear

guidelines for identifying waters that may be jurisdictional by virtue of their significant nexus to other jurisdictional waters, the Rule provides fair notice to regulated parties and appropriate parameters for enforcement. Moreover, parties have ample opportunity to request an approved jurisdictional determination from the Corps and seek judicial review of such determination.

VI. All applicable procedural requirements were met.

A. The rulemaking process adhered to the requirements of the APA.

The Agencies provided adequate notice under the APA. The Agencies' intention to provide bright lines and much needed clarity was evident in myriad ways in the Proposed Rule, including (a) the proposal to define "neighboring" with respect to floodplains, riparian zones, or other spatial distance limits; (b) the proposal to define case-specific waters to include only waters that are sufficiently close to jurisdictional waters; and (c) express statements that waters used for normal agriculture should continue to retain the same status as under the 1986 regulation and agency practice. The Agencies sought and received comments on these questions, which shaped the Agencies' decisionmaking and the Rule. While the final Rule differs from the proposal, the revisions reflect the Agencies' conscientious efforts to respond to the robust debate with the additional clarity requested by commenters.

The Agencies also provided ample opportunity to comment on the Rule's scientific and technical bases by noticing the peer-reviewed Draft Science Report with the Proposed Rule and placing the SAB's review of the Draft Science Report and

other scientific sources in the public docket during the lengthy comment period. The Agencies' voluminous Response to Comments demonstrates that Petitioners commented on all relevant aspects of the Rule and that the Agencies considered and responded to those comments.

B. The Agencies complied with the Regulatory Flexibility Act.

The Agencies complied with the Regulatory Flexibility Act by certifying that the Rule will not "have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). The Rule imposes no direct regulatory requirements or costs. Business Petitioners' reliance on extra-record declarations to argue differently should be rejected as outside the scope of judicial review, in addition to being speculative and unfounded. Moreover, the Agencies appropriately relied on the 1986 regulation as the baseline for assessing the Rule's impacts, consistent with EPA guidance on the subject.

Even if Petitioners could establish error with respect to the Agencies' certification of no significant economic impact, such error would be harmless because the Agencies conducted considerable outreach and consultation with small entities and revised the final Rule in response.

VII. Petitioners' NEPA and ESA challenges lack merit.

A. The rulemaking is exempt from NEPA requirements, and the Army's voluntary actions suffice in any event.

As an action of the EPA Administrator, the Rule is statutorily exempt from NEPA's requirements. 33 U.S.C. § 1371(c)(1). This Court and others have recognized that an action does not cease to be "action of the Administrator" merely because it was jointly undertaken with the Secretary of the Army and the Corps. *In Re Dep't of Def.*, 817 F.3d at 273. In any event, the Environmental Assessment and Finding of No Significant Impact that the Army voluntarily prepared satisfy NEPA's requirements.

B. The ESA claims are waived and not cognizable.

Waterkeeper Petitioners' claims that the Agencies should have consulted with the Fish and Wildlife Service and National Marine Fisheries Service under the ESA are waived since they were not raised at any time during the public comment period. Moreover, because the Rule defines the scope of CWA jurisdiction but does not exercise that jurisdiction in a manner that could affect listed species, the duty to consult under the ESA is not triggered.

For all these reasons the Court should deny the petitions.

STANDARD OF REVIEW

This case is governed by the APA standard of review. Petitioners must show that the Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Questions of statutory interpretation, including those involving the CWA's definitions, are governed by the familiar two-step test set forth in *Chevron, Inc. U.S.A. v. NRDC*, 467 U.S. 837, 842-45 (1984). *B.P. Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 791 (6th Cir. 1995). Under step one, the Court asks whether Congress "has directly spoken to the precise question at issue," in which case the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If the statute is "silent or ambiguous with respect to the specific issue," the Court moves to *Chevron*'s second step and must defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Id.* This deferential standard applies to an agency's interpretation of its statutory jurisdiction. *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1868 (2013).

Deference accorded an agency is heightened in reviewing its interpretation of a statute it administers when the statute is complex and within the agency's expertise. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001). The CWA falls within this category. *See PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 704 (characterizing the CWA as a "complex statutory and regulatory scheme"). Thus, the Court need only find "that EPA's understanding of this very 'complex statute' is a sufficiently rational one to

preclude a court from substituting its judgment for that of EPA." *Chem. Mfrs. Ass'n v. NRDC, Inc.*, 470 U.S. 116, 125 (1985).

The arbitrary and capricious standard applies to an agency's factual or technical determinations. "The scope of review under the 'arbitrary and capricious' standard is narrow" and the Court is not to substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court's role "is limited to reviewing the administrative record 'to determine whether there exists a 'rational connection between the facts found and the choice made.'" *Nat'l Truck Equip. Ass'n. v. Nat'l Highway Traffic Safety Admin.*, 711 F.3d 662, 667 (6th Cir. 2013) (citation omitted). This standard is a highly deferential one, which presumes the validity of agency actions, and upholds them if the actions satisfy minimum standards of rationality. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *Citizens Coal Council v. EPA*, 447 F.3d 879, 890 (6th Cir. 2006) (en banc) (applying the "highest level of deference" to agency's technical and scientific determinations).

ARGUMENT

I. The Agencies reasonably relied on the significant nexus standard to determine CWA jurisdiction over waters of the United States.

The backbone of the Agencies' interpretation of the scope of the CWA is the significant nexus standard. 80 Fed. Reg. at 37,056/3. Business Petitioners challenge the Agencies' reliance on the standard, characterizing it as a "faulty legal premise."

Bus. Br. 50. But the Agencies acted lawfully in applying the fractured decision of *Rapanos* and reasonably in interpreting the broad and ambiguous statutory term "waters of the United States" consistently with Justice Kennedy's *Rapanos* concurrence.

A. Justice Kennedy's significant nexus standard constitutes a rule of law from *Rapanos.*

In interpreting the statutory term "waters of the United States," the Agencies considered *Riverside Bayview*, *SWANCC*, and *Rapanos*. Construing the unanimous opinion in *Riverside Bayview* and the majority opinion in *SWANCC* is relatively straightforward. But understanding *Rapanos* is more complicated—indeed "baffl[ing]," *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009)—because "no one rationale commanded a majority of the Court." *Sackett*, 132 S. Ct. at 1370. Notwithstanding this difficulty, the Agencies have consistently construed *Rapanos* to mean that a water is jurisdictional under the CWA if its meets either the plurality's relatively permanent standard or Justice Kennedy's significant nexus standard. *See* TSD at 48-53, JAxxxx-xxxx. That is the right approach because the four dissenting Justices, who would have affirmed CWA jurisdiction under the pre-existing regulatory interpretation of "waters of the United States," stated explicitly that they would "uphold [CWA] jurisdiction … in all [] cases in which either the plurality's or Justice Kennedy's test is satisfied" and "the United States may elect to prove jurisdiction under either test." *Rapanos*, 547 U.S. at 810 & n.14. Thus, the assertion of CWA

jurisdiction under either standard would be consistent with the views of a majority of the Court's Members and the limits set on the Agencies' discretion.

1. The Supreme Court has relied on dissenting opinions to formulate a governing rule where the plurality and concurring opinions lack commonality.

The Rule reflects the Agencies' decision to assert CWA jurisdiction in accordance with Justice Kennedy's concurrence in *Rapanos*. Contrary to the Business Petitioners' argument that the significant nexus standard carries no legal force, Bus. Br. 45-50, applicable principles for interpreting splintered decisions of the Supreme Court establish that it does. Traditionally, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted); *see, e.g., Glossip v. Gross*, 135 S. Ct. 2726, 2731, 2738 n.2 (2015); *United States v. Kratt*, 579 F.3d 558 (6th Cir. 2009). In *Marks*, the Supreme Court considered the precedential value of an earlier case, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), in which there was no majority opinion. Three Justices had voted to reverse the judgment in *Memoirs* based on their view of the First Amendment, while two additional Justices had "concurred on broader grounds." *Marks*, 430 U.S. at 193. *Marks* held that the three-justice plurality in *Memoirs* had provided the controlling rule.

But interpreting fractured decisions has evolved since *Marks*—a fact ignored by Business Petitioners.[7] As this Court and others have explained, a literal application of *Marks* will reliably effectuate the views of a majority of the Court only when one ground of decision is "narrower" in the sense of offering "the least change to the law," *Cundiff*, 555 F.3d at 209 (citations omitted), or constituting "a logical subset of other, broader opinions." *United States v. Johnson*, 467 F.3d 56, 63 (1st Cir. 2006) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). Thus, "[t]he *Marks* rule is not workable … when a concurrence that provides the fifth crucial vote does not provide an opinion that can be meaningfully regarded as narrower than another or does not represent a common denominator of the Court's reasoning." *United States v. Ray*, 803 F.3d 244, 270 (6th Cir. 2015) (internal quotation marks and citation omitted). Where a common denominator is lacking among a majority of the Justices supporting the judgment, effectuating a majority's views may require expanding the search for commonality by considering the dissenting Justices' views. That furthers *Marks*'s underlying purpose.

Significantly, the Supreme Court itself has recognized that *Marks* can be "more easily stated than applied to the various opinions supporting the result," *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), and that "[i]t does not seem useful to pursue the *Marks* inquiry to the utmost logical possibility" in every case, *id.* (internal quotation

[7] *See also* States Br. 21; Amicus Br. of Nat'l Rural Water Ass'n 8-10.

marks and citations omitted). *See also Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (quoting *Marks* and *Grutter*). Moreover, "the Supreme Court … [has] considered dissenting opinions when interpreting fragmented Supreme Court decisions." *United States v. Davis*, 825 F.3d 104, 1024 (9th Cir. 2016) (en banc) (citing, *inter alia*, *United States v. Jacobsen*, 466 U.S. 109, 115-117 (1984), and *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 16-17 (1980)). *See also, e.g., Abdul-Kabir v. Quarterman*, 550 U.S. 233, 251-54 & n. 14, 257-58 (2007); *Vasquez v. Hillery*, 474 U.S. 254, 261 n.4 (1986); *Alexander v. Choate*, 469 U.S. 287, 293 & nn.8-9 (1985).

Jacobsen, which interpreted the fractured decision of *Walter v. United States*, 447 U.S. 649 (1980), is particularly instructive. There, the Court found a common denominator only among two Justices supporting the judgment and four dissenting Justices. In relying upon the dissent, the Court explained that "the disagreement between the majority and the dissenters … with respect to [application of law to fact] is less significant than the agreement on the standard to be applied." *Jacobsen*, 466 U.S. at 117 n.12.

Likewise, in *Rapanos*, the plurality and concurring opinions describe different legal standards, neither of which is a logical subset of the other. *See* 80 Fed. Reg. at 37,061/2; TSD at 37, 41, JAxxxx, xxxx. Although this Court has not yet "reconcile[d] *Rapanos* with *Marks*," it has observed that "there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's view." *Cundiff*, 555 F.3d at 210 (citations

omitted).[8] The dissent, on the other hand, expressly stated that the Act encompasses all waters that satisfy the significant nexus standard or that of the plurality. *See Rapanos*, 547 U.S. at 809-11 & n. 14 (Stevens, J., dissenting).

Thus, the significant nexus standard articulated by Justice Kennedy is a narrower ground than the dissent and is a ground on which a majority of the Justices would confirm jurisdiction under the Act. As in *Jacobsen*, the disagreement between Justice Kennedy and the dissenters regarding the Act's coverage of adjacent wetlands is less significant than their express agreement that adjacent wetlands with a significant nexus to traditional navigable waters constitute "waters of the United States." Their disagreement turned on whether case-by-case determinations are required. Justice Kennedy, for example, wrote that where wetlands are adjacent to nonnavigable tributaries, "[a]bsent more specific regulations" the Agencies must "establish a significant nexus on a case-by-case basis." *Rapanos*, 547 U.S. at 782. The dissenters believed that any significant nexus requirement was "categorically satisfied" by the 1986 regulation. *Id.* at 807-08. But all five Justices expressly agreed on the

[8] Business Petitioners correctly note that in *Rapanos,* all Justices agreed that the Act "reaches some waters and wetlands that are not navigable-in-fact[,]" Bus. Br. 48, consistent with *Riverside Bayview*, 474 U.S. at 133. It is also true that "if neither of the tests is met, the plurality and Justice Kennedy would form a majority saying that the wetlands are not covered by the CWA." *United States v. Donovan*, 661 F.3d 174, 184 (3rd Cir. 2011). And all nine Justices in *Rapanos* found the Act to be ambiguous in at least some respects. Beyond that, Business Petitioners are wrong that any common denominator of consequence exists between the plurality and concurring opinions.

fundamental point that wetlands with a significant nexus to traditional navigable waters are waters of the United States.

That the plurality's standard is also a narrower ground than the dissent, *see Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting), does not support Business Petitioners' suggestion that CWA jurisdiction exists only if *both* the plurality's *and* Justice Kennedy's standards are met. Bus. Br. 49. Petitioners' approach to *Rapanos*—adopted by no court to date—would unduly narrow the scope of the Act and exceed the scope of the decision's common denominator. "*Marks* does not imply that the 'narrowest' *Rapanos* opinion is whichever one restricts jurisdiction the most." *Cundiff*, 555 F.3d at 209.[9]

2. All circuits that have addressed the issue have given effect to the significant nexus standard.

The Rule's use of the significant nexus standard is consistent with every circuit decision that has gleaned a rule of law from *Rapanos*. TSD at 49, JAxxxx (collecting cases). Three courts of appeals have given effect to the common denominator between Justice Kennedy's concurrence and the four-Justice dissenting opinion in holding, consistent with the Agencies' position, that CWA jurisdiction is established if Justice Kennedy's significant nexus standard is met. *See Donovan*, 661 F.3d at 180-84; *United States v. Bailey*, 571 F.3d 791, 797-99 (8th Cir. 2009); *Johnson*, 467 F.3d at 62-66.

[9] Contrary to amicus curiae's contention, Amicus Br. of Nat'l Rural Water Ass'n 12, *Hawkes* did not involve the meaning of waters of the United States and therefore has no bearing on the validity of the significant nexus standard.

These decisions also allow the Agencies to assert jurisdiction under the *Rapanos* plurality standard. But even circuits that have taken somewhat different approaches to *Rapanos* have rejected arguments—like those of Business Petitioners here—that the Agencies *must* establish CWA jurisdiction in accordance with the plurality standard. These decisions hold that Justice Kennedy's significant nexus standard is either sufficient or exclusive. *See United States v. Robison*, 505 F.3d 1208, 1219-22 (11th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006). No court has held that the plurality standard is the sole available method for establishing CWA jurisdiction.

Every reason exists for this Court to follow its sister circuits and uphold the Agencies' position. *See Johnson*, 467 F.3d at 64 (applying a "common sense approach to fragmented opinions.") (citations omitted); *Cundiff*, 555 F.3d at 208 (referencing the "First Circuit's thoughtful reasoning" in *Johnson*).

B. The significant nexus standard reasonably interprets the Act.

Business Petitioners' objection fails for the additional reason that the Agencies' use of the significant nexus standard reasonably interprets the Act.

1. The Act is ambiguous.

The Rule, at its core, represents the Agencies' interpretation of the Act. Under *Chevron*, if a statute is silent or ambiguous, 467 U.S. at 842, then the Agencies' interpretation should be upheld so long as it is reasonable. *Id.* at 843-44. As a

threshold matter, the Act's term "navigable waters" and its definition as including the "waters of the United States" are unquestionably "ambiguous in some respects." 79 Fed. Reg. at 22,254/2 n.11; RTC Topic 10 at 32, JAxxxx. The Supreme Court has so held twice.

First, in *Riverside Bayview*, the Supreme Court upheld, at *Chevron* step two, the Agencies' interpretation of the Act to protect wetlands adjacent to navigable-in-fact bodies of water. 474 U.S. at 131 ("[A]n agency's construction of a statute … is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.").

Second, in *Rapanos*, all Justices found ambiguity—albeit to varying degrees. In his concurring opinion, Justice Kennedy referenced "ambiguity in the phrase 'navigable waters.'" 547 U.S. at 780. So did the dissenting Justices. *See id.* at 796 ("[G]iven the ambiguity inherent in the phrase 'waters of the United States,' the Corps has reasonably interpreted its jurisdiction[.]") (Stevens, J.)*; id.* at 811-12 ("Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review).") (Breyer, J.). The plurality agreed that the Act "is in *some* respects ambiguous." *Id.* at 752 (emphasis in original).

Ambiguity in a statute represents "delegations of authority to the agency to fill the statutory gap in a reasonable fashion." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). As the Supreme Court explained in *Riverside*

Bayview, Congress delegated a "breadth of federal regulatory authority" and expected the Agencies to tackle the "inherent difficulties of defining precise bounds to regulable waters." 474 U.S. at 134. *See also Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988) ("Congress generally intended that EPA would exercise substantial discretion in interpreting the [CWA]."") (internal citation and quotation omitted).

2. The significant nexus standard reasonably fills the statutory gap.

The Agencies reasonably adopted Justice Kennedy's significant nexus standard in filling the statutory gap.

First, that standard gives effect to the Act's broad terms and environmentally protective aim. *See Rapanos*, 547 U.S. at 767-69 (observing "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems" and referring to the Act as "a statute concerned with downstream water quality") (Kennedy, J., concurring) (citations omitted); *Riverside Bayview*, 474 U.S. at 133 ("Congress chose to define the waters covered by the Act broadly."). The Act expressly aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and establishes a "national goal" of eliminating discharges and attaining "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." *Id.* § 1251(a)(2). Congress surely understood that "water flows into

traditionally navigable waters from upstream sources; pollution added to non-navigable upstream waters ultimately will cause harmful effects on downstream traditionally navigable waters; and consequently, it would be futile to regulate direct discharges into traditionally navigable waters without also regulating discharges to upstream waters." TSD at 22, JAxxxx. Thus, the ability to regulate upstream sources is vital to give flesh to the Act, a reality this Court recognized in the Act's early days, noting that "[i]t would, of course, make a mockery … if its authority [under the Act] to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned." *Ashland Oil*, 504 F.2d at 1326.[10]

Second, the significant nexus standard reasonably effectuates the text of 33 U.S.C. § 1362(7), which defines "navigable waters." The requirement that a significant nexus exist between upstream waters (including wetlands) and "navigable waters in the traditional sense" fulfills "the need to give the term 'navigable' some meaning." *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). The Agencies likewise gave "navigable" meaning when they applied the significant nexus standard to primary waters *not* addressed in *Rapanos*, i.e., the territorial seas and interstate waters. *See* 33

[10] *See also generally Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 113-14 (D.C. Cir. 1976) ("The only life system we know of and are part of … cannot develop without water.") (citation omitted); Amicus Br. of Members of Congress 7 ("Both the Senate and the House of Representatives … made it clear that to protect the water quality of navigable waters, jurisdiction … included tributaries of navigable waters.").

U.S.C. § 1362(7) ("navigable waters" expressly defined to include the territorial seas); TSD at 223, JAxxxx ("As the territorial seas are clearly covered by the CWA (they are also traditional navigable waters), it is reasonable to use Justice Kennedy's significant nexus framework to protect the integrity of the territorial seas."); *id.* at 222, JAxxxx ("[T]he rule … similarly protects the interstate waters … clearly covered by the CWA."); *infra* at 104-110 (further explaining that the term "navigable waters" is reasonably read to include interstate waters regardless of their navigability).

Third, the significant nexus standard is consistent with prior Supreme Court decisions. For example, in *Riverside Bayview*, "the Court indicated that 'the term 'navigable' as used in the Act is of limited import,' 474 U.S., at 133, [and] it relied, in upholding jurisdiction, on the Corps' judgment that 'wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water,' *id.* at 135 []." *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). "The implication," Justice Kennedy observed, "was that wetlands' status as 'integral parts of the aquatic environment'—that is, their *significant nexus* with navigable waters—was what established the Corps' jurisdiction over them as waters of the United States." *Id.* (emphasis added). *See also id.* at 780 ("[W]etlands' ecological functions vis-á-vis other covered waters are the basis for the Corps' regulation of them[.]").

Finally, the significant nexus standard furthers sound administration of the Act. Justice Kennedy invited the Agencies to fulfill the significant nexus requirement by promulgating "more specific regulations" rather than proceeding entirely case-by-case. *See Rapanos*, 547 U.S. at 782. That approach accords with *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and its progeny, *e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), which hold that agencies generally may choose between rulemaking and case-specific procedures to develop law and policy.

Justice Kennedy elaborated on the applicable rulemaking criteria, stating: "Through regulations … the Corps may choose to identify categories of tributaries that, due to their volume of flow …, their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Rapanos*, 547 U.S. at 780-81. *See also id.* at 781 (acknowledging "administrative convenience or necessity"). This straightforward regulatory benchmark mirrors that established in *Riverside Bayview*: "If it is reasonable for the Corps to conclude that *in the majority of cases*, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand." 474 U.S. at 135 n.9 (emphasis added).

Accordingly, the Rule's incorporation of the significant nexus standard represents a reasonable interpretation of broad and ambiguous statutory text and a

permissible way for the Agencies to fulfill their congressionally-delegated responsibility to interpret "waters of the United States."

C. Petitioners' *Chevron* and *Rapanos* plurality arguments fail.

Because the Agencies reasonably interpreted the Act using the significant nexus standard, two corollary arguments by Petitioners necessarily fail—that the Agencies are not entitled to *Chevron* deference and that the *Rapanos* plurality opinion defeats the Rule.

Under Justice Kennedy's concurring opinion in *Rapanos*, significant nexus is a *statutory* requirement. *See, e.g., Rapanos*, 547 U.S. at 767 ("Absent a significant nexus, jurisdiction under the Act is lacking."). Indeed, Justice Kennedy explained that "[t]he required nexus must be assessed in terms of the statute's goals and purposes." *Id.* at 779 (citing 33 U.S.C. § 1251(a)). Thus, contrary to Petitioners' argument, Bus. Br. 45-46 and Waterkeeper Br. 38 n.19, the Agencies are entitled to *Chevron* deference when they interpret the significant nexus standard, including associated terminology such as "similarly situated lands," "in the region," and "chemical, physical, and biological integrity." *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). *See Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 289-90 (4th Cir. 2011) ("[R]ecognizing the Corps' expertise in administering the CWA, we give deference to its interpretation and application of Justice Kennedy's test where appropriate."). As Justice Breyer explained: "[T]he Court … has written a 'nexus' requirement into the statute … [b]ut it has left the administrative powers of the Army Corps of Engineers untouched.

That agency may write regulations defining the term … [a]nd the courts must give those regulations appropriate deference." *Id.* at 811 (Breyer, J., dissenting) (citations omitted). *See also Precon Dev. Corp.*, 633 F.3d at 290 n.10.

Similarly, there is no reason for this Court to address any argument to the effect that "the Rule fails the *Rapanos* plurality's test." States Br. 34-37; *see also* Bus. Br. 67. As the Rule's text and the administrative record make clear, "[t]he key to the agencies' interpretation of the CWA is the significant nexus standard." TSD at 48, JAxxxx. As explained above, the Act covers waters that satisfy either *Rapanos* standard. Although the Agencies considered the plurality opinion—noting, for example, that "certain features were not primarily the focus of the CWA," *id.* (citing *Rapanos*, 547 U.S. at 734)—the plurality opinion need not and did not form the basis for the Rule. The significant nexus standard is sufficient.

II. The Agencies reasonably determined that tributaries and adjacent waters are jurisdictional and made no change to the status of interstate waters.

A. The Agencies reasonably determined that tributaries are jurisdictional.

Tributaries have long been considered to be waters of the United States. *See, e.g.*, 33 C.F.R. § 328.3(a)(5) (1987); 33 C.F.R. § 323.2(a)(3), (4) (1978); 80 Fed. Reg. at 37,058/1; *see also Ashland Oil*, 504 F.2d at 1329 (in enacting the CWA, "Congress was concerned with pollution of the tributaries of navigable streams as well as with the pollution of the navigable streams"). The Rule retains jurisdiction over tributaries as a category, based on the significant nexus standard and the uncontroverted scientific

evidence that tributaries individually or with other tributaries in a watershed have a significant effect on downstream waters. However, the Agencies clarified that not all streams are tributaries. Under the Rule, a stream is only a tributary if it contributes flow to a primary water and has two physical indicators of the ordinary high water mark, i.e., a bed and banks and a second physical indicator. 33 C.F.R. § 328.3(c)(3); 80 Fed. Reg. at 37,076/2.

State Petitioners assert that the definitions of "tributary" and "ordinary high water mark" are over-inclusive, are inconsistent with Justice Kennedy's concurring opinion in *Rapanos*, and fail to ensure that a significant nexus to traditional navigable waters exists. States Br. 24-26. Business Petitioners similarly assert that the definitions are inconsistent with Justice Kennedy's opinion and that the Agencies' conclusions regarding significant nexus are contrary to evidence in the administrative record. Bus. Br. 56-63. Associational Petitioners, on the other hand, assert that the definition of tributary is under-inclusive. Ass'n Br. 46-47. All of these Petitioners are wrong. The Agencies applied their expertise to balance the law and the science to identify a threshold where the nexus is sufficiently "significant" to ensure that the Rule covers the waters that Congress intended to protect. The arguments of the State and Business Petitioners are addressed immediately below. The arguments of the Associational Petitioners are addressed in Argument Section IV.

1. The Agencies reasonably found a significant nexus between tributaries and primary waters.

Although in *Rapanos* Justice Kennedy focused on whether adjacent wetlands as a category possess a significant nexus to downstream waters, the Agencies concluded that it is reasonable and appropriate to examine whether tributaries, as a category, likewise significantly affect the chemical, physical, or biological integrity of downstream waters. TSD at 53-55, 272, JAxxxx-xxxx, xxxx; *see also Rapanos*, 547 U.S. at 767 (the Agencies can "deem the water or wetland a 'navigable water' under the Act"). The Agencies found that tributaries, as defined in the Rule, either alone or in combination with other tributaries in a watershed, do significantly affect primary waters. *Id.* Tributaries are therefore waters of the United States. *Id.*; *see also* 80 Fed. Reg. at 37,068/2-37,069/3.

The science supporting this conclusion is abundant and clear. Perennial, intermittent, and ephemeral streams all play a critical role in the physical, chemical, and biological integrity of primary waters. TSD at 274, JAxxxx; 80 Fed. Reg. at 37,068/3. The Science Report defines streams by reference to the presence of a channel, i.e., a bed and banks. Science Report at 2-2, 2-14, JAxxxx, xxxx. The definition of "tributary" takes a more conservative approach and covers a subset of streams. Under the Rule, a tributary is a stream that contributes flow to a downstream water and that has a bed and banks and an additional physical indicator of the ordinary high water mark.

Streams affect the physical integrity of downstream waters because they are the predominant source of water. This is true even if a stream does not flow seasonally or perennially. For example, one study found that 76% of the flow in the Rio Grande after a storm came from ephemeral streams. TSD at 246, JAxxxx (citing Science Report at 3-7 to 3-8, JAxxxx-xxxx). Streams also even out stormwater pulses into rivers by dispersing the arrival of high flows over time. *Id.* at 246, JAxxxx (citing Science Report at 3-10, JAxxxx). Water also infiltrates into stream channels, especially in ephemeral streams in arid and semiarid regions, which minimizes flooding and recharges the aquifer. *Id.* at 246-47, JAxxxx-xxxx (citing Science Report at 3-10 to 3-11, JAxxxx-xxxx). Streams also trap and store sediment and woody debris until those materials are transported downstream during large flow events, where they shape and maintain river channels and provide habitat. *Id.* at 247-48, JAxxxx-xxxx.

In addition to these physical effects, streams affect the chemical and biological integrity of downstream waters. They trap contaminants and store, transform, and export nutrients and carbon. *Id.* at 249, JAxxxx. For example, small streams can reduce downstream nitrogen delivery by up to 40% by transforming nitrate, excessive amounts of which can harm aquatic life, into atmospheric nitrogen. *Id.* at 252, JAxxxx. Streams also increase the amount and quality of habitat, are an important source of food, and maintain genetic diversity among upstream and downstream populations of fish and other animals. *Id.* at 254-55, JAxxxx-xxxx. As the Science Report recognized, headwater streams and their associated wetlands are "critical to

mediating the recognized relationship between the integrity of downstream waters and the land use and stressor loadings from the surrounding landscape." Science Report at 5-11, JAxxxx.

Because streams function together in a watershed, and the incremental effects of individual streams are cumulative, they must be evaluated in combination with other streams in a watershed. TSD at 245, JAxxxx (citing Science Report at ES-5, ES-13, JAxxxx, xxxx); *see also id.* at 243, JAxxxx (cumulative influence on downstream rivers); 80 Fed. Reg. at 37,066/1. Downstream rivers are, in fact, the integrated result of their contributing streams. TSD at 245, JAxxxx (citing Science Report at ES-5, JAxxxx).

The Agencies applied these uncontroverted scientific findings to the significant nexus standard. By defining "tributary" to cover only streams with a bed and banks and a second indicator of the ordinary high water mark, the Agencies ensured that regulated tributaries have sufficient volume, duration, and frequency of flow to provide the same functions and to work together as science shows that streams do, and thus are similarly situated in a watershed. And by defining "tributary" to cover only streams that contribute flow to a primary water, the Agencies ensured that only the impacts from streams that drain to the nearest primary water are considered. Tributaries as defined therefore have a significant nexus to downstream primary waters because, either alone or in combination with similarly situated tributaries in the watershed, they significantly affect the physical, chemical, and biological integrity of a

primary water. TSD at 244, JAxxxx; *see also* 80 Fed. Reg. at 37,068/2. This is true whether the primary water is a traditional navigable water, an interstate water, or a territorial sea. TSD at 232-33, 244, JAxxxx-xxxx, xxxx.

2. Defining "tributary" to include ephemeral and intermittent streams is consistent with the law.

Contrary to Petitioners' assertions, States Br. 23-24 and Bus. Br. 57-59, including ephemeral and intermittent streams as tributaries is consistent with Justice Kennedy's concurrence. Justice Kennedy explained the flaw in the plurality's logic for excluding such waters from CWA protection, observing that a continuous flow requirement "makes little practical sense" because the "merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not." *Rapanos*, 547 U.S. at 769. In Justice Kennedy's view, an ephemeral water, which "often looks more like a dry roadway than a river," *id.* at 769, can be a water of the United States. *See also id.* at 768-69 (noting that the plurality's exclusion of intermittent and ephemeral streams is a limitation "without support in the language and purposes of the Act or in our cases interpreting it"); *id.* at 769 (Congress could have excluded irregular waterways but did not); *id.* at 770 ("the Corps can reasonably interpret the [CWA] to cover the paths of such impermanent streams").

Business Petitioners assert that even if some tributaries in a watershed have a significant nexus to a primary water, others do not, especially those carrying "minor

volumes" of water. Bus. Br. 59. But the Agencies did not evaluate individual tributaries in isolation; instead, they properly examined the cumulative impact of all similarly situated tributaries in a watershed. Moreover, a perfectly tailored definition is not necessary. The Supreme Court unanimously disposed of a similar argument in *Riverside Bayview*, noting that "it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as 'waters.'" 474 U.S. at 135 n.9. The Court concluded that if "it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand." *Id.* If "a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit." *Id.* There is no reason to treat the categorical definition of tributaries any differently.

Business Petitioners' assertion that the Rule will cover "countless miles of previously unregulated features," Bus. Br. 58 & n.11, is based on speculation. For example, comments by the National Association of Home Builders claim that the Rule's tributary definition will extend jurisdiction to nearly 100,000 miles of intermittent and ephemeral streams in Missouri. AR-19574, at 123, JAxxxx. But the commenter works from a false baseline, arriving at its number by assuming that *zero*

intermittent streams and *zero* ephemeral streams were waters of the United States under the 1986 regulation and the *Rapanos* Guidance, and that *every* intermittent stream and *every* ephemeral stream is regulated under the Rule. *Id.* at 123, JAxxxx. Neither the 1986 regulation nor the *Rapanos* Guidance excludes intermittent or ephemeral streams; in fact, the Agencies historically have considered intermittent and ephemeral streams to be jurisdictional. 80 Fed. Reg. at 37,079/2. Nor is there any basis to assume that every intermittent and ephemeral stream has the physical indicators and contribution of flow necessary to be considered a tributary under the Rule. Petitioners' comparison of the miles of streams that they speculate were jurisdictional under the 1986 regulation and the 2008 Guidance with the miles of streams that they speculate are jurisdictional under the Rule is speculative and unpersuasive.

A more useful comparison would consider the streams that were not jurisdictional under the 1986 regulation and the *Rapanos* Guidance but would be jurisdictional under the Rule. EPA made that comparison, examining jurisdictional determinations of streams made from 2013 to 2014 under the *Rapanos* Guidance, and found that 99.3% of the streams at issue in those determinations were jurisdictional. Economic Analysis at 13, JAxxxx. Thus, even if every one of those waters would be jurisdictional under the Rule, as the Agencies assumed for purposes of the Economics Analysis, the increase is a mere 0.7%. That is hardly the vast expansion over

"countless miles of previously unregulated features," that Business Petitioners imagine.[11]

3. The Agencies' use of physical indicators to define tributaries is reasonable and supported by the record.

Petitioners incorrectly contend that the Rule's reliance on the ordinary high water mark is inconsistent with Justice Kennedy's concurrence and is technically unreliable as a measure of significant nexus. States Br. 24-25 (quoting *Rapanos*, 547 U.S. at 781); Bus. Br. 57. Neither argument has merit.

The ordinary high water mark has long been defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line, changes in the character of soil, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R § 328.3(c)(6). Although the ordinary high water mark was commonly thought of as a defining attribute of a tributary prior to the Rule, the 1986 regulation only used the ordinary high water mark to establish the lateral extent of certain tributaries. 33 C.F.R. §

[11] The other comments Petitioners cite, Bus. Br. 58 n.11, are similarly baseless. For example, Delta County, Colorado, made the same false assumption that all ephemeral streams and impoundments are regulated under the Rule, yet none were previously regulated. AR-14405, at 3, JAxxxx. National Stone, Sand, and Gravel Association broadly asserted, without any explanation, that the Rule "would turn entire mountain ranges and their corresponding watersheds" into waters of the United States. AR-14412, at 21, JAxxxx. And Petitioner Murray Energy Corporation asserted that drainage ditches at many of its mines were "historically exempt and non-jurisdictional," AR-13954, at 11, JAxxxx, but did not explain how its drainage ditches would be treated differently under the Rule, which retains all the exclusions from the 1986 regulation and adds more.

328.4(c)(1). Nevertheless, the concept of the ordinary high water mark and the means for identifying it are well-understood. As Petitioner Murray Energy Corporation noted in its comments urging the Agencies to require ordinary high water mark indicators, the ordinary high water mark is "clear and discernable" and, along with a bed and banks, are "well-established features of the historical definition of tributaries under the CWA." AR-13954, at 10, JAxxxx.

Consistent with that view, Justice Kennedy observed that a tributary definition that requires an ordinary high water mark and the flow of water into a traditional navigable water (directly or through another tributary) "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act." *Rapanos*, 547 U.S. at 781. The record amply demonstrates that the Rule's definition of "tributary," which requires two indicators of the ordinary high water mark and thus is more restrictive than the definition Justice Kennedy endorsed, provides that reasonable measure and can be consistently applied.

The physical indicators of an ordinary high water mark are reliable evidence that a stream has sufficient volume, duration, and frequency of flow to be considered similarly situated with, and therefore considered in combination with, other streams in the watershed of a primary water. Petitioners' arguments to the contrary essentially repackage their arguments that ephemeral and intermittent flow are insufficient to establish significant nexus. Bus. Br. 57-58; States Br. 25-26. As the Corps has

explained, "*ordinary high water* implies streamflow levels that are greater than average but less than extreme, and that occur with some regularity." Matthew K. Mersel et al., U.S. Army Corps of Eng'rs, *A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States* (2014) at 10, JAxxxx.[12] Further, "[e]vidence resulting from extraordinary events, including major flooding and storm surges, is not indicative" of an ordinary high water mark. U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-05, Subject: Ordinary High Water Mark Identification (Dec. 7, 2005) ("2005 RGL") at 3, JAxxxx.[13] Instead, the ordinary high water mark should be determined based on "characteristics associated with ordinary high water events, which occur on a regular or frequent basis." *Id.*

The record supports the Agencies' conclusion that these physical indicators demonstrate flow that is frequent and consistent enough to be considered "ordinary" and not extreme. TSD at 242, JAxxxx (indicators of the ordinary high water mark demonstrate the duration and frequency of flow); *see also id.* at 239, JAxxxx (the

[12] This document, along with studies and manuals from 2006, 2008, and 2013 cited in subsection I.B.4.b, are in the administrative record. ECF Doc. 122 at 9 n.1. They are also available at http://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/.

[13] Available at http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-05.pdf.

ordinary high water mark is indicative of regular flow); 80 Fed. Reg. at 37,076/2 (a bed and banks and other indicators of ordinary high water mark are only created by sufficient and regular intervals of flow).[14]

State Petitioners' related assertion that a bed and banks is "an even less reliable measure of water flow" similarly fails. States Br. 26-27. Although a bed and banks can be a useful indicator of flow, the Rule does not define all features with just a bed and banks as tributaries; another indicator of the ordinary high water mark is also required. 33 C.F.R. § 328.3(c)(3).

4. The scientific evidence supports inclusion of streams in the arid West as tributaries protected by the CWA.

Business Petitioners argue that the tributary definition is "inconsistent with the scientific evidence," particularly when applied to intermittent and ephemeral streams in the arid West. Bus. Br. 59, 61-63. However, the record shows that even in the arid West, intermittent and ephemeral streams significantly affect downstream waters and that the physical indicators of the ordinary high water mark are a reliable basis for considering such streams to be similarly situated.

---

[14] Business Petitioners complain that the Agencies can rely on historical information to identify the ordinary high water mark. Bus. Br. 57. The Agencies have always used *all* reliable information at their disposal, including historical information. TSD at 237, 238, JAxxxx, xxxx; *see also* 2005 RGL at 3, JAxxxx (if physical characteristics are unreliable or otherwise not evident, districts may determine the ordinary high water mark using reliable methods such as historic records of water flow). It is difficult to fathom how the use of reliable methods can be objectionable.

a. The record demonstrates the importance of intermittent and ephemeral streams to downstream waters in the arid West.

All streams, including intermittent and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels. Science Report at ES-2, JAxxxx; *see also* TSD at 259, JAxxxx. These stream channels concentrate, mix, transform, and transport water and other materials such as wood, organic matter, nutrients, and organisms. Science Report at ES-2, JAxxxx. The evidence of the downstream effects of ephemeral streams is "strong and compelling," particularly due to their channelized flow. *Id.* at ES-7, JAxxxx; *see also* TSD at 274, JAxxxx (whether they are perennial, intermittent, or ephemeral, streams play an important role in the transport of water, sediments, nutrients, organic matter, and organisms to downstream waters).

One way in which intermittent and ephemeral streams affect downstream waters is through the infiltration of water into the stream channel, which minimizes downstream flooding and recharges aquifers. TSD at 246-47, JAxxxx-xxxx (citing Science Report at 3-10 to 3-11, JAxxxx-xxxx); *see also* Science Report at 1-7 (figure 1-2), JAxxxx. As water flows down an ephemeral stream channel it infiltrates the channel bottom and sides, recharging the aquifer and influencing the surface flow in downstream waters. Science Report at B-41, JAxxxx. Large runoff events in ephemeral streams can continue to sustain baseflow in downstream rivers for months. *Id.* at B-42, JAxxxx. In fact, stormflow channeled into aquifers by ephemeral streams

and then released into surface waters over time, for example through seeps and springs, is the major source of water for some rivers. TSD at 259, JAxxxx.

The record shows that this physical connection applies with equal force in the arid West. *Id.* at 267, JAxxxx (flows from ephemeral streams are a major driver of the hydrology of southwestern rivers, particularly through monsoon season flooding); *see also* Science Report at 1-10, B-41 to B-42, JAxxxx, xxxx-xxxx. Ephemeral tributaries of the San Pedro River, for example, supply roughly half of its baseflow. TSD at 266, JAxxxx. The importance of ephemeral streams in the arid West in sustaining baseflow in downstream waters exemplifies the cumulative effects of tributaries-–the incremental contribution of individual streams in combination with similarly situated streams. *Id.* at 266-67, JAxxxx-xxxx. Intermittent and ephemeral streams in arid regions thus "exert strong influences on the structure and function of downstream waters." *Id.* at 265-66, JAxxxx-xxxx.

Intermittent and ephemeral streams also shape river channels by accumulating and periodically releasing stored sediment and woody debris, which help slow the flow of water and provide habitat for aquatic organisms. Science Report at ES-8, JAxxxx. The episodic nature of this physical influence on downstream waters does not diminish its cumulative significance, and is especially apparent in arid environments. TSD at 247, JAxxxx; *see also id.* at 260, 266, JAxxxx, xxxx (southwestern streams transfer water, sediments, and nutrients to downstream waters in an episodic fashion, with material deposited and then moved farther downstream by later precipitation).

The "flashy" nature of flow in ephemeral streams in arid regions is typical, Science Report at 2-36, B-39 to B-45, JAxxxx, xxxx-xxxx, and is well-documented. *See, e.g.*, Multiflume runoff event August 1, 1990, AR-20875, JAxxxx (video of intense, but typical, flow in Walnut Gulch, an ephemeral tributary of the San Pedro River in Arizona, discussed in more detail, *infra* at 77-78).[15]

Fish and other aquatic life in downstream rivers are adapted to the variable flow regimes of ephemeral and intermittent tributaries. TSD at 267, JAxxxx. In particular, ephemeral tributaries in the Southwest strongly influence the biological integrity of downstream rivers and their riparian communities by supplying water, sediment, and nutrients. *Id.* at 267-68, JAxxxx-xxxx, citing Science Report at B-46 to B-48 and 3-25, JAxxxx-xxxx, xxxx. In arid and semiarid regions, riparian areas, including those near ephemeral streams, support the vast majority of wildlife species, are the predominant sites of woody vegetation, and provide food and critical habitat. Science Report at B-55, JAxxxx.

b. The physical indicators of the ordinary high water mark are reliable in the arid West.

Petitioners claim that ordinary high water mark indicators in the arid West "often reflect one-time, extreme water events," Bus. Br. 60, and provide "no indication of the regularity of flow and no indication of other channel characteristics

[15] The record contains a link to a video which is also available at: http://www.tucson.ars.ag.gov/unit/Movies/Aug_1_1990_with_animation.wmv.

that could justify a significant nexus." States Br. 26*; see also id.* 24, 27; Bus. Br. 61 (asserting that "'randomly' distributed indicators cannot provide a rational basis for a blanket significant nexus finding"). These arguments, and the comments Petitioners cite, mischaracterize the Corps' studies of the physical indicators of the ordinary high water mark in arid landscapes and are wrong.[16]

In 2006 the Corps examined whether potential physical indicators of the ordinary high water mark can be used to establish the regularity of flow in arid regions. 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* (2006) ("2006 Study") at 1-2, JAxxxx-xxxx. Intermittent and ephemeral streams in the arid West have a low-flow channel (which is extremely dynamic and which moves around in response to flood events), an active floodplain (which is very stable), and a terrace floodplain. *Id.* at 9, 16, JAxxxx, xxxx. The Corps found that some indicators of the ordinary high water mark in arid regions were related to smaller, one-to-three-year flow events, and that

[16] Business and State Petitioners rely on comments from Freeport McMoRan, AR-14135, at 7, JAxxxx, and from the Arizona Mining Association, AR-13951 at 7-11, JAxxxx-xxxx. Bus. Br. 60, 61; States Br. 26-27. These comments simply repeat the same mischaracterizations of the Corps' studies that Business and State Petitioners make in their briefs. State Petitioners also cite the Water Advocacy Council's comments, States Br. 27, which similarly claim that arid regions have "a significant number of small channels (often only a few feet in width) yet with a defined bed and bank." AR-14568 at 34, JAxxxx. As discussed in the text, this "low flow channel" has been addressed in the numerous studies and manuals issued by the Corps since 2006.

moderate, five-to-10-year flow events could over-write these indicators until they were gradually replaced. The 2006 Study observed that some physical indicators are therefore "randomly" distributed within the active floodplain, depending on when during the cycle of one-to-three- and five-to-10-year flow events the stream is examined. *Id.* at 14-16, JAxxxx-xxxx.

Business and State Petitioners attempt to seize on this observation about random distribution, but ignore its context. The Corps found that these physical indicators still indicate that flow has occurred; they simply do not correspond to the same flow events that apply in more humid regions.

In order to promote consistency, the 2006 Study suggested that the boundary of the active floodplain is the most reliable indicator of the ordinary high water mark in arid systems. 2006 Study at 16, JAxxxx. In 2008 the Corps released a regional manual to identify the boundary of the active floodplain and delineate the ordinary high water mark. Robert W. Lichvar et al., U.S. Army Corps of Eng'rs, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual* (2008) at 28, 31, JAxxxx, xxxx. This manual confirmed that in arid regions "the location of traditional [ordinary high water mark] indicators is transitory," so the active floodplain is "the only repeatable feature that can be reliably used to delineate the position of a non-wetland water's [ordinary high water mark]. The active floodplain is easily identified in the field, less variable over time, and statistically linked to the hydrologic and hydraulic parameters of

ephemeral/intermittent arid channel forms." *Id.* at 31, JAxxxx; *see also id.* at 33, JAxxxx (the ordinary high water zone in ephemeral channels in the arid West "is the active floodplain").

Contrary to Petitioners' assertion, Bus. Br. 61, States Br. 26, the Corps did not reach a different conclusion in 2013. As Petitioners note, the Corps repeated its 2006 finding that in arid systems some ordinary high water mark indicators can be found throughout the active floodplain. Lindsey Lefebvre, et al., U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* (2013) at 15, JAxxxx. The Corps explained that these indicators are therefore better described as flow indicators for streams in arid regions. Thus, the ordinary high water mark in arid regions should be delineated by identifying the active floodplain, through an examination of changes in vegetation, sediment, and slope. *Id.* at 15-17, JAxxxx-xxxx.

The random distribution of some physical indicators of the ordinary high water mark in arid regions does not mean that the ordinary high water mark itself is a poor tool for defining tributaries with a significant nexus to downstream waters. It simply means that not all indicators correlate to the active floodplain, which in arid regions most closely fits the concept of ordinary high water. TSD at 268, JAxxxx. When the focus is on the boundary of the active floodplain, the ordinary high water mark indicators are readily ascertainable, indicate regular flow, and are an effective tool for defining tributaries in the arid West.

Petitioners also cite comments by the Arizona Mining Association, Bus. Br. 60-61, States Br. 27, which similarly asserted that the Agencies are regulating features that only carry water "in direct response to flashy, but infrequent, precipitation events." AR-13951, at 8, JAxxxx; *see also* Bus. Br. 59; States Br. 26, 27, citing AR-18024, at 3, JAxxxx (pointing to Rawhide Wash, which the City of Scottsdale, Arizona, claims has recorded flow for only 18 hours over the past 15 years). But as we have explained, a channel and an ordinary high water mark form from the *ordinary* flow of water, even if the ordinary flow is flashy and infrequent. In the arid West, "short, intense rainstorms during the summer monsoons commonly drive hydrologic events," Science Report at 2-36, JAxxxx, and are neither rare nor extraordinary. And in order to satisfy the definition of "tributary" under the Rule, the ephemeral or intermittent stream must contribute flow to a primary water. For example, an intermittent stream that exists wholly within one state, is not itself a primary water, and which does not connect, directly or through another water, to a primary water, is not a "tributary" under the Rule. 80 Fed. Reg. at 37,076/1. As Business Petitioners acknowledge, Bus. Br. 59-60, such considerations have led the Agencies to identify some washes and other features as not jurisdictional under the *Rapanos* Guidance. The result would likely be the same under the Rule.

Instead of relying on extraordinary events, or very short-term transient indicators, identifying the most consistent physical indicator of the ordinary high

water mark in arid regions ensures that tributaries include only those streams that are similarly situated.

c. The Agencies' conclusions regarding ephemeral systems in the arid West are well supported by the record.

Business Petitioners wrongly assert that the scientific basis for the Agencies' conclusions regarding ephemeral streams in the arid West is flawed because the Science Report relied "almost exclusively" on the watershed of the San Pedro River, which they contend is not representative of arid regions. Bus. Br. 62-63.

The Science Report appropriately relied on data gathered about the San Pedro River basin, given the "uniquely thorough understanding" of that river and its tributaries, and given its watershed's hydrogeology, which is typical of many river basins in the southwest. Science Report at B-39, B-45, JAxxxx, xxxx. Several studies have demonstrated that ephemeral streams supply water and sediment to the San Pedro River, which influence the character of its floodplain and aquifer. *Id.* at B-39, B-46 to B-47, 2-36, JAxxxx, xxxx-xxxx, xxxx. Other studies have demonstrated that riparian plant communities along the river's mainstem depend on water derived from ephemeral streams, and that ephemeral streams heavily influence nutrients in the river. *Id.* at B-47 to B-48, JAxxxx-xxxx.

Furthermore, the Science Report explicitly addressed Petitioners' concerns about the representative nature of the San Pedro River watershed, noting that similar impacts from ephemeral tributaries have been observed in other southwestern rivers,

"increasing confidence that the observations made within the San Pedro are applicable to other southwestern river systems." *Id.* And contrary to Petitioners' characterization, the Science Report was not confined to the San Pedro River but included a specific section titled "Other Southwestern Rivers." *Id.* at B-48 to B-58, JAxxxx-xxxx. For example, the Science Report described a study of 14 ephemeral stream reaches in northeastern Arizona that reinforces the conclusion that downstream rivers are influenced and connected, often episodically, to distant upstream tributaries. *Id.* at B-49 to B-50, JAxxxx-xxxx. The Science Report also cited a study that found that significant contributions of flow in the lower Pecos River came from ephemeral tributary streams. *Id.* at B-49, JAxxxx.

Petitioners suggest that the Santa Cruz River would be a more representative choice, Bus. Br. 62-63, but the record shows otherwise. The Santa Cruz River's aquifer has been extensively pumped in the Tucson, Arizona, area, severely lowering the groundwater level. Science Report at B-54 to B-55, JAxxxx-xxxx. Petitioners attempt to compare median flow statistics from the main stems of the Santa Cruz and the San Pedro, but the focus of such a comparison should be on the entire river system, including a river's ephemeral tributaries, not just on its main stem. *Id.* at 5-8, JAxxxx. One of the comments cited by Petitioners agrees, explaining that the relevant inquiry is the effects of the "features at the distal ends of the channel network," i.e., the tributaries, "not the main stem river." Freeport McMoRan, AR-14135, at technical comments page 2, JAxxxx. Those comments go on to suggest that "the vast

data available from Walnut Gulch," a tributary of the San Pedro River, would provide "a more meaningful analysis for arid landscapes." *Id.* at 3, JAxxxx. The Science Report did just that, extensively discussing and relying on information from the Walnut Gulch Experimental Watershed research station. Science Report at B-45 to B-47, JAxxxx-xxxx.

5. The definition of "tributary" reasonably allows for man-made features and breaks.

Business Petitioners contend that the definition of "tributary" is unreasonable because it allows for breaks in the ordinary high water mark indicators. Bus. Br. 57, 63-64. Many streams lose their ordinary high water mark—for example, if wetlands border the stream channel—yet remain connected to downstream waters. The Agencies have long held the view that a jurisdictional water remains jurisdictional even if there are natural or man-made breaks in the ordinary high water mark (e.g., culverts, boulder fields, a reach where the stream flows underground), provided the ordinary high water mark can be identified upstream of the break. *See, e.g.*, Memorandum for 2006-436-FBV, AR-20876, at 1, JAxxxx (memo clarifying that breaks do not isolate the upstream portion of a tributary). The Rule does not change that view. 80 Fed. Reg. at 37,078/1; 33 C.F.R. § 328.3(c)(3). The Agencies explained that the upper limit of the tributary is generally the point at which a bed and banks and another indicator of the ordinary high water mark "cease to be identifiable." 80 Fed. Reg. at 37,077/3; RTC Topic 8 at 480, JAxxxx. If those indicators can still be

identified upgradient of a break, the indicators have not ceased to be identifiable and the stream is still a tributary upstream of the break. 80 Fed. Reg. at 37,077/3; RTC Topic 8 at 480, JAxxxx. This approach is reasonable because a break in the stream channel's characteristics may change the nature of the connection to downstream waters, but it does not remove that connection altogether. RTC Topic 8 at 479, JAxxxx.

Petitioners also assert that the Rule's treatment of breaks in the ordinary high water mark is unsupported and inconsistent with the SAB's review of the Draft Science Report. Bus. Br. 63-64. The Draft Science Report included a chapter on the factors that affect connectivity, including a section pertaining to "Human Activities and Alterations." Draft Science Report at 3-47 to 3-50, JAxxxx-xxxx. The SAB recommended that the Agencies supplement that discussion and include additional scientific references, SAB Science Report Review at 31, JAxxxx, and the final Science Report incorporates the SAB's recommendations. Science Report at 1-11 to 1-14, 2-44 to 2-47, 5-3 to 5-9, JAxxxx-xxxx, xxxx-xxxx, xxxx-xxxx. Petitioners' assertions of a lack of scientific support for the Agencies' determinations regarding breaks, and of inconsistency with the views of the SAB on this subject, are groundless.

6. The Agencies reasonably determined that some ditches may be regulated as tributaries.

The Agencies have long interpreted "waters of the United States" to include certain ditches. TSD at 74, JAxxxx (noting 1975 opinion by EPA's General Counsel

regarding jurisdictional ditches).[17] And courts have frequently affirmed the Agencies' assertion of jurisdiction over ditches.[18] Under the Rule, modified or constructed waters, including non-excluded ditches, are jurisdictional if they are a primary water or meet the definition of "tributary." 80 Fed. Reg. at 37,078/2-3. Business and State Petitioners argue that regulating some ditches as tributaries is arbitrary and capricious. Bus Br. 72-73; States Br. 27. In addition, Business Petitioners argue that the Agencies are foreclosed from regulating modified or constructed waters, including ditches, based on the *Rapanos* plurality. Bus. Br. 74-77. These arguments lack merit.

a. The record supports the Rule's assertion of jurisdiction over ditches that function as tributaries.

Tributaries have a cumulative, significant effect on the chemical, physical, and biological integrity of downstream primary waters regardless of whether they are natural, man-altered, or man-made. TSD at 243, JAxxxx. While modification or construction of tributaries can change the nature of connections within a tributary system, "it does not eliminate them." *Id.* at 259, JAxxxx; *see also id.* at 256-59, JAxxxx-xxxx (studies demonstrate that ditches and canals, like other tributaries, export

[17] As explained below, not all ditches are considered jurisdictional. *See infra* at 139-42 (addressing arguments that more ditches should be covered by the Rule).

[18] *See, e.g.*, *Deaton*, 332 F.3d 698 (roadside ditch that eventually flowed into a river and bay); *United States v. Eidson*, 108 F.3d 1336, 1341-42 (11th Cir. 1997) (drainage ditch connected to sewer drain and canal leading to Tampa Bay); *Nat'l Ass'n. of Home Builders v. U.S. Army Corps of Eng'rs*, 699 F. Supp. 2d 209 (D.D.C. 2010) (nationwide permit related to upland ditches was reasonable), *rev'd on other grounds* 663 F.3d 470 (D.C. Cir. 2011).

sediment, nutrients, and other materials downstream and provide habitat for fish and other aquatic organisms). Thus, the Rule reasonably includes certain ditches, which function as tributaries, as waters of the United States.

Because the Rule only asserts jurisdiction over ditches that meet the definition of tributary, it was unnecessary to separately define the "ditches" that are considered jurisdictional, as Business Petitioners suggest. Bus. Br. 72. "Ditch" is a colloquial term used to describe a variety of waters. For example, the Los Angeles River, which has been modified with a concrete bed and banks for much of its length, might be called a ditched river, but it is definitively a water of the United States. 80 Fed. Reg. at 37,098/1; *see also Rapanos*, 547 U.S. at 769-70 (Kennedy, J., concurring); *Los Angeles Cnty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*, 133 S. Ct. 710, 712-13 (2013) (describing the Los Angeles River as jurisdictional despite flow through a concrete channel and other engineered improvement in the river). The Agencies reasonably limited the use of the term "ditch" to 33 C.F.R. § 328.3(b)(3), where it is used with other limiting physical conditions to establish narrow, bright-line exclusions (e.g., "not a relocated tributary or excavated in a tributary"). 80 Fed. Reg. 37,097-98, JAxxxx-xxxx; *see infra* at 139-42.

State Petitioners erroneously assert that certain ditches are covered "regardless of flow," which they claim is contrary to Justice Kennedy's *Rapanos* concurrence. States Br. 27. The Rule does not regulate any ditch regardless of its flow. The Rule

excludes certain ditches with either ephemeral or intermittent flow.[19] 33 C.F.R. § 328.3(b)(3)(i)-(ii). However, assuming it meets the tributary definition, a ditch that is excavated in or relocates a tributary is regulated, regardless of whether its flow is ephemeral or intermittent (or perennial). *Id.* But a ditch must still contribute flow to a primary water; that is one of the basic elements of the tributary definition. 80 Fed. Reg. at 37,078/1. The Agencies' approach reasonably balances the exclusion with the need to ensure that tributaries, and the significant functions they provide, are covered. *Id.* at 37,098/1.

b. Ditches that are tributaries can be both a point source and a jurisdictional water.

The CWA requires permits for discharges of pollutants to waters of the United States from a "point source." 33 U.S.C. § 1362(12). Business Petitioners erroneously argue that because some modified and constructed waters, such as ditches, channels and conduits, are mentioned in the statutory definition of "point source," they can never be waters of the United States. Bus. Br. 74-77. Petitioners' construction renders CWA statutory text superfluous, is inconsistent with *Rapanos*, and is contrary to the Agencies' longstanding interpretation.

[19] State Petitioners inaccurately claim that the Agencies will identify "some ditches" based on the "historical presence of tributaries," rather than on "current conditions." States Br. 27. Petitioners misconstrue the Agencies' discussion of relocated streams. In order to determine whether or not a stream channel has been "physically moved," it is unsurprising that the Agencies may rely on maps, photos, or other evidence. 80 Fed. Reg. at 37,078/3-37,079/1.

The Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Nothing in the text of the CWA indicates that modified and constructed waters, such as ditches, cannot be waters of the United States. To the contrary, 33 U.S.C. § 1344(f)(1)(C) reflects Congress's understanding that ditches can be waters of the United States because it creates a permitting exemption for discharges associated with the "construction or maintenance of farm or stock ponds or irrigation *ditches*, or the maintenance of drainage *ditches*." (Emphasis added.) There would have been no need for Congress to create a permit exemption for discharges related to maintenance activities for some ditches if ditches could *never* be waters of the United States.

In *Rapanos*, the plurality noted that it was not clear "whether the nearby drains and ditches contain continuous or merely occasional flows of water," and ordered the lower courts to determine "whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow." 547 U.S. at 729, 757. The plurality thus understood that a ditch could be a water of the United States.

Petitioners rely on a single out-of-context sentence of the plurality, Bus. Br. 76, that compared the definitions of "point source" and "navigable water": "The definition of 'discharge' would make little sense if the two categories were significantly overlapping." *Rapanos*, 547 U.S. at 735-36. The plurality did not conclude that a ditch

can never be a water of the United States, but instead left room for a ditch to meet its concept of "navigable waters." *Id.* at 736 n. 7. And Justice Kennedy and the four dissenting Justices noted that the plurality's reasoning was based on a faulty premise about the amount of flow in waters defined as point sources. *Id.* at 772 (Kennedy, J., concurring), 802 (Stevens, J., dissenting). Thus, these five Justices rejected the plurality's suggestion that the definition of point source could be read to limit the definition of waters of the United States.[20]

EPA's longstanding interpretation that jurisdictional ditches may also meet the definition of "point source" is entitled to deference. *See* TSD at 74, JAxxxx (quoting 1975 EPA General Counsel opinion); *see e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (irrigation canals that derived and diverted water from surface streams were waters of the United States); *N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654, 673, 679 (E.D.N.C. 2003) (ditches were both waters of the United States and point sources).

B. The Agencies reasonably determined that adjacent waters are jurisdictional.

Waters of the United States under the Rule include not only tributaries of traditional navigable and other primary waters, but also "wetlands, ponds, lakes, oxbows, impoundments, and similar waters" that are "adjacent to" a primary water, a

[20] Moreover, Petitioners' reading would lead to the absurd result that a navigable-in-fact shipping channel could never be a water of the United States, because "channel," like "ditch," is mentioned in the statutory definition of point source.

tributary, or an impoundment. *See* 33 C.F.R. § 328.3(a)(6). "Adjacent," in turn, means "bordering, contiguous, or neighboring" with "neighboring" separately defined to include: (i) all waters located within 100 feet of the ordinary high water mark of a tributary, primary water, or impoundment; (ii) all waters located within the 100-year floodplain of a tributary, primary water, or impoundment and not more than 1,500 feet from the ordinary high water mark of such water; and (iii) all waters located within 1,500 feet of the high tide line of a tidally-influenced primary water, and all waters within 1,500 feet of the ordinary high water mark of a Great Lake. *See* 33 C.F.R. § 328.3(c)(1)-(2).

The record sets forth the Agencies' highly-detailed determinations that adjacent waters, as defined, "have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas based upon their hydrological and ecological connections to, and interactions with, those waters." 80 Fed. Reg. at 37,057/1-37,058/2. These determinations are well supported. *See*, *e.g.,* TSD at 169-70, 305, 312, JAxxxx-xxxx, xxxx, xxxx; Science Report at ES-11, JAxxxx; SAB Science Report Review at 4-5, JAxxxx-xxxx. Indeed, no Petitioner alleges that the Agencies misinterpreted a specific scientific publication or any other technical information in the voluminous record before them.[21]

[21] Illustrative publications include: Amoros, C., and G. Bornette. 2002. Connectivity and biocomplexity in waterbodies of riverine floodplains. *Freshwater Biology* no. 47:761-776, JAxxxx-xxxx; Junk, W. J., P. B. Bayley, and R. E. Sparks. 1989. The flood pulse

Cont.

Rather, Business and State Petitioners challenge the inclusion of: waters adjacent to nonnavigable tributaries; waters separated from jurisdictional waters by man-made or natural barriers; waters as opposed to just wetlands; and waters within specified numeric distance and floodplain limitations. Petitioners' arguments lack merit.

1. The Agencies reasonably concluded that waters adjacent to nonnavigable tributaries have a significant nexus.

The Rule's coverage of waters that are adjacent to nonnavigable tributaries does not violate Justice Kennedy's concurrence in *Rapanos* or any other precedent. *Contra* States Br. 28-29; Bus. Br. 65-66. *Rapanos* involved an assertion of CWA jurisdiction under the 1986 definition of adjacency in the context of wetlands adjacent to tributaries of traditional navigable waters. *See* 547 U.S. at 759-62 (Kennedy, J., concurring). Justice Kennedy found the treatment of wetlands adjacent to traditional

---

concept in river-floodplain systems. Pages 110-127 *in* Proceedings of the international large river symposium, Canadian Special Publication of Fisheries and Aquatic Sciences 106. D. P. Dodge, editor, Ottawa, Canada, JAxxxx-xxxx; Naiman, R. J., and H. Decamps. 1997. The ecology of interfaces: Riparian zones. Annual Review of Ecology and Systematics 28:621-658, JAxxxx-xxxx; Stanford, J. A., and J. V. Ward. 1993. An ecosystem perspective of alluvial rivers: Connectivity and the hyporheic corridor. *Journal of the North American Benthological Society* no. 12:48-60, JAxxxx-xxxx; Tockner, K., M. Pusch, D. Borchardt, and M.S. Lorang. 2010. Multiple stressors in coupled river-floodplain ecosystems. *Freshwater Biology* no. 55 (Suppl. 1):135-151. doi: 10.1111/j.1365-2427.2009.02371, JAxxxx-xxxx; Vidon, P., C. Allan, D. Burns, T. P. Duval, N. Gurwick, S. Inamdar, R. Lowrance, J. Okay, D. Scott, and S. Sebestyen. 2010. Hot spots and hot moments in riparian zones: Potential for improved water quality management. *Journal of the American Water Resources Association* no. 46:278-298, JAxxxx-xxxx. Each of these publications is in the record. *See* Notice of Filing of Corrected Certified Index to the Administrative Record (ECF No. 122) at 9 n.1.

navigable waters to be valid without the need for any additional or case-specific significant nexus determination, finding that it "rests upon a reasonable inference of ecological interconnection[.]" *Id.* at 780 (citing *Riverside Bayview*). Any shortcoming, according to Justice Kennedy, regarded inferring a significant nexus in the context of wetlands adjacent to nonnavigable *tributaries* of traditional navigable waters. He explained that the Agencies' "existing standard for tributaries … provides no such assurance," *i.e.*, evidence that nonnavigable tributaries "are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id.* at 781.

The record supporting the Rule clearly addresses the shortcoming identified by Justice Kennedy. The Technical Support Document, for example, "summarizes the key points made in the Science Report and explains the technical basis" for the Agencies' findings that adjacent waters, similarly situated in a given watershed, significantly affect the physical integrity, TSD at 306-11, JAxxxx-xxxx, the chemical integrity, *id.* at 311-15, JAxxxx-xxxx, and the biological integrity, *id.* at 315-21, JAxxxx-xxxxx, of primary waters. *See also id.* at 321-26, JAxxxx-xxxx (further summary and rationale). In light of the scientific evidence, the Agencies reasonably determined that adjacent waters, including waters adjacent to nonnavigable tributaries, have the requisite nexus. *See, e.g.,* 79 Fed. Reg. at 22,194/2.

For similar reasons, the Rule accords with *SWANCC*, which did not involve any assertion of CWA jurisdiction over adjacent wetlands. Rather, *SWANCC*

involved "ponds and mudflats" "unconnected to other waters covered by the Act." 547 U.S. at 766-67 (Kennedy, J., concurring). *See also Sackett*, 132 S. Ct. at 1370 (observing that *SWANCC* involved "an abandoned sand and gravel pit, which 'seasonally ponded' but which was not adjacent to open water"). Because the Agencies have determined that adjacent waters as defined in the Rule have a significant nexus to downstream primary waters, the Agencies' assertion of jurisdiction over waters adjacent to nonnavigable tributaries is fully consistent with *SWANCC*.

2. The Agencies reasonably concluded that adjacent waters have a significant nexus even if a physical separation exists.

The Rule reasonably retains the longstanding approach that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c) (1987); *compare with* 33 C.F.R. § 328.3(c)(1) (2015) ("The term *adjacent* means bordering, contiguous, or neighboring a [jurisdictional water], including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like."). *Rapanos* upheld this approach so long as a requisite nexus exists. Justice Kennedy explained: "Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of a hydrologic connection … that shows the wetlands' significance for the aquatic system." *Rapanos*, 547 U.S. at

786. *See also id.* at 805-06 (Stevens, J., dissenting) ("This [adjacency] definition is plainly reasonable[.]").

Justice Kennedy urged the Agencies to examine the relevant science on the relationship and downstream effects of waters and make determinations of significant nexus. That is precisely what the Agencies have now done. *See, e.g.,* TSD at 166, JAxxxx ("[T]he health of larger downstream waters is directly related to the aggregate health of waters located upstream, including waters such as wetlands that may not be hydrologically connected but function together to prevent floodwaters and contaminants from reaching downstream waters.").

Business Petitioners' (and amici's) objection to the Rule's treatment of "man-made barrier[s] *whose precise aim and effect* is to interrupt any hydrologic connection to a jurisdictional water" ignores the foregoing law and science. Bus. Br. 66 (emphasis in original); *see* Amicus Br. of ACWA, *et al.* 7, 16, 23-24; Amicus Br. of Members of Congress 7. Petitioners also disregard the aggregate nature of the significant nexus standard. Under *Rapanos*, the standard does not ask whether physically separated waters *by themselves* possess a significant nexus; the question is whether the waters "either alone *or in combination with similarly situated lands in the region*" have a requisite nexus. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (emphasis added).

Similarly, Business and State Petitioners are wrong that the Rule's approach contravenes the "ordinary meaning" of adjacency as gleaned from *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012). *See* Bus. Br. 64-65; States Br. 28. *Summit*

does not apply here for three reasons. First, *Summit* involved a different environmental statute (the Clean Air Act) and a different regulation (40 C.F.R. § 71.2), neither of which offered any definition of the term "adjacent." In contrast, the text of the Clean Water Act references adjacency jurisdiction—*see* 33 U.S.C. § 1344(g)(1); *Riverside Bayview*, 474 U.S. at 138-39—and the Rule provides definitions not only for the term "adjacent" but also one of its components, "neighboring."

Second, *Summit* relied on the plurality opinion in *Rapanos*, which it erroneously assumed constituted the "majority" opinion. 690 F.3d at 743. *See, e.g., Sackett*, 132 S. Ct. at 1370 (recognizing that in *Rapanos*, "no one rationale commanded a majority of the Court"). No court of appeals, including this Court, has interpreted *Rapanos* to limit the Agencies' authority to act *only* in accordance with the plurality opinion. *See Donovan*, 66 F.3d at 180-81 (surveying case law); *supra* at 49-50. Under the significant nexus standard, which the Rule reasonably employs, it is permissible to interpret the CWA to protect waters that have a functional relationship with downstream waters. *See, e.g.*, *Rapanos*, 547 U.S. at 780 ("[W]etlands' ecological functions vis-á-vis other covered waters are the basis for the Corps' regulation of them[.]") (Kennedy, J., concurring).

Third, the extensive record here supports the inclusion of waters even if they do not physically abut jurisdictional waters because such waters have a significant nexus with primary waters regardless of any physical separation. *See, e.g.,* 80 Fed. Reg. at 37,057/2 ("Wetlands and open waters in floodplains and riparian areas are

chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters.").

Even if *Summit* did apply here, it does not support Petitioners. Although this Court vacated and remanded EPA's determination that the facilities in that case—including gas production wells scattered "over an area of approximately forty-three square miles," 690 F.3d at 735-36—were "adjacent" to the plant at issue, the upshot of *Summit* for present purposes is that EPA there failed to give *more* (indeed controlling) consideration to proximity in interpreting the term. *See Summit*, 690 F.3d at 736, 741, 744, 751. The Rule's definition of "neighboring" gives due accord to proximity and is backed by a robust record of aquatic interconnectedness.

3. The Rule's inclusion of adjacent ponds, lakes, oxbows, impoundments, and similar waters—along with adjacent wetlands—is reasonable.

The Rule's assertion of CWA jurisdiction over adjacent open waters that are not wetlands, i.e., "ponds, lakes, oxbows, impoundments, and similar waters," 33 C.F.R. § 328.3(a)(6), is also reasonable and consistent with the law. Under the 1986 regulation, such open waters were subject to CWA jurisdiction if they were actually navigable, served as tributaries, crossed state lines, impounded other regulated waters, or if their "use, degradation or destruction … could affect interstate or foreign commerce," 33 C.F.R. § 328.3(a)(3) (1987)—commonly referred to as the "other waters" provision. Of the three Supreme Court decisions addressing the meaning of "waters of the United States," only *SWANCC* involved the assertion of CWA

jurisdiction based upon the "other waters" provision. There, the Court examined whether the "Migratory Bird Rule," an administrative interpretation of that provision, 51 Fed. Reg. at 41,217, exceeded the Corps' authority when applied to nonnavigable, isolated, and intrastate waters. *SWANCC*, 531 U.S. at 174.

SWANCC stands for the proposition that "to constitute 'navigable waters' under the Act, a *water or wetland* must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring) (quoting *SWANCC*, 531 U.S. at 167; emphasis added). *See also id.* at 767 ("[T]he connection between a *nonnavigable water* or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the *water* or wetland a 'navigable water' under the Act.") (emphasis added). Hence, during the rulemaking process, the Agencies sensibly consolidated non-wetland waters with wetlands in considering the presence or absence of a significant nexus. *See* TSD at 325, JAxxxx ("[I]t is reasonable to also assess whether non-wetland waters have a significant nexus, as Justice Kennedy's opinion makes clear that a significant nexus is a touchstone for CWA jurisdiction."). As the scientific record demonstrates, "adjacent open waters … perform many of the same functions as wetlands that impact downstream waters, including contribution of flow, water retention, and nutrient processing and retention." *Id.* at 326, JAxxxx. The SAB agreed. *See, e.g.,* SAB Proposed Rule Review at 2, JAxxxx ("[A]djacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters.").

Petitioners' assertion that the Rule's adjacent waters provision constitutes a "sweeping" change, Bus. Br. 66, is refuted by the 1986 regulation's inclusion of, *inter alia*, adjacent other waters. Moreover, Petitioners ignore the aforementioned excerpt from Justice Kennedy's *Rapanos* concurrence—preferring instead to rely on the *Rapanos* plurality opinion and its characterization of *Riverside Bayview*. As discussed *supra* at 43-50, the Agencies may interpret the statutory term "waters of the United States" differently from the plurality opinion as long as they identify a significant nexus to primary waters.

Petitioners' reliance on *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700 (9th Cir. 2007), a citizen suit, is also misplaced. *Cargill* merely illustrates adjacency jurisdiction under the 1986 regulation. At that time, only "wetlands" could qualify as waters of the United States based exclusively on the adjacency provision of the regulation. *See* 79 Fed. Reg. at 22,207/2. The *Cargill* plaintiff did not invoke the "other waters" regulatory provision and instead relied solely on adjacency jurisdiction. *See* 481 F.3d at 703. The court rejected the plaintiff's approach, reasoning that a *court* lacked authority to find non-wetland waters to be adjacent because "[u]nder the controlling regulations, … the only areas that are defined as waters of the United States by reason of adjacency to other such waters are 'wetlands.'" *Id.* at 705. Thus, nothing in *Cargill* barred the Agencies from consolidating the treatment of wetlands and ponds, lakes, oxbows, impoundments, and similar waters.

4. The Agencies reasonably defined the outer limits of adjacent waters.

Petitioners' remaining objections relate to the geographic reach of adjacency. Addressing adjacent waters within a floodplain, Business Petitioners contend that the Agencies failed to provide "good reasons" to support the 1,500-foot distance limitation. Bus. Br. 68 (citations omitted); *see also id.* at 72 (alleging "no evidentiary basis" for "the 1,500-foot adjacency boundary"); Amicus Br. of Wash. Legal Found. 23-24 (similar assertion). State Petitioners complain that the numeric distance limitations are based "solely on geographical proximity" without regard to significant nexus. States Br. 31 (internal quotation marks omitted). Both sets of Petitioners also challenge the use of the "100-year floodplain" in 33 C.F.R. § 328.3(c)(2). *See* Bus. Br. 67-68; States Br. 29.

These arguments fail.

a. The numeric distance limitations are reasonable.

As an initial matter, the Agencies' interpretation of adjacency-based CWA jurisdiction has never been unbounded, and nothing in Justice Kennedy's *Rapanos* concurrence, *Riverside Bayview*, or *SWANCC* precluded the Agencies from further clarifying the boundaries of adjacent waters through numeric distance limitations. Indeed, "'[a]djacen[cy]' … has always included an element of reasonable proximity." 79 Fed. Reg. at 22,207/3-22,208/1 (citing *Riverside Bayview*, 474 U.S. at 133-34). *See also* 80 Fed. Reg. at 37,089/2 ("The agencies have always recognized that adjacency is

bounded by proximity."); 42 Fed. Reg. 37,122, 37,128 (July 19, 1977) (CWA jurisdiction extends to "any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system"). It is well within the Agencies' rulemaking authority to identify a point on the continuum at which: (a) waters are appropriately regarded as jurisdictional based on adjacency; and (b) waters may be regarded as jurisdictional only after a case-specific analysis.

Science drove the Agencies' consideration of adjacency jurisdiction—including its geographic reach. The Agencies initially proposed that "neighboring" be defined to include, *inter alia*, "waters located within the riparian area or floodplain" of a jurisdictional water. 79 Fed. Reg. at 22,263/2 (proposing alternatives and requesting comment). The Draft Science Report noted, for example, that "wetlands and open waters in floodplains of streams and rivers and in riparian areas … have a strong influence on downstream waters." *Id.* at 22,196/2. Indeed, "[t]he body of literature documenting connectivity and downstream effects was *most abundant* for perennial and intermittent streams, *and for* riparian/floodplain wetlands." TSD at 104, JAxxxx (emphasis added).

That robust scientific support remained unchanged when the Agencies established specific numeric distance limitations for adjacent waters in the final Rule. The final Science Report, like its draft predecessor, presented clear evidence that

wetlands and open waters located in floodplains or riparian areas[22] are "physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter." Science Report at ES-2 to ES-3, JAxxxx-xxxx; *see also* TSD at 126-27, JAxxxx-xxxx. In deciding to narrow the proposed definition, the Agencies focused on a number of factors, including where the scientific support was the strongest:

- For waters within 100 feet of the ordinary high water mark of a jurisdictional water, 33 C.F.R. § 328.3(c)(2)(i), the Agencies observed that "[m]any studies indicate that the primary water quality and habitat benefits will generally occur within a several hundred foot zone of a water." 80 Fed. Reg. at 37,085/2. The Agencies noted "clear evidence" that waters located close to jurisdictional waters, whether outside the floodplain or in the absence of floodplain (as with small or incised streams), "perform critical processes and functions." *Id.*
- Likewise, for adjacent waters within the 100-year floodplain, 33 C.F.R. § 328.3(c)(2)(ii), the Agencies established the 1,500-foot distance

[22] The Proposed Rule's reference to riparian areas was dropped since "as a general matter, waters in the riparian area will also be in the 100-year floodplain." 80 Fed. Reg. at 37,082/3.

limitation, in part, "to protect vitally important waters within a watershed." 80 Fed. Reg. at 37,085/3. The Agencies explained that "[d]istance also affects connectivity between non-floodplain and riparian/floodplain wetlands and downstream waters" and the limit selected "ensure[s] that the waters are providing similar functions to downstream waters and … the waters are located comparably in the landscape such that the agencies reasonably judged them to be similarly situated." TSD at 150, 172, JAxxxx, xxxx.[23]

- And with respect to waters within 1,500 feet of a high tide line or the ordinary high water mark of a Great Lake, 33 C.F.R. § 328.3(c)(2)(iii), the Agencies noted that "[m]any tidally-influenced waters do not have floodplains" and "tidally-influenced traditional navigable waters, the territorial seas, and the Great Lakes are generally much larger in size than other jurisdictional waters." 80 Fed. Reg. at 37,085/3, 37,086/2. The Agencies found that a 1,500-foot distance limit "capture[s] most wetlands and open waters that are so closely linked to these waters that

[23] Only waters within the floodplain up to 1,500 feet are jurisdictional under this provision of the definition of "neighboring." If the floodplain of a tributary is smaller than 1,500 feet, as is the case for most headwater streams and ephemeral streams, then jurisdiction under this provision extends only to the extent of the floodplain. 80 Fed. Reg. at 37,081/1.

they can properly be considered adjacent as neighboring waters." 80 Fed. Reg. at 37,086/2.

All the numeric distance limitations are supported by science. Petitioners are incorrect that the SAB "rejected any distance-based approach." States Br. 54; *see also* Amicus Br. of Nat'l Rural Water Ass'n 16 (similarly incorrect assertion). The SAB instead advised that "adjacent waters and wetlands … not be defined *solely* on the basis of geographical proximity or distance to jurisdictional waters." SAB Proposed Rule Review at 3, JAxxxx (emphasis added). The Rule asserts CWA jurisdiction over adjacent waters based upon the existence of a significant nexus, not "solely" because of distance. Furthermore, as the Agencies reasonably explained, "science does not provide bright lines" and thus "the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them." TSD at 93, JAxxxx.

Though science supports the numeric distance limitations for adjacent waters, the Agencies reasonably considered other relevant factors. The Rule's core objective is to establish clear boundaries. *See* 80 Fed. Reg. at 37,082/1 ("In light of the [public] comments, the science, the agencies' experience, and the Supreme Court's consistent recognition of the agencies' discretion to interpret the bounds of CWA jurisdiction, the agencies have made some revisions in the final rule designed to more clearly establish boundaries on the scope of 'adjacent waters.'"); *id.* at 37,089/1 ("[I]t is important to promulgate a rule that not only protects the most vital of our Nation's

waters, but one that is practical and provides sufficient boundaries so that the public reasonably understands where CWA jurisdiction ends.").

Indeed, scores of comments sought greater clarity. RTC Topic 3 at 18, JAxxxx ("The dominant request was to identify specific limits."). "[M]any commenters" suggested the use of the 100-year floodplain in particular. *Id.* at 19, JAxxxx. *See also, e.g., id.* at 33, JAxxxx (comment that the 100-year floodplain is "[t]he most obvious choice"). The Agencies reasonably found these comments persuasive, 80 Fed. Reg. at 37,082/2-3, particularly given that the Agencies did not determine that floodplain waters located more than 1,500 feet from the ordinary high water mark of a jurisdictional water would *never* be found jurisdictional but rather established that such waters would be analyzed on a case-specific basis for significant nexus. *Id.* at 37,085/3.

It was eminently reasonable for the Agencies to consider the need for a "practical and implementable rule" as informed by their technical expertise and experience. 80 Fed. Reg. at 37,085/3. As the D.C. Circuit explained in the context of whether certain activities constituted the "discharge of any pollutant," 33 U.S.C. § 1311(a), because the Act does not draw bright lines with regard to whether certain activities are discharges, "a reasoned attempt by the agencies to draw such a line would merit considerable deference." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1405 (D.C. Cir. 1998). *See also infra* at 116, 120 (discussing *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001)). Neither the Act nor the science

establishes bright geographic lines within a watershed. The Rule's use of numeric distance limitations for adjacent waters, as supported by science and refined by a host of sensible considerations, should therefore be upheld.

b. The 100-year floodplain limitation is reasonable.

Petitioners premise their attack on the Rule's use of the 100-year floodplain on a misunderstanding of connectivity—the degree of connection among aquatic features. 79 Fed. Reg. at 22,195/3; Science Report at ES-6, JAxxxx. The "100-year flood" refers to the flow volume with a specific probability of occurring annually (0.01), and the "100-year floodplain" is the spatial extent of such an event. 80 Fed. Reg. at 37,081/1. Events of this probability can and do occur more than once every 100 years and last for many days, and larger, lower probability events may inundate an even larger area. *See, e.g.*, Science Report at 2-5, JAxxxx ("100-year floodplain can but need not coincide with the geomorphic floodplain."). As the SAB explained, less frequent, high intensity flood events, such as those occurring on a 100-year interval, affect the physical connectivity of wetlands and open waters in a floodplain to downstream waters by storing water for later release, attenuating the volume of water flowing downstream, and moving and depositing sediment and wood. SAB Science Report Review at 41, JAxxxx; *see also* Science Report at ES-2 to ES-3, 1-8, 1-19, JAxxxx-xxxx, xxxx, xxxx. The spatial scale of these events "tends to be extensive, dictated largely by topography, and covering all available habitats." SAB Science Report Review at 41, JAxxxx.

Petitioners are also wrong in their insistence that the scope of adjacent waters should depend on flooding considerations alone. Bus. Br. 67; States Br. 29. The concept of flood probability in no way describes other connections floodplain wetlands and open waters may have to the nearby channel, such as hydrologic connections through flows overland or beneath and alongside the stream bed. *See* 79 Fed. Reg. at 22,207/1-2; TSD at 124-25, 134-35, 297, 300, 306, 309, JAxxxx-xxxx, xxxx-xxxx, xxxx, xxxx, xxxx, xxxx (describing bidirectional connections floodplain waters have with stream channels). Indeed, the Supreme Court rejected similar arguments in *Riverside Bayview* and upheld the Agencies' scientific judgment that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment *even when the moisture creating the wetlands does not find its source in the adjacent bodies of water.*" *Riverside Bayview*, 474 U.S. at 134-35 (emphasis added).

Petitioners do not—and cannot—provide factual record support for their inaccurate assertion that waters in a floodplain have "[a]t most" an insubstantial effect on water quality. Bus. Br. 68; *see also* States Br. 29 (speculating that "hydrologic connection is surely too insubstantial"). The Agencies, in contrast, considered the extensive scientific literature and technical data supporting their conclusion that waters in floodplains prevent flooding, support river food webs and provide important habitat for river species, and otherwise are chemically, physically, and biologically integrated with downstream water quality. *See, e.g.,* 80 Fed. Reg. at

37,063/1-2; TSD at 350, JAxxxx; Science Report at ES-2, ES-3, 2-7, JAxxxx, xxxx, xxxx; *supra* at 85 n.21 (illustrative scientific publications).[24]

Therefore, the Rule's interpretation of "waters of the United States" to include adjacent waters, as defined, is reasonable.

C. Interstate waters have always been waters of the United States, independent of their navigability.

The Rule retains interstate waters as one of the primary waters included within waters of the United States. 33 C.F.R. § 328.3(a)(2). Business and State Petitioners argue that interstate waters can only be considered waters of the United States if they are either traditional navigable waters themselves or have a significant nexus to such waters. Bus. Br. 55-56; States Br. 33-34. This argument is untimely; interstate waters have been categorically protected under the CWA and its predecessors for many decades, regardless of their navigability, and the Rule does not change their status. But even if timely, Petitioners' argument fails.

1. Petitioners' challenge is untimely.

Interstate waters have long been a distinct category of waters of the United States under the Agencies' regulations, along with traditional navigable waters and the territorial seas. *See* 33 C.F.R. § 323.2(a)(4) (1978) (identifying jurisdictional "[i]nterstate waters and their tributaries, including adjacent wetlands"); *id.* at §

[24] Petitioners also challenge the Rule's use of the 100-year floodplain in the context of case-specific waters, 33 C.F.R. § 328.3(a)(8); these arguments are addressed *infra* at 118-121.

323.2(a)(5) (1978) (distinguishing between waters that are "part of a tributary system to interstate waters" and waters that are part of the tributary system "to navigable waters of the United States"). The specific regulatory text regarding interstate waters has not changed since 1982, although the Corps consolidated and renumbered its regulations in 1986. *Compare* 33 C.F.R. § 323.2(a)(2) (1983) (waters of the United States include "[a]ll interstate waters including interstate wetlands") *with* 33 C.F.R. § 328.3(a)(2) (1987) (same) *and* 33 C.F.R. § 328.3(a)(2) (2015) (same).

Because petitions for review of final CWA rules must be filed within 120 days of promulgation, 33 U.S.C. § 1369(b)(1), and the Rule did not change the long-standing language of section 328.3(a)(2), which includes interstate waters as a separate category of waters of the United States, the time to challenge that portion of the regulation is long past. *Ohio Pub. Interest Research Grp., Inc. v. Whitman ("Ohio PIRG")*, 386 F.3d 792, 799-800 (6th Cir. 2004) (denying petition for review as time-barred).

While it is true that an agency may create an opportunity for renewed comments on an established regulation, thus restarting the time period for judicial review, the Agencies did not do so here. The relevant inquiry is whether the agency has given any "indication that [it] was reconsidering" the regulation. *Id.* at 800. In *Ohio PIRG*, EPA sought comment on whether state permit programs implemented under the Clean Air Act complied with the agency's interpretation of that statute. *Id.* The agency did not, however, "signal its reconsideration of its previous rule

interpreting" that statute. *Id.* Thus, this Court held that a challenge to the interpretation was time-barred.

Here, the Agencies were very clear in the proposal that the Rule "does not change" the Agencies' jurisdiction over interstate waters. 79 Fed. Reg. at 22,200/2. Although some comments addressed interstate waters, the Agencies' response was that the Rule effected no change with respect to such waters. RTC Topic 10 at 269, JAxxxx. As the Proposed Rule, the response to comments, and the Rule all demonstrate, the Agencies did *not* reconsider the inclusion of interstate waters, and did not "reopen the question" of interstate waters for purposes of judicial review. *Ohio PIRG*, 386 F.3d at 800 (*quoting Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397-98 (D.C. Cir. 1989)); *Nat'l Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135, 145 (D.C. Cir. 1998) ("The mere act of repeating old reasons for an old policy … is not the equivalent of reconsidering, and therefore reopening, the old issue.").

2. Interstate waters are waters of the United States, independent of their navigability.

If the Court reaches the merits, it should uphold the protection of interstate waters under the CWA whether or not they have a connection to traditional navigable waters. This is required by the language and structure of the Act, but to the extent the statute is ambiguous the Court should defer to the Agencies' longstanding

interpretation, which is permissible, reasonable, and consistent with Supreme Court precedent. *See generally* TSD at 197-223, JAxxxx-xxxx.

Under *Chevron* step one, courts evaluate whether a statutory term is ambiguous by looking at its plain language, as well as the statute's structure and history. *See, e.g., First City Bank v. Nat'l Credit Union Admin. Bd.*, 111 F.3d 433, 437 (6th Cir. 1997). Here, the structure, history, and purpose of the Clean Water Act confirm that it unambiguously includes nonnavigable interstate waters within its scope.

Until 1972, the predecessors of the Act explicitly protected interstate waters independent of their navigability. The 1948 statute declared that the "pollution of interstate waters" and their tributaries is "a public nuisance and subject to abatement ...." 33 U.S.C. § 466a(d)(1) (1952) (codifying Pub. L. No. 80-845 § 2(d)(1), 62 Stat. 1156 (1948)). Interstate waters were defined without reference to navigability: "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." 33 U.S.C. § 466i(e) (1952) (codifying Pub. L. No. 80-845 § 10(e), 62 Stat. 1161 (1948)). In 1961, Congress broadened the 1948 statute and made the pollution of "interstate or navigable waters" subject to abatement, retaining the definition of "interstate waters." 33 U.S.C. § 466g(a) (1964) (codifying Pub. L. No. 87-88 § 8(a), 75 Stat. 204, 208 (1961)). In 1965, Congress required States to develop water quality standards for "interstate waters or portions thereof within such State." 33 U.S.C. § 1160(c)(1) (1970) (codifying Pub. L. No. 89-234 § 5, 79 Stat. 903, 907 (1965)); *see also* 33 U.S.C. § 1173(e) (1970) (retaining definition of interstate waters).

In 1972, Congress abandoned the "abatement" approach initiated in the 1948 statute in favor of a permitting program for discharges of pollutants, which Congress defined as "any addition of any pollutant to navigable waters . . . ." 33 U.S.C. §§ 1311(a), 1362(12). Business Petitioners contend that the removal of the term "interstate waters" in 1972 shows that Congress intended to make interstate waters a subset of navigable waters, and to protect them only to the extent that they are navigable. Bus. Br. 55. But that argument ignores 33 U.S.C. § 1313(a), also added in 1972, which provided that pre-existing water quality standards for interstate waters remained in effect, unless EPA determined that they were inconsistent with any applicable requirements of the pre-1972 version of the Act. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 709 (6th Cir. 2016) (internal citation omitted) ("a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous"). Through section 1313(a), Congress continued to protect the water quality of interstate waters without reference to their navigability.

Furthermore, Petitioners' reading ignores the purpose of the 1972 amendments, which was to expand, not narrow, federal protections. The 1972 amendments were a reaction to the shortcomings of the prior versions of the statute and the limitations of the Rivers and Harbors Act, also known as the Refuse Act.[25]

[25] Enacted in 1899, the Refuse Act prohibits the discharge of refuse into any "navigable water of the United States," or into any tributary of any navigable water. 33 U.S.C. § 407. The term "navigable water of the United States" is defined as waters

Cont.

See S. Rep. No. 414, 92nd Cong., 1st Sess. 7 (1972) (the existing mechanisms for abating pollution "have been inadequate in every vital respect"). The House and the Senate conferees explained that they "fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92nd Cong., 2d Sess. 144 (1972); *see also* H.R. Rep. No. 911, 92nd Cong., 2d Sess. 131 (1972).[26] *See also Riverside Bayview*, 474 U.S. at 133 (the 1972 amendments extend to "at least some waters that would not be deemed 'navigable' under the classical understanding of that term").

The Supreme Court has recognized that federal law, as it existed prior to the 1972 amendments, protected nonnavigable interstate waters via the federal common law of nuisance. In *Illinois v. City of Milwaukee*, the Court held that Illinois could bring a nuisance claim against the City of Milwaukee under federal common law because "federal, not state, law . . . controls the pollution of interstate or navigable waters" and because the predecessors to the CWA did not displace such actions "to abate pollution of interstate or navigable waters." 406 U.S. 91, 102, 104 (1972). Ten years

---

that are "subject to the ebb and flow of the tide and/or that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4.

[26] The version passed by the House defined navigable waters as "the navigable waters of the United States," H.R. 11896, 92nd Cong., 2d Sess., § 502(8) (1971), but that version was rejected and the definition as enacted refers to "the waters of the United States." 33 U.S.C. § 1362(7).

later, the Court revisited the issue and concluded that the 1972 amendments "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317 (1981). Thus, although the 1972 amendments superseded the federal common law of nuisance as a means to protect interstate waters in favor of a statutory "all-encompassing program of water pollution regulation," *id.* at 318, they did not curtail the scope of protected waters.

Even if the history, structure, and purpose of the CWA do not unambiguously resolve the issue, this Court under *Chevron* step two should defer to the Agencies' interpretation that interstate waters remain independently protected after the 1972 amendments. As the Agencies have explained, the effects of water pollution in one state can adversely affect the quality of waters in another, "particularly if the waters involved are interstate." TSD at 216, JAxxxx (quoting 42 Fed. Reg. 37,122, 37,127/3 (July 19, 1977)). Protecting interstate waters as a separate category of waters of the United States is therefore "consistent with the Federal government's traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries." TSD at 216, JAxxxx.

State Petitioners argue that Justice Kennedy's opinion in *Rapanos* requires a significant nexus to navigability, even for interstate waters. States Br. 33-34. But *Rapanos* did not involve interstate waters. Rather, as Justice Kennedy explained, that

case called upon the Court to interpret the application of the CWA to traditional navigable waters, "tributaries of those waters and, of particular relevance here, wetlands adjacent to those waters or their tributaries." 547 U.S. at 760-61. Justice Kennedy specifically identified the portions of the 1986 regulation that were before the Court as 33 C.F.R. §§ 328.3(a)(1), (a)(5), and (a)(7) (1987). *Id.* at 761. Notably absent from this list is subsection (a)(2), interstate waters.[27]

Nor were interstate waters at issue in *SWANCC*, where the Court stated numerous times that it was addressing nonnavigable *intrastate* waters. 531 U.S. at 166, 169, 171, 172; *see also id.* at 171 (describing isolated ponds "wholly located within two Illinois counties"). The *SWANCC* Court noted that only 33 C.F.R. § 328.3(a)(3) was at issue: waters that could affect interstate commerce. *Id.* at 163. If State Petitioners were correct that interstate waters must have a significant nexus to traditional navigable waters in order to be protected under the CWA, then *SWANCC* need only have described the waters at issue as nonnavigable. Instead, the Court repeatedly said the waters were neither navigable *nor* interstate. That reference only has meaning if

[27] As explained *supra* at 7-9, the 1986 definition of waters of the United States included 328.3(a)(1) traditional navigable waters; 328.3(a)(2) interstate waters; 328.3(a)(3) other waters, the use, degradation, or destruction of which could affect interstate commerce; 328.3(a)(4) impoundments of jurisdictional waters; 328.3(a)(5) tributaries of waters identified in (a)(1) through (a)(4); 328.3(a)(6) the territorial seas; and 328.3(a)(7) wetlands adjacent to waters identified in (a)(1) through (a)(6). 33 C.F.R. § 328.3(a) (1987).

interstate waters are separately protected, independent of their relationship to traditional navigable waters.

Business Petitioners contend that if nonnavigable interstate waters are protected, then the Rule extends to any isolated pond or intermittent trickle that happens to cross a state line. Bus Br. 56. This alleged over-reach is supposedly compounded because tributaries of interstate waters and waters adjacent to interstate waters are also protected. *Id.* But just as interstate waters have always been considered waters of the United States, so too have their tributaries and adjacent wetlands. *See, e.g.*, 33 C.F.R. § 323.2(a)(4) (1978) (covering "[i]nterstate waters and their tributaries, including adjacent wetlands"). Moreover, no Petitioner provides any specific example of alleged over-reach on the basis of interstate waters and the Agencies are unaware of any such example in the million-plus comments on the Proposed Rule.

Business Petitioners also assert that the Agencies' interpretation fails to "carry into effect the will of Congress." Bus. Br. 56, quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976). But *Ernst* stands for the unremarkable proposition that the scope of a regulation cannot exceed the power granted by Congress. The Agencies agree, and have shown that CWA protection of interstate waters, regardless of their navigability, is fully consistent with both Congress's intent and the Agencies' authority.

III. The Agencies reasonably concluded that certain waters should be subject to a case-specific analysis of significant nexus.

The Rule includes two narrow categories of waters that may be found jurisdictional based on a case-specific analysis of significant nexus ("case-specific waters"). 33 C.F.R. § 328.3(a)(7), (8). These waters will be found jurisdictional only if, either alone or in combination with similarly situated waters, they are determined to have a significant effect on the chemical, physical, or biological integrity of a primary water. *Id.* § 328.3(c)(5). As explained below, the Rule's application of the significant nexus standard to case-specific waters is based on the text of the CWA, Supreme Court case law, science, public comment, and the Agencies' technical expertise and experience. 80 Fed. Reg. at 37,060/2.

All Petitioners challenge some aspects of the case-specific categories of waters, with some asserting their scope is too restrictive and others asserting they are too expansive. Business and State Petitioners also challenge one aspect of the definition of "significant nexus" and one criterion for assessing whether a case-specific water demonstrates a significant nexus. Their arguments are misplaced, however, as the Agencies reasonably designated what waters are subject to a significant nexus analysis and the relevant criteria for making such a determination.

A. The Agencies appropriately confined the scope of case-specific waters to waters that potentially have a significant nexus with primary waters.

Waterkeeper Petitioners contend that the Agencies should have "consider[ed]" retaining the provision of the 1986 regulation that defined "waters of the United States" to include all other waters "the use, degradation, or destruction of which could affect interstate or foreign commerce," and that the Agencies failed to provide a valid reason for not retaining that provision. Waterkeeper Br. 36 (citing 33 C.F.R. § 328.3(a)(3) (1987)). Petitioners ignore both Supreme Court precedent and the Agencies' rationale for identifying case-specific waters.

Although the Agencies retained much of the structure of the prior regulatory interpretation of the term "waters of the United States," the Proposed Rule included a "substantial change": i.e., the deletion of the provision defining jurisdiction based on effects on interstate or foreign commerce. 79 Fed. Reg. at 22,192/2. This proposed change was in response to *SWANCC* and Justice Kennedy's concurring opinion in *Rapanos*. *Id.* In both cases, it was the significant nexus to a traditional navigable water that informed the Court's decision as to whether the waters at issue were intended by Congress to be protected. *SWANCC*, 531 U.S. at 167 (citing *Riverside Bayview*, 474 U.S. at 131-32 n.8); *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring) ("Absent a significant nexus, jurisdiction under the Act is lacking.").

Contrary to Petitioners' assertion, Waterkeeper Br. 37-38, the Agencies have not misread *SWANCC*. Although *SWANCC* did not vacate subsection (a)(3) of the

1986 regulation, it found the Agencies' interpretation of that subsection to be unsupported because the waters at issue were alleged to be jurisdictional based solely on their use by migratory birds, and not because of a significant nexus to a downstream primary water. *SWANCC*, 531 U.S. at 172. *See* TSD at 77-78, JAxxxx-xxxx. As discussed above, the significant nexus standard, as refined in Justice Kennedy's concurrence in *Rapanos*, is an important element of the Agencies' interpretation of the CWA. 80 Fed. Reg. at 37,056/2-3, 37,057/2-3. Indeed, the "fundamental premise" of the Rule is that for a water to be a "water of the United States" it must have a significant effect on the chemical, physical, or biological integrity of a primary water. RTC Topic 4 at 168, JAxxxx; *see also* 80 Fed. Reg. at 37,055/2. Accordingly, it was reasonable that the Agencies defined the category of case-specific waters based on their potential significant nexus with a primary water. RTC Topic 4 at 26-27, 168-69 JAxxxx-xxxx, xxxx-xxxx; TSD at 30, JAxxxx.

B. The geographic scope of waters subject to a case-specific significant nexus analysis is reasonable and supported by the record.

The first category of case-specific waters consists of waters in specific regions of the country that are considered "similarly situated" by rule because they function alike and are typically found sufficiently close together: prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. 33 C.F.R. § 328.3(a)(7). The second category consists of waters that are within the 100-year floodplain of a primary water or within 4,000 feet of the high

tide line or ordinary high water mark of a primary water, impoundment, or tributary. *Id.* at § 328.3(a)(8). Waters in this second category are not considered "similarly situated" by rule but can be determined to be so on a case-specific basis. *Id.*; *see also* 80 Fed. Reg. 37,088/1. The case-specific waters described in subsections (a)(7) and (a)(8) are only *potentially* jurisdictional; in order to actually be found jurisdictional, a case-specific determination of significant nexus must be reached.

The Supreme Court has made clear that CWA jurisdiction is not without limit. *Riverside Bayview*, 474 U.S. at 132-33; *Rapanos* 547 U.S. at 768 (Kennedy, J., concurring). By limiting case-specific determinations to the five categories of similarly situated waters identified in subsection (a)(7), and to waters within either the 100-year floodplain of a primary water or within 4,000 feet of a jurisdictional water as set forth in subsection (a)(8), the Agencies appropriately balanced the goal of protecting waters that science shows may have a significant nexus with the goal of providing greater regulatory certainty.

1. The geographic scope of case-specific waters is consistent with the Agencies' statutory authority under the CWA.

Associational Petitioners do not challenge the 100-year floodplain and 4,000 foot boundaries for case-specific waters *per se*, but they do contend that, in setting a geographic limit of any sort, the Agencies unlawfully relinquished their duty under the CWA to protect waters of the United States because the Agencies "acknowledge that, as with any meaningful boundary, some waters that could be found jurisdictional lie

beyond the boundary and will not be analyzed for significant nexus." 80 Fed. Reg. at 37,090. *See* Ass'n Br. 44-45; *see also* Waterkeeper Br. 54-55. Under this view, the Agencies could never select an outer geographic limit for consideration of a case-specific significant nexus given the current body of science. But Justice Kennedy recognized that where there is no "precise boundary" establishing where waters become significantly intertwined, it is reasonable for the Agencies to reach conclusions based on "the majority of cases." *Rapanos*, 547 U.S. at 772-73. The Agencies' experience has shown that "the vast majority of waters where a significant nexus has been found, and which are therefore important to protect to achieve the goals of the Act, are located within the 4,000 foot boundary." 80 Fed. Reg. at 37,089; *see also infra* at 117-124 (discussing rationale for subsection (a)(8) distance limits). Thus, the Agencies reasonably concluded that "the value of enhancing regulatory clarity, predictability and consistency" through distance limits for subsection (a)(8) waters "outweigh the likelihood that a distinct minority of waters that might be shown to meet the significant nexus test will not be subject to analysis." 80 Fed. Reg. at 37,090/3-37,091/1.

The distance limitations for subsection (a)(8) waters—non-adjacent waters in the 100-year floodplain of a primary water or within 4,000 feet of a primary water, impoundment, or tributary—are distinguishable from the lines drawn in the cases cited by Petitioners. Ass'n Br. 40-41. Here, the Agencies acted within their discretion to interpret the statutory term "waters of the United States," and there was no

attempt to exclude from the definition any waters that "clearly meet[]" that statutory term. *See League of Wilderness Defs./Blue Mountains. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002) (CWA does not authorize the Administrator to exempt point sources from permitting requirements). To the contrary, the 4,000 foot boundary provides regulatory consistency at a reasonable point in the connectivity continuum in light of the science and the Agencies' experience. Moreover, Petitioners fail to recognize that the 4,000 foot boundary does not apply to waters in the 100-year floodplain of a primary water, which means that such waters, which are more likely to have a significant nexus precisely because they are in the floodplain, may be assessed on a case-specific basis. 80 Fed. Reg. at 37,088. Nor do they acknowledge that the distance limitations in subsection (a)(8) do not apply to the types of case-specific waters that are identified in subsection (a)(7), 33 C.F.R. § 328.3(a)(7), or the categories of jurisdictional waters in subsections (a)(1)-(6), 33 C.F.R. § 328.3(a)(1)-(6).

An agency's "decision to make ease of administration and enforceability a consideration in setting its standard for regulatory relief" is permissible provided that the standard set is reasonable. *WorldCom,* 238 F.3d at 459. "[B]right line tests are a fact of regulatory life." *Macon Cnty. Samaritan Mem'l Hosp. v. Shalala*, 7 F.3d 762, 768 (8th Cir. 1993). There is no general prohibition against an agency using bright lines, provided they are "founded on considerations rationally related to the statute" being administered. *Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970). Here, both science and the Agencies' experience support the distance limits for case-specific

waters in subsection 328.3(a)(8) and ensure that "truly important waters" will be protected. 80 Fed. Reg. at 37,088-89; *see infra* at 117-24 (discussing support for distance limitations).

2. The record supports the Rule's specific distance limitations for purposes of case-specific significant nexus determinations.

State, Business, and Waterkeeper Petitioners all assert that the Agencies acted arbitrarily in establishing the distance limitations of the 100-year floodplain of a primary water and 4,000 feet from other jurisdictional waters in the second category of waters subject to a case-specific significant nexus analysis under 33 C.F.R. § 328.3(a)(8). States Br. 53-54; Bus. Br. 70-72; Waterkeeper Br. 54-55. While the State and Business Petitioners complain that the distance limitations are over-inclusive and the Waterkeeper Petitioners complain that the limitations are under-inclusive, they all incorrectly contend that the lines drawn by the Agencies are "conclusory" and that there is "nothing in the record" to support them. States Br. 53; *see also* Bus. Br. 72; Waterkeeper Br. 54-55.

It is well-recognized that agencies may "employ bright-line rules for reasons of administrative convenience, so long as those rules fall within a zone of reasonableness and are reasonably explained." *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 22 n.20 (D.C. Cir. 2009). *See also Beazer E., Inc. v. U.S. EPA Region III*, 963 F.2d 603, 609 (3d Cir. 1992) (noting that "in the complex area of environmental regulation, the [agencies] must create bright lines to separate prohibited and permissible activity," and

courts "defer to this line-drawing provided the interpretation is both reasonable and consonant with Congress' intent"). This Court has similarly recognized that administrative lines "need not be drawn with mathematical precision." *All. for Cmty. Media v. FCC*, 529 F.3d 763, 780 (6th Cir. 2008) (quoting *Kirk v. Sec'y of Health & Human Servs.*, 667 F.2d 524, 532 (6th Cir. 1981)).

Here, the Proposed Rule would have subjected any water not specifically covered or excluded anywhere in the single point of entry watershed of a primary water to a significant nexus determination. The Agencies recognized the potential breadth of this category and sought comment regarding how to achieve greater clarity and predictability as to the jurisdictional status of case-specific waters. 79 Fed. Reg. at 22,192-93. Numerous commenters urged some limitation. 80 Fed. Reg. at 37,090/1. The Agencies candidly acknowledged the difficulty of identifying "any particular bright line delineating waters that have a significant nexus from those that do not." *Id.* Instead, they considered the known science regarding connectivity of waters in floodplains and non-floodplains, and their experience in making significant nexus determinations, and arrived at reasonable bright lines that provide the administrative certainty sought by commenters.

100-year floodplain. Business Petitioners concede the relevance of using floodplains as a boundary "in general" but challenge the use of the 100-year floodplain "in particular." Bus. Br. 71. The Agencies' rationale and the record show that Petitioners are wrong.

As explained *supra* at 94-97 and 100, there is a significant body of science that supports the Agencies' conclusion that waters in floodplains significantly affect the integrity of primary waters, and a flood interval is not dispositive of the degree of connectivity between waters in a floodplain and primary waters. In addition, various scientific studies that form the basis for the Science Report specifically examined 100-year rain or flood events and their influence on downstream waters. *See, e.g.*, Acreman and Holden, *How Wetlands Prevent Floods*, Wetlands (2013) 33:777, JAxxxx (noting storage capacity measured in specific wetlands in North Dakota following 100-year frequency rainfall event); Mathews, *North American prairie streams as systems for ecological study,* Journal of the N. Am. Benthological Soc'y (1988), 7:391 JAxxxx (discussing potential changes to channel geometry, differences in suspended load, and water chemistry from a single 100+ year event); Osterkamp and Savard, *Recharge estimates using a geomorphic/distributed-parameter simulation approach, Amargosa River Basin*, Journal of the Am. Water Res. Ass'n (1994) 30:493-507, JAxxxx-xxxx (study of extreme rainfalls and rare floods and semi-arid areas versus other areas of North America); *see also* Science Report at 4-4 to 4-8, 4-15, 4-19 to 4-20, JAxxx-xxxx, xxxx, xxxx-xxxx (describing wetlands and open waters in floodplains). Moreover, the 100-year interval is commonly used in scientific literature. Science Report at 2-5, JAxxxx.

The Agencies further recognized the utility of using the 100-year floodplain because the Federal Emergency Management Agency ("FEMA") has generally mapped that floodplain for large portions of the United States, and those maps are

publicly available, well-known, and well-understood. 80 Fed. Reg. at 37,083/1; TSD at 300-01, JAxxxx-xxxx.[28] For precisely that reason, many commenters specifically requested that references to the term "floodplain" be revised to reflect the 100-year floodplain mapped by FEMA. *See, e.g.*, Comments of Ass'n of Cal. Water Agencies, AR-12978, at 13, JAxxxx; Wash. Cnty. Water Conservancy Dist., AR-15536, at 19, JAxxxx; NRDC, AR-15437, at 62-63, JAxxxx-xxxx. There is nothing improper in the Agencies' decision to consider "ease of administration" in selecting the 100-year floodplain. *WorldCom,* 238 F.3d at 459.

The Agencies did not "ignore" comments suggesting one- or five-year floodplain intervals. *See* Bus. Br. 71. To the contrary, the Agencies explained that "[a] smaller [distance] threshold increases the likelihood that waters that could have a significant nexus will not be analyzed and therefore not [be] subject to the Act," while no distance threshold, such as in the Proposed Rule, would mean that the Agencies and the public would expend resources on case-specific analyses of waters that have a lesser likelihood of demonstrating a significant nexus. 80 Fed. Reg. at 37,090/2-3. In setting the 100-year floodplain distance limitation, the Agencies prudently balanced these competing considerations. *Id.* at 37,081/2-3, 37,082/2-3, 37,090/3.

[28] Where there is no FEMA map for a particular area, or the FEMA map is out of date, it is reasonable to rely on other tools to identify the 100-year floodplain, such as soil surveys, tidal gauge data and other federal, state, or tribal floodplain maps. 80 Fed. Reg. at 37,081/2-3.

In light of the body of scientific knowledge regarding the effects of floodplain waters on downstream waters, and the practicality of using a well-understood and widely-mapped floodplain interval, the Agencies' decision to use the 100-year floodplain as a limit under subsection 328.3(a)(8) was reasonable and supported by the record. Petitioners have failed to meet their "heavy burden to show that the totality of the evidence required [the Agencies] to decide differently than it did." *Mississippi v. EPA*, 744 F.3d 1334, 1349 (D.C. Cir. 2013); *see also Kirk*, 667 F.2d at 532.

4,000 foot distance limitation. Based on a number of factors, the Agencies appropriately identified a boundary of 4,000 feet from a primary water, impoundment, or tributary for application of case-specific significant nexus determinations under subsection 328.3(a)(8) for waters that are not within the 100-year floodplain of a primary water. 80 Fed. Reg. at 37,089-91; TSD at 353-69, JAxxxx-xxxx. Despite this being a *limitation* on jurisdiction compared to the prior regulation, which presumably benefits their constituents, Business and State Petitioners suggest that the 4,000 foot limit should have been drawn even more narrowly. Bus. Br. 70-71; States Br. 52-54.

First, although the scientific record does not in itself establish a bright line beyond which waters do not have a significant nexus to primary waters, there is compelling scientific evidence that waters up to 4,000 feet from another jurisdictional water *may* have a significant nexus to downstream waters and thus should be subject to a case-specific analysis. Science Report at 4-20 to 4-38, JAxxxx-xxxx (discussing

effects of non-floodplain waters); TSD at 360-62, JAxxxx-xxxx (explaining water movement and other effects on downstream waters).

Second, the Agencies acknowledged that while proximity to primary waters is not the sole factor for evaluating connectivity between waters, it is nonetheless an important one. TSD at 359-60, JAxxxx-xxxx; 80 Fed. Reg. at 37,089/2-3. The body of science informs that "[s]patial proximity is one important determinant of the magnitude, frequency and duration of connections between wetlands and streams that will ultimately influence the fluxes of water, materials and biota between wetlands and downstream waters." Science Report at ES-11, JAxxxx. The Agencies' experience in implementing the Act confirms this to be true. 80 Fed. Reg. at 37,090/2-3.

Recognizing that there is no precise distance at which waters cease to have a significant nexus, the Agencies looked to their extensive experience in making significant nexus determinations since the *Rapanos* decision. TSD at 379, JAxxxx. The Agencies have analyzed waters for significant nexus on a case-specific basis in every state in the country, involving a wide range of waters in a broad variety of conditions. *Id.* As part of the rulemaking process, EPA reviewed 199 approved jurisdictional determinations randomly selected from the approved jurisdictional determinations published on the web sites of all but one of the Corps districts.

Jurisdictional Determination Review Memorandum, AR-20877, JAxxxx-xxxx.[29] These approved jurisdictional determinations, issued between March 2009 and March 2015, involved a cross-section of waters. *Id.* Only four of the 199 sites involved wetlands or waters located more than 4,000 feet from a jurisdictional water. *Id.* And of those four sites, only two contained wetlands that were jurisdictional under the 1986 regulation but would presumably not be jurisdictional under the Rule due to the 4,000 foot limit in subsection 328.3(a)(8). *Id.* The total surface area of the wetlands at those two sites is approximately one acre. *Id.* Based on this analysis and their general experience implementing the Act since *Rapanos*, the Agencies concluded that setting a distance limit of 4,000 feet would encompass those waters that are most likely to have a significant nexus while also providing the certainty sought by the public.[30] 80 Fed. Reg. at 37,090-91.

---

[29] Although the cited memorandum discusses "200 approved jurisdictional determinations," one is a duplicate. The 199 approved jurisdictional determinations are included in the administrative record (AR-20876).

[30] The April 25, 2015 internal Corps memorandum that was added to the record by the Court, AR-20882 JAxxxx-xxxx, was prepared to facilitate discussion with EPA staff prior to the analysis described in the above-discussed Jurisdictional Determination Review Memorandum, AR-20877. The conclusions in the internal Corps memorandum were based on an earlier draft of the Rule, and several of those conclusions would have been different if revisions made in later drafts of the Rule had been considered. For example, the internal Corps memorandum did not take into account that the 4,000 foot limit does not apply to waters within the 100-year floodplain of a primary water, as ultimately adopted in subsection 328.3(a)(8).

Third, the Agencies considered the goal of providing clarity as to the scope of waters that may be protected under the Act. *Id.* at 37,089/1. Many commenters expressed concern that the Proposed Rule would provide no outer boundary for case-specific waters and requested that the Agencies provide clearer limits, while others contended that the Agencies lacked discretion to set regulatory limits on which waters would be subject to a case-specific analysis. *Id.* at 37,090/1. Because neither the Act nor the case law prohibits the Agencies from setting appropriate limits for case-specific significant nexus determinations, the Agencies balanced the science and their experience with the desire for greater certainty while protecting human health and the environment consistent with the Act.

The Agencies' careful weighing of the relevant considerations in establishing the 4,000 foot limitation is the quintessential example of reasoned decisionmaking deserving of judicial deference, and the "totality of evidence" in the record supports the Agencies' decision. *Mississippi,* 744 F.3d at 1349 (discussing approach to "giant administrative records").

3. The record supports the Agencies' identification of Texas coastal prairie wetlands as similarly situated for purposes of significant nexus determinations.

Business Petitioners contend that Texas coastal prairie wetlands should not have been categorized as "similarly situated" under 33 C.F.R. § 328.3(a)(7). Bus. Br.

73.[31] Petitioners have waived this argument because neither they (nor, as far as the Agencies are aware, any other commenter) raised this issue during the public comment period. *See Mich. Dep't of Envtl. Quality v. Browner*, 230 F.3d 181, 183 n.1 (6th Cir. 2000) (noting that an argument petitioners failed to raise during a comment period is waived for purposes of review); *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (specific argument, not just general legal issue, must be raised before agency). Many comments were submitted in support of identifying Texas coastal prairie wetlands as similarly situated and subject to case-specific significant nexus determination, and there were no comments in opposition. RTC Topic 4 at 445-50, JAxxxx-xxxx; 80 Fed. Reg. at 37,096/1.

In any event, the Agencies' decision to include Texas coastal prairie wetlands in subsection (a)(7) is reasonable and supported by the record. *See* 80 Fed. Reg. at 37,071/1, 37,072/3-37,073/1 (explaining rationale). In the proposal, the Agencies cited numerous scientific studies analyzing coastal prairie wetlands in Texas. 79 Fed. Reg. 22,216/2, 22,250-51; Draft Science Report at 1-12, 5-36, JAxxxx, xxxx. The SAB concurred, finding that there is "adequate scientific evidence" to support the designation of Texas coastal prairie wetlands as similarly situated. SAB Proposed Rule Review at 3, JAxxxx. Petitioners have offered no information to the contrary.

[31] Business Petitioners erroneously state that subsection 328.3(a)(7) waters do not require a case-specific analysis. Bus. Br. 73. To be clear, the identification of Texas coastal prairie wetlands in 328.3(a)(7) means that these particular wetlands are subject to a significant nexus determination, not that they are categorically jurisdictional.

The apparent basis for Petitioners' challenge—that coastal prairie wetlands in western Louisiana are not also included under subsection 328.3(a)(7), so coastal prairie wetlands in Texas should not be included, Bus. Br. 73,—is a non sequitur. Coastal prairie wetlands do exist in Louisiana, and they may be found to be jurisdictional under subsection 328.3(a)(8) (or other applicable subsection). However, the scientific studies relied on by the Agencies and cited by commenters focused on coastal prairie wetlands within Texas. 79 Fed. Reg. at 22,251/2-3; Draft Science Report at 1-12, 5-36, JAxxxx, xxxx; TSD at 348-49, JAxxxx-xxxx; Ducks Unlimited Comments, AR-11014 at 50-51, JAxxxx-xxxx. The fact that there are coastal prairie wetlands in Louisiana has no bearing on whether coastal prairie wetlands in Texas are reasonably identified as similarly situated.

C. A case-specific water may reasonably be found to have a significant nexus based on indicators of chemical, physical, *or* biological integrity.

A "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 [primary water]." 33 C.F.R. § 328.3(c)(5). Case-specific waters are assessed for a significant nexus by evaluating the aquatic functions identified in subsection 328.3(c)(5)(i)-(ix). *Id.* If one or more of the listed functions are present and contribute significantly to the chemical, physical, or biological integrity of the nearest primary water, there is a significant nexus. *Id.* The Agencies' definition of the term "significant nexus" is consistent with *SWANCC* and

Rapanos, and with the goal of the CWA to "restore and maintain" all three forms of "integrity." 80 Fed. Reg. at 37,067/2 (citing 33 U.S.C. § 1251(a)).

State and Business Petitioners contend that under Justice Kennedy's significant nexus standard, jurisdiction may be established only where a water significantly affects the chemical, physical, *and* biological integrity of a primary water. States Br. 31-33; Bus. Br. 69-70. Petitioners misconstrue the Act and Justice Kennedy's concurring opinion in *Rapanos*.

Justice Kennedy noted the "objective" of the CWA: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *Rapanos*, 547 U.S. at 759 (quoting 33 U.S.C. § 1251(a)). Justice Kennedy then stated that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. However, in quoting the phrase "chemical, physical, and biological integrity" from the Act's objective, Justice Kennedy could not have meant to require that all three types of integrity be significantly affected for there to be a significant nexus. This is evident from the types of functions that Justice Kennedy identified that could form a significant nexus—such as pollution filtering or trapping, flood control, and runoff storage—that do not necessarily affect all three types of integrity. *Id.* at 775, 779, 786. Congress intended the CWA to "restore and maintain" all three types of integrity, 33

U.S.C. § 1251(a), and it would be contrary to the statute's stated objective if any one were compromised.

Under Petitioners' view, a water that significantly affects the physical and biological (but not the chemical) integrity of a nearby traditional navigable water would not be protected under the Act. That would be akin to requiring that any actions taken under the Act both "restore *and* maintain" the Nation's waters, *id.* (emphasis added), such that any action that accomplished only restoration or only maintenance would be contrary to the objectives of the Act. Neither the Act nor Justice Kennedy's opinion supports such an illogical reading. Requiring a significant effect on all three types of integrity would be "incongruous with the Act's objectives and inconsistent with the language in the Act." *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d. 1210, 1217 n.4 (D. Or. 2009); *see also id.* (rejecting argument that significant effect to all three forms of integrity must be present); *OfficeMax, Inc. v. United States*, 428 F.3d 583, 589-90 (6th Cir. 2005) (explaining that use of "and" in a statute should be construed disjunctively when necessary to avoid an incoherent reading of the statute).

Likewise, this Court and others have approached the inquiry disjunctively, asking whether there is a significant effect on any one (or more) of the three forms of integrity for purposes of establishing CWA jurisdiction. *See, e.g.*, *Cundiff*, 555 F.3d at 211 n. 4 (stating that the evidence indicated that placing poison into the defendants' wetlands would reach two creeks and the Green River, thereby establishing a

"significant chemical, physical, *or* biological connection between the wetlands and the nearby navigable-in-fact waters") (emphasis added); *Benjamin*, 673 F. Supp. 2d. at 1217 n.4 ("What is important is not that the nexus between the wetland and the navigable water is chemical, physical, and biological, but that the nexus is *significant*.") (emphasis in original); *Robison*, 505 F.3d at 1223 (finding that the government had failed to present evidence "about the possible chemical, physical, *or* biological effect" that a creek had on a navigable river) (emphasis added); *United States v. Robertson*, CR15-07-H-DWM, 2015 WL 7720480, *3 (D. Mont. Nov. 30, 2015), *appeal (on other grounds) pending* No. 16-30178 (9th Cir.) (affirming jury instructions that provided that a significant nexus is established if the water in question significantly affects the chemical, physical, *or* biological integrity of traditional navigable waters). Thus, as a textual matter, the Rule reasonably grounds significant nexus in waters where chemical, physical, or biological integrity is implicated.

The Agencies' definition of significant nexus is further supported by the scientific evidence in the record. The effect of an upstream water can be significant even if that water provides just one of the functions listed in 33 C.F.R. § 328.3(c)(5). TSD at 180-84, JAxxxx-xxxx; *see also* 80 Fed. Reg. at 37,066/2 (describing significant effects of excess nutrients on downstream waters). The definition is also consistent with the Agencies' practice since *Rapanos*, where field staff evaluate the functions of the waters in question and the effects of those functions on downstream waters. 80 Fed. Reg. at 37,091/2; RTC Topic 4 at 31, JAxxxx. For example, in one of the

jurisdictional determinations in the record, the Agencies found that the subject tributary had a significant nexus to Canyon Lake, a traditional navigable water, based on the tributary's substantial effects on the chemical integrity of the lake. SPL-2007-261-FBV, AR-20876 at 27-31, JAxxxx-xxxx. *See also Rapanos* Guidance at 8-11, JAxxxx-xxxx.

Nor does the definition of significant nexus "reinstate[ ] the Migratory Bird Rule," as Petitioners suggest. Bus. Br. 69; *see also* States Br. 32-33. In *SWANCC*, the Court held that the use of isolated, nonnavigable, intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under 33 C.F.R. § 328.3(a)(3) (1987). But the Clean Water Rule is very different from the Agencies' administrative interpretation at issue in *SWANCC*.

The Rule lists nine functions that may be analyzed with respect to primary waters in case-specific significant nexus determinations. 33 U.S.C. § 328.3(c)(5)(i)-(ix). One of those functions is the "[p]rovision of life cycle dependent aquatic habitat ([including, but not limited to,] 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),*" i.e., a primary water. *Id.* 328.3(c)(5)(ix) (emphasis added); *see also* 80 Fed. Reg. at 37,068/1-2. For example, amphibians, reptiles, or aquatic birds that move between a primary water and a case-specific water, and depend on both waters for feeding, nesting, or breeding, demonstrate evidence of a biological connectivity between those waters. *See* TSD at 152-53, JAxxxx-xxxx (describing examples of biological

connectivity due to movement of fish, snails, and invertebrates in river systems and floodplain wetland habitats). In the preamble, the Agencies explicitly state that "[n]on-aquatic species or species such as non-resident migratory birds do not demonstrate a life cycle dependency on the identified aquatic resources [i.e., primary waters] and are not evidence of biological connectivity for purposes of this rule." 80 Fed. Reg. at 37,094/2. Thus, the Rule avoids the deficiency found in *SWANCC* by requiring a significant nexus to a primary water rather than just protecting an isolated, nonnavigable, intrastate water based on the presence of migratory birds.

Here, the Agencies reasonably identified functions that significantly affect the biological (as well as chemical and physical) integrity of primary waters. Where a case-specific water is found to significantly affect a primary water by providing life cycle dependent aquatic habitat for species in a primary water, that water should be protected under the CWA. *SWANCC* is not to the contrary.

IV. The Agencies properly interpreted "waters of the United States" to exclude certain waters.

The Rule retains two pre-existing exclusions from the definition of "waters of the United States" and adds several exclusions that reflect longstanding agency practices and public input during the rulemaking. Associational and Waterkeeper Petitioners challenge the exclusions as inconsistent with congressional intent and the significant nexus analysis. In fact, the exclusions reasonably interpret the CWA and the legal concept of significant nexus. Moreover, the exclusions are a reasonable

mechanism for delineating the outer reaches of CWA jurisdiction in a clear, practical, and functional way for the regulated public and regulators.

A. Regulatory exclusions are within the Agencies' CWA authority.

Associational Petitioners argue that *any* exclusion of a water that could plausibly meet the significant nexus standard exceeds the Agencies' statutory authority under the CWA. Ass'n Br. 39-43. This threshold argument lacks any statutory support, and ignores judicial and congressional affirmation of prior regulatory exclusions. It also contradicts the courts' repeated acknowledgement that the phrase "waters of the United States" is ambiguous, ignores the necessity for administrative line-drawing, and is not supported by the cases Petitioners cite.

Nothing in the CWA precludes the Agencies from using their rulemaking authority under 33 U.S.C. § 1361(a) to promulgate exclusions from the undefined statutory term "waters of the United States." The textual basis for Associational Petitioners' argument—the congressional goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), Ass'n Br. 6, 30, 39—does not mandate that the Agencies exercise their authority at the outermost possible bound. To the contrary, the Agencies have considerable discretion in interpreting the term "waters of the United States." *See supra* at 55.

"[B]right-line tests are a fact of regulatory life." *Macon Cnty. Samaritan Mem'l Hosp.*, 7 F.3d at 768. Under the CWA, the Agencies may draw bright lines administratively defining "categories" of waters based on their evaluation of what is

"significant enough." *Rapanos*, 547 U.S. at 780–81. In fact, several Justices have called on the Agencies to clarify "waters of the United States" through rulemaking. *See id.* at 758 (Roberts, C.J., concurring); *id.* at 811-12 (Breyer, J., dissenting); *Sackett,* 132 S. Ct. at 1375-76 (Alito, J., concurring). Clarity requires line drawing, which necessarily entails the exclusion of some waters from the definition of "waters of the United States." Notably, the sole court of appeals to consider the Agencies' authority to promulgate an exclusion under the Act concluded that the Agencies acted within their authority in promulgating that exclusion. *See infra* at 149-50 (discussing *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009)). Congress's acknowledgment of a prior exclusion also suggests that Congress considered exclusions to be within the scope of the Agencies' authority under the CWA.[32] *Cf. Riverside Bayview*, 474 U.S. at 137 ("[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention...").

[32] Pursuant to EPA and Corps regulations, wetlands that qualify as "prior converted cropland" are categorically excluded from the definition of "waters of the United States." *See, e.g.*, 33 C.F.R. § 328.3(b)(2); *see also* 58 Fed. Reg. 45,008, 45,034 (Aug. 25, 1993). Congress discussed the Agencies' prior converted cropland exclusion when amending the Food Security Act in 1996. *See* H.R. Rep. No. 104-494, at 380, *as reprinted in* 1996 U.S.C.C.A.N. 683, 745 (referencing "prior converted cropland" and stating the Food Security Act amendments "should not supersede the wetland protection authorities and responsibilities of the [Agencies] under Section 404 of the Clean Water Act").

Associational Petitioners' reliance on cases addressing exemptions for categories of point sources from the Act's permitting requirements, Ass'n Br. 41, is misplaced. In *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977), *Forsgren*, 309 F.3d at 1190, and *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008), two courts concluded that because the NPDES permitting program under 33 U.S.C. § 1342 is central to CWA enforcement, EPA could not exempt categories of point sources. But those cases do not stand for the broad proposition that the Agencies lack authority to exclude some waters from the definition of waters of the United States. Moreover, unlike the categorical point source exceptions in those cases, the Rule's exclusions align with longstanding agency interpretations developed through decades of implementing the CWA that certain waters and features are not waters of the United States. Nor do the exclusions in the Rule have the effect of exempting discharges of pollutants from statutory permitting requirements. As explained *infra* at 139-42 (ditch exclusions), 142-46 (groundwater), and 146-50 (waste treatment system exclusion), while a CWA permit would not be required to discharge directly into an excluded water, if a discharge reaches "waters of the United States" through an excluded water, such discharge may be subject to NPDES permitting.

Associational Petitioners also mistakenly rely on *National Cotton Council of America v. EPA*, 553 F.3d 927, 936 (6th Cir. 2009). In *National Cotton* this Court concluded that pesticide residue could not be exempted from the CWA definition of "pollutant" because it is a "chemical waste" and "biological material[]," terms

included in the statutory definition, 33 U.S.C. § 1362(6). In contrast to the detailed statutory definition addressed in *National Cotton*, the statutory definition of "navigable waters," *id.* § 1362(7), simply refers to the ambiguous term "waters of the United States."[33]

Nor does *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), compel the inflexible interpretation of "waters of the United States" advocated by Petitioners, *see* Ass'n Br. 40, 42. Aside from the district court's lack of an articulated rationale, the Supreme Court's subsequent decisions in *SWANCC* and *Rapanos* make clear that *Callaway* cannot foreclose the Agencies from clarifying the meaning of "waters of the United States" by excluding certain waters. *See supra* at 10-12.

B. The Agencies reasonably interpret "waters of the United States" to exclude some waters from the CWA's reach.

Associational Petitioners argue broadly that the exclusion of any water with a significant nexus is arbitrary and capricious. Ass'n Br. 43-44. Petitioners also specifically challenge the erosional feature exclusion at 33 C.F.R. § 328.3(b)(4)(vi); the ditch exclusions at section 328.3(b)(3); and the groundwater exclusion at section 328.3(b)(5). Ass'n Br. 28-49; Waterkeeper Br. 41-54. These arguments are unavailing.

[33] *North Plains Resource Council v. Fidelity Exploration & Development Company,* 325 F.3d 1155 (9th Cir. 2003), which also turned on the interpretation of the term "pollutant," is likewise distinguishable.

Petitioners' arguments presume that the Rule is based *solely* on science, but as the Agencies frequently noted, it is not. Indeed, "[s]ignificant nexus is not purely a scientific determination." 80 Fed. Reg. at 37,060/3; *see also id.* at 37,056-57 (the Agencies considered the goals, objectives, and policies of the CWA, Supreme Court case law, the Agencies' own technical expertise and experience, and many requests for bright-lines). The Agencies' practical line-drawing fully comports with the Supreme Court's view that the Agencies' task is to determine whether categories of nonnavigable waters are "significant enough" to the "aquatic system incorporating navigable waters" to qualify for CWA protection. *Rapanos*, 547 U.S. at 780–81 (Kennedy, J., concurring).

The Agencies began by examining their longstanding practices to identify waters that they had generally treated as non-jurisdictional. 79 Fed. Reg. at 22,218/2 These waters included erosional features, a subset of ditches, and groundwater. *Id.* at at 22,218-19.

The Agencies also considered numerous comments in support of the proposed exclusions and suggestions for additional exclusions. *See, e.g.*, 80 Fed. Reg. 37,097-98; RTC Topic 7 at 23-28, JAxxxx-xxxx. The Agencies properly balanced numerous considerations in determining whether certain waters have a significant nexus with downstream primary waters and, in a few narrow instances, legal, policy, or other technical factors outweighed possible connections to primary waters. *See infra* at 137-38 (erosional feature exclusion), 139-42 (ditch exclusions), 142-45 (groundwater

exclusion); *see also supra* at 121-24 (4,000 foot limitation). Where the Agencies concluded that a suggested exclusion would provide clarity and also accord with the Agencies' established interpretation of the CWA, they adopted it. *See, e.g.*, 80 Fed. Reg. at 37,100/1-2 (adding a new exclusion for stormwater control features in response to requests for clarity, and based on longstanding view that such features were non-jurisdictional when not constructed in jurisdictional waters).

Such administrative line-drawing need not be mathematically precise. Rather, the fundamental question is whether the "lines drawn … are patently unreasonable, having no relationship to the underlying regulatory problem.'" *All. for Cmty. Media*, 529 F.3d at 780 (citing *Covad Commc'n Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006)). The Rule's use of bright-line exclusions taken from the Agencies' historical practices passes that test.

1. The Agencies reasonably interpreted the CWA to exclude erosional features.

The Rule excludes erosional features from the definition of "waters of the United States." 33 C.F.R. § 328.3(b)(4)(vi); *see also* 80 Fed. Reg. at 37,099/2. Ephemeral streams that have a bed and banks and another ordinary high water mark indicator and contribute flow to a primary water satisfy the definition of tributary, and thus, are not excluded erosional features. 80 Fed. Reg. at 37, 099/3. Conversely, ephemeral streams that do not meet the definition of "tributary" are excluded as erosional features. 33 C.F.R. § 328.3(b)(4)(vi).

Associational and Waterkeeper Petitioners contend that erosional features should be considered waters of the United States because water flowing through such features could have connections to downstream primary waters. Ass'n Br. 46-48; Waterkeeper Br. 45-50. But the exclusion of erosional features is consistent with the definition of tributary, and is reasonable in light of the Agencies' technical expertise and longstanding practices. *See, e.g.*, 80 Fed. Reg. at 37,075-80; 80 Fed. Reg. at 37,097/1, 37,099/2-3; RTC Topic 7 at 268, JAxxxx.

Numerous commenters stated that the proposed exclusion of erosional features would avoid confusion. *See, e.g.*, RTC Topic 7 at 268, 270-72, JAxxxx, xxxx-xxxx. The Agencies agreed, concluding that it was important to continue their historical practice of excluding erosional features. 80 Fed. Reg. at 37,097/1, 37,099/2.

The Agencies do not dispute that some streams in arid and semi-arid environments or in low gradient landscapes lack an ordinary high water mark. *See* SAB Proposed Rule Review at 2, JAxxxx. However, as discussed *supra* at 72-77, the Agencies reasonably concluded that the ordinary high water mark is indicative of regular intervals of flow, including in the arid West. Therefore, the Agencies reasonably determined that erosional features—which contain less regular flow than tributaries—should be excluded. 80 Fed. Reg. at 37,099/2-3; TSD at 260-61, JAxxxx-xxxx.

2. The Agencies reasonably interpreted the CWA to distinguish between jurisdictional and excluded ditches.

The Rule excludes three types of ditches: (1) those with ephemeral flow, provided that they were not excavated in or relocate a tributary; (2) those with intermittent flow, provided that they were not excavated in or relocate a tributary and that they do not drain wetlands; and (3) those that do not flow, directly or indirectly, into a primary water. 33 C.F.R. § 328.3(b)(3)(i)-(iii).

Waterkeeper Petitioners challenge the first two ditch exclusions, 33 C.F.R. § 328.3(b)(3)(i)-(ii). Waterkeeper Br. 46-50. Contrary to Petitioners' arguments, these exclusions are supported by the record and were adequately explained.

The Agencies have long distinguished between ditches that require protection under the Act and those that do not. The Agencies historically have considered some non-tidal drainage and irrigation ditches excavated in dry land to be non-jurisdictional. *See* 51 Fed. Reg. at 41,217/1; 53 Fed. Reg. at 20,765/2 (June 6, 1988). Following *Rapanos*, the Agencies stated that they generally would not assert jurisdiction over upland ditches that lack relatively permanent flow and that do not drain wetlands. *Rapanos* Guidance at 1, JAxxxx.

The Agencies' goal in promulgating the ditch exclusions was to "improve clarity, predictability, and consistency." 79 Fed. Reg. at 22,219/2. Prior to the Rule, "there [were] inconsistencies in practice implementing agency policy with respect to ditches." *Id.* Thus, the Agencies' primary objective was to address the "existing

confusion and inconsistency regarding the regulation of ditches." 80 Fed. Reg. at 37,058/2.

The Agencies received many comments regarding the regulation of ditches, and the overwhelming majority requested clarity and limitations. *See, e.g.*, RTC Topic 6 at 24-25, 202-04, 211, JAxxxx-xxxx, xxxx-xxxx, xxxx. Some commenters suggested that all ditches be excluded from regulation, but that would be inconsistent with the CWA, the Agencies' practice, and numerous courts of appeals decisions. *See supra* at 79-84; *see also* TSD at 73, JAxxxx (citing numerous cases). Instead, the Agencies weighed various options for excluding certain categories of ditches based on flow. 79 Fed. Reg. at 22,203-04, 22,219/1-3; 80 Fed. Reg. at 37,097-98.

The Agencies sought comment "on whether the flow regime in [excluded] ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow as proposed." 79 Fed. Reg. at 22,219/3. Some commenters responded that perennial flow is the simplest to understand and document. RTC Topic 6 at 25, 185-86, 188-89, JAxxxx, xxxx-xxxx, xxxx-xxxx. The Agencies concluded that they would continue to regulate all ditches with perennial flow, ditches that are excavated in or redirect flow from a tributary, and tributary ditches with more than ephemeral flow that drain wetlands; but other ditches would

be excluded.[34] *Id.* at 29-30, 185-88, JAxxxx-xxxx, xxxx-xxxx; *see also* 80 Fed. Reg. at 37,098/1-2; TSD at 187, JAxxxx.

The Agencies considered the SAB's view that some ditches with connections to downstream waters would be excluded under this approach, as well as the need for consistency and clarity. TSD at 163, JAxxxx; *see also* 80 Fed. Reg. at 37,097/3. The Agencies relied on their technical expertise and extensive experience in implementing the CWA over the past four decades in determining where to draw the line between regulated tributaries and excluded ditches. 80 Fed. Reg. at 37,097/1; RTC Topic 6 at 29-30, 185-88, JAxxxx-xxxx, xxxx-xxxx. Balancing all of these factors and the CWA, relevant case law, and public comments, the Agencies reasonably determined that they would continue their policy of not exercising jurisdiction over "[d]itches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water." RTC Topic 6 at 185, 187, JAxxxx, xxxx (discussing *Rapanos* Guidance).

Excluded ditches are not wholly exempt from CWA permitting requirements, as they "may function as 'point sources' under [33 U.S.C. § 1362(14)], such that

[34] The distinction between an excluded ditch and tributary under the Rule is not "blurred to the point of nonexistence." Waterkeeper Br. 49; *see also* States Br. 27, 73. Many tools are available to determine the historical presence of tributaries, such as on-site characteristics and "historical maps, historic aerial photographs, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts." 80 Fed. Reg. at 37,078/3-37,079/1.

discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., [33 U.S.C. § 1342])." 79 Fed. Reg. at 22,219/3; *see also Rapanos*, 547 U.S. at 735-36 (plurality) (noting that ditches may be point sources). In other words, while discharges *into* an excluded ditch will not be subject to CWA requirements, discharges of pollutants *from* an excluded ditch into a jurisdictional water may be regulated. In this way, the ditch exclusions are consistent with congressional policy reflected in 33 U.S.C. § 1344(f)(1)(C), which exempts discharges of dredged or fill material from the construction and maintenance of irrigation ditches or for the maintenance of drainage ditches from section 404 permit requirements.

3. The Agencies reasonably interpreted the CWA to exclude groundwater.

The Rule excludes groundwater from the definition of "waters of the United States." 33 C.F.R. § 328.3(b)(5). Waterkeeper Petitioners contend that this exclusion is arbitrary and capricious because it "abandon[s]" the significant nexus framework. Waterkeeper Br. 50; *see also* Ass'n Br. 49 (incorporating Waterkeeper's argument). Petitioners' argument is misplaced.

Groundwater is not itself jurisdictional, but discharges to groundwater with a direct hydrologic connection to jurisdictional surface waters are subject to CWA regulation. 80 Fed. Reg. at 37,099/3, 37,101/1; TSD at 16-17, JAxxxx-xxxx.[35] The

[35] *See also* Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892/3 (Dec. 12, 1991)

Cont.

Agencies made clear that "[n]othing in this [R]ule changes or affects that longstanding interpretation, including the exclusion of groundwater from the definition of 'waters of the United States.'" RTC Topic 10 at 383, 386-387, JAxxxx, xxxx-xxxx.

The groundwater exclusion is consistent with the Act and the case law, and is reasonable based on legal and policy considerations. Although the CWA occasionally refers to groundwater, groundwater is noticeably absent from the prohibition on discharges to navigable waters and from the permitting provisions. *Compare* 33 U.S.C. § 1254(a)(5) (providing for "monitoring the quality of the navigable waters and ground waters") *with* 33 U.S.C. §§ 1311, 1342, 1344, 1362(12)(A) (prohibiting the discharge of a pollutant into "navigable waters" except in compliance with specified CWA sections); *see also* 33 U.S.C. § 1252(a) (differentiating between "navigable waters and ground waters" and between "surface and underground waters"). The occasional references to groundwater strongly indicate that Congress considered groundwater something other than waters of the United States.

("[T]he affected ground-waters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters."); NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997/3 (Nov. 16, 1990) ("this rulemaking only addresses discharges to waters of United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)").

Moreover, the legislative history of the CWA indicates that Congress did not intend to regulate groundwater. The report accompanying the Senate version of the CWA stated:

> Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil and other surface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.

S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3749. The House also rejected an amendment that would have brought groundwater within the permitting and enforcement sections of the bill. 118 Cong. Rec. 10,669 (1972). In opposing that amendment, Rep. Clausen, a sponsor of the House bill, stated:

> Mr. Chairman, in the early deliberations within the committee which resulted in the introduction of H.R. 11896, a provision for ground waters, similar to that suggested by the gentleman from Wisconsin, was thoroughly reviewed and it was determined by the committee that there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters.

118 Cong. Rec. 10,667 (1972) (remarks of Rep. Clausen). Consistent with the CWA's limited and isolated references to groundwater, its legislative history, and EPA's longstanding interpretation, numerous courts have concluded that Congress did not intend the term "waters of the United States" to include groundwater. *See, e.g.*, *Village of Oconomowoc Lake v. Dayton Hudson, Corp.*, 24 F.3d 962, 965 (7th Cir. 1994); *Chevron U.S.A. Inc. v. Apex Oil Co., Inc.*, 113 F. Supp. 3d 807, 816 (D. Md. 2015).

Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1179-80 (D. Idaho 2001), is not to the contrary. Waterkeeper Br. 53. The court there concluded that "the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States." *Id.* at 1180. The district court, recognizing Congress's goals in the CWA, concluded that in certain circumstances discharges of pollutants that reach jurisdictional waters through groundwater fall within the Act's reach. That conclusion is consistent with EPA's interpretation that although groundwater itself is not a water of the United States, discharges into groundwater that reach jurisdictional waters may be subject to CWA requirements.

Contrary to Petitioners' suggestion, Waterkeeper Br. 50-53, there is nothing inconsistent between the exclusion of groundwater and the Agencies' determination that shallow subsurface flow may support the basis for a significant nexus determination, which properly recognizes the importance of shallow subsurface hydrologic connections between geographically separated surface waters. *See, e.g.*, 79 Fed. Reg. at 22,208/2-3; TSD at 371-78, JAxxxx-xxxx; *cf.* 80 Fed. Reg. at 37,099-100 (noting that "surface expressions of groundwater, … such as where groundwater emerges on the surface and becomes baseflow in streams or spring fed ponds" are not excluded under 33 C.F.R. § 328.3(5)).

C. The Agencies did not reopen the exclusion for waste treatment systems, and even if they had, the exclusion is reasonable.

Associational Petitioners argue that the waste treatment system exclusion at 33 C.F.R. § 328.3(b)(1) exceeds the Agencies' statutory authority, Ass'n Br. 30-31; that it is arbitrary and capricious, *id.* 32-35; and that the Agencies should have responded substantively to their comments, *id.* 36-39. Their challenges are untimely, but in any event, the exclusion is within the Agencies' authority and is a reasonable interpretation of the CWA.

1. Petitioners' challenge to the waste treatment system exclusion is untimely.

The Rule moves the challenged waste treatment system exclusion from 33 C.F.R. § 328.3(b)(8), where it had been codified since 1982, to subsection 328.3(b)(1) in order to consolidate it with the other regulatory exclusions.[36] Petitioners' arguments are untimely because the challenged exclusion was promulgated more than thirty years ago.

As discussed *supra* at 103-04, a prior rule is not reopened to challenge if the agency "has not created the opportunity for renewed comment and objection." *Ohio PIRG*, 386 F.3d 800 (internal quotation and citation omitted); *see also Am. Iron & Steel*, 886 F.2d at 397 (issue reopened only if agency proposes substantive changes, solicits

[36] Other regulations that address waters of the United States contain similar, though not all identical, exclusions for waste treatment systems. The Agencies did not change these other versions either.

comments, and responds substantively in promulgating the final regulation). Thus, reopening occurs only if the agency undertakes a "serious, substantive reconsideration" of the existing rule. *See Nat'l Mining Ass'n v. DOI*, 70 F.3d 1345, 1352 (D.C. Cir. 1995).

Here, the Agencies did not purport to reexamine, reconsider, or invite comment on the substance of the 1982 waste treatment systems exclusion. The Agencies proposed only two minor ministerial actions: a change in the placement of the exclusion and the deletion of a cross-reference to an EPA regulation that is no longer in the Code of Federal Regulations. 79 Fed. Reg. at 22,217/3. The Agencies expressly stated that they were *not* reopening the waste treatment system exclusion. *Id.* ("The agencies do not propose to address the substance of the waste treatment system exclusion....").

The Agencies did not substantively respond to unsolicited comments. 80 Fed. Reg. at 37,097/2 (noting comments "outside the scope of the proposed rule"). Nor did the Agencies make any substantive changes to the Rule. *See id.* ("[t]he agencies do not intend to change how the waste treatment exclusion is implemented").

Associational Petitioners incorrectly assert that the Rule "permanently adopted" a version of the waste treatment system exclusion without limiting language that had been suspended in 1980. Ass'n Br. 36 (citing 45 Fed. Reg. 48,620 (July 21, 1980)). The version of the waste treatment system exclusion Associational Petitioners refer to, located at 40 C.F.R. § 122.2(2)(i), states:

> At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies ___" in the definition of "Waters of the United States." *This revision continues that suspension.*[1]
>
> (1) [C.F.R.] Editorial Note: The words "This revision" refer to the document published at 48 FR 14153, Apr. 1, 1983.

(Emphasis added). As the C.F.R. Editorial Note makes clear, the suspension from 1980 was first continued in a 1983 rulemaking, and it was continued again in the Rule. Associational Petitioners' assertion that the Rule "made the suspension permanent," Ass'n Br. 29, is without merit. Petitioners may file an administrative petition requesting that the Agencies undertake a new rulemaking to address the continued suspension, but they cannot now bring a collateral attack on a 1980 agency action that was not reopened by the Rule. Such a challenge is untimely.

2. The waste treatment system exclusion is permissible and reasonable.

If the Court reaches the merits of the waste treatment system exclusion, it should reject Associational Petitioners' argument that the exclusion exceeds the Agencies' authority under the CWA.

Contrary to Petitioners' suggestion, Ass'n Br. 30-31, there is no conflict between the waste treatment system exclusion and the CWA's goal of eliminating pollution discharges or the Act's permit requirements. The waste treatment system exclusion does not free a discharger from the need to comply with the CWA with respect to pollutants that are discharged from a waste treatment system to a water of the United States. The waste treatment system exclusion exempts only those

discharges that remain within the treatment system itself. *See Healdsburg*, 496 F.3d at 1002 ("The exception was meant to avoid requiring dischargers to meet effluent discharge standards for discharges *into* their own closed system treatment ponds.") (citing 45 Fed. Reg. 48,620-21 (July 21, 1980)) (emphasis in original). Thus, the exclusion is distinguishable from the categorical "point source" exemptions that Associational Petitioners note some courts have found to be *ultra vires*. *See, e.g., Costle*, 568 F.2d at 1377 (cited at Ass'n Br. 31, 41-43).

Typically, the waste treatment system exclusion applies to ponds and lagoons constructed in non-jurisdictional uplands. *See, e.g.,* 44 Fed. Reg. 32,854, 32,858 (June 7, 1979); *Healdsburg*, 496 F.3d at 1001. Occasionally, the waste treatment system exclusion may apply where an impoundment has been constructed in a stream for treatment of wastes such as mine tailings. *See, e.g., Ohio Valley Envtl. Coal.*, 556 F.3d 177. It is this application of the exclusion that Petitioners specifically challenge. Ass'n Br. 30-31 (asserting that the Agencies cannot "remove waters of the United States from the Act's protections").

The Fourth Circuit in *Ohio Valley Environmental Coalition*, considered this precise issue and, as Petitioners acknowledge, Ass'n Br. 31-32, n.9, concluded that the exclusion was neither *ultra vires* nor unreasonable. In *Ohio Valley Environmental Coalition*, the plaintiffs challenged four CWA permits issued by the Corps for the discharge of dredged or fill material associated with surface coal mining, which were

based in part on the Corps' characterization of certain stream segments as "waste treatment systems." *Id.* at 185-86, 211.

The Fourth Circuit reversed the district court judgment in plaintiffs' favor. Applying the *Chevron* framework, the court first concluded that Congress had delegated authority to the Corps to determine the scope of the term "waters of the United States." *Id.* at 212. The court then held that the Corps' application of the regulatory exemption to a water that would otherwise be part of a natural stream, and thus a water of the United States, was permissible. *Id.* at 212-15. The court concluded that the Corps' permitting decision, including the conclusion that stream segments connecting valley fills to sediment ponds are waste treatment systems and not waters of the United States, reasonably harmonized the goals of the CWA and the Surface Mining Control and Reclamation Act. *Id.* at 216 (citing 30 U.S.C. § 1202(f) (2000)).

Petitioners' contention that the Rule changes EPA's interpretation of the waste treatment system exclusion is meritless. Ass'n Br. 33-34. EPA's longstanding interpretation of the exclusion is that waste treatment systems may be located in a water of the United States only if the embankment that creates the waste treatment system is authorized by a section 404 permit. *See, e.g.,* 80 Fed. Reg. at 37,097/2 (explaining that a section 404 permit would be necessary to construct a waste treatment system in a water of the United States and a section 402 permit would be

required for any discharge into a water of the United States); *Ohio Valley Envtl. Coal.,* 556 F.3d at 214 (discussing 1992 and 2006 EPA guidance documents).[37]

If this Court were to address the reasonableness of the waste treatment system exclusion, despite the untimeliness of the challenge, it should follow the reasoning of the Fourth Circuit in *Ohio Valley Environmental Coalition* and conclude that the exclusion is lawful.

V. The Rule is constitutional.

The Rule is consistent with Congress's Commerce Clause authority to protect the Nation's waters from pollution, and with states' authority to regulate land use, protect water resources, and implement the CWA under its cooperative federalism framework. In providing clarity to the regulatory definition of waters of the United States, the Rule is more than clear enough to meet Due Process requirements. There also is no need to apply any of the constitutional canons the Petitioners invoke.

---

[37] EPA's position in *West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1282 (S.D.W. Va. 1989), *aff'd* 932 F.2d 964 (4th Cir. 1991), is entirely consistent with the regulatory exclusion. EPA's position was that West Virginia could allow instream treatment under some circumstances, but that a section 404 permit might also be required to create the waste treatment system. *Id.* at 1282. In *Ohio Valley Environmental Coalition*, the Fourth Circuit revisited its decision in *Reilly*, and reviewed guidance documents addressing the application of the waste treatment system exclusion to in-stream treatment of mine tailings, and noted that the Agencies' administrative positions and implementation of the waste treatment system exclusion had been consistent. 556 F.3d at 214-25.

A. Protection of waters of the United States as defined by the Rule is within Congress's Commerce Clause power.

Under the Commerce Clause, Congress can regulate: (1) the channels of interstate commerce; (2) persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Regulation of "waters of the United States" as interpreted by the Rule is a valid exercise of Congress's power under at least the first and third *Lopez* categories.[38]

1. Congress's power to protect channels of interstate commerce includes the power to regulate upstream nonnavigable waters that have a significant effect on downstream traditional navigable waters.

In *Rapanos*, Justice Kennedy reasoned that an interpretation of waters of the United States that relies on a significant nexus between upstream nonnavigable waters and downstream traditional navigable waters raises no serious Commerce Clause concerns. *Rapanos*, 547 U.S. at 782-83 (citations omitted); *see also Cundiff*, 555 F.3d at 213 n.6 (citations omitted) (noting a commerce clause challenge would be "rather tenuous"). Justice Kennedy's opinion relied, in part, on the well-settled proposition that Congress's power to regulate channels of interstate commerce also includes the power to adopt "appropriate and needful control of activities and agencies which, though intrastate, affect that commerce." *Rapanos,* 547 U.S. at 782-83 (citing *Pierce County v. Guillen*, 537 U.S. 129, 147 (2003); *Oklahoma ex rel. Phillips v. Guy F. Atkinson*

[38] The Supreme Court has also found water to be an item in commerce, the second *Lopez* category. *Sporhase v. Nebraksa*, 458 U.S. 941 (1982).

Co., 313 U.S. 508, 525-26 (1941)). The Rule incorporates Justice Kennedy's significant nexus approach and interprets waters of the United States to include traditional navigable waters, interstate waters, and the territorial seas and those waters having a significant nexus to these primary waters. In many cases, interstate waters are or have been navigable-in-fact or susceptible to reasonably being so made, and thus are also traditional navigable waters.[39] Thus, by design, the heart of the Rule's reach is waters that fall within Congress's broad power over channels of interstate commerce.

Traditional navigable waters are within Congress's power to regulate. "It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause" as "channels of interstate commerce." *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979); *United States v. Hubenka*, 438 F.3d 1026, 1032 (10th Cir. 2006) (citations omitted); *Deaton*, 332 F.3d at 706 (citations omitted); *see Illinois v. City of Milwaukee*, 406 U.S. at 101 (noting that "Congress has enacted numerous laws touching interstate waters"). These categories of primary waters have been included in the regulatory definition of waters of the United States since 1977, and Petitioners point to no case even suggesting that the primary waters protected by the Rule are outside of Congress's Commerce Clause power.

[39] As discussed *supra*, Argument Section II.C, the CWA regulates interstate waters whether or not they are navigable. References to interstate waters in this part of the argument are to interstate waters that are also navigable. In the next part, we address Congress's Commerce Clause authority to regulate nonnavigable interstate waters.

Petitioners do not dispute that the power to regulate channels of commerce includes the power to regulate nonnavigable waters that have an impact on traditional navigable waters. *See* States Br. 66; *see also* Amicus Br. of Members of Congress 5-6, 10. State Petitioners contend that the Rule "sweeps" in waters that are not navigable and have only a "tangential" connection to traditional navigable waters. States Br. 66; *see also* Bus. Br. 88. This argument reflects more Petitioners' disagreement with the Agencies' scientific and technical judgments regarding what constitutes a significant nexus than it does a constitutional defect. As Justice Kennedy found in *Rapanos*, "the significant-nexus test itself prevents problematic applications of the statute." 547 U.S. at 783. By interpreting waters of the United States to include traditional navigable waters and waters that, categorically or on a case-specific basis, have a significant effect on the quality of traditional navigable waters, the protections afforded by the CWA reach waters that are clearly within Congress's power over channels of interstate commerce.

To the extent Petitioners mean that Congress may not regulate waters based on water quality impacts, as opposed to navigation impacts, they are wrong. Congress has broad power to keep the channels of commerce free from injurious uses. *See, e.g., Pierce Cnty. v. Guillen*, 537 U.S. at 147; *Lopez*, 514 U.S. at 558; *Perez v. United States*, 402 U.S. 146, 150 (1971); *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *The Lottery Case (Champion v. Ames)*, 188 U.S. 321 (1903). Thus, courts have recognized that the power over traditional navigable waters as channels of commerce includes "the power

to regulate waters to limit pollution, prevent obstructions to navigation, reduce flooding, and control watershed development." *Hubenka*, 438 F.3d at 1032 (citations omitted). Indeed, the pollution control objectives of the Act were evident in the earliest CWA cases. As this Court stated:

> It would, of course, make a mockery of those [commerce] powers if [Congress's] authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.

Ashland Oil, 504 F.2d at 1325–26.

To be sure, the Supreme Court has stated that the term "navigable" must be given some meaning in defining "waters of the United States." *SWANCC*, 531 U.S. at 173; *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). The Agencies' interpretation does that by defining waters of the United States to include traditional navigable waters and those waters that have a significant nexus to those waters. *See supra* at 50-56. But, "there is no reason to believe that Congress has less power over navigable waters than over other interstate channels," such that Congress could not regulate nonnavigable waters in order to protect water quality in traditional navigable waters. *Deaton*, 332 F.3d at 707. To do so would be contrary to the express purposes in the Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and "attain water quality which provides for the protection and

propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(1)-(2).

Similarly unavailing are Petitioners' arguments that the Rule relies on significant nexus factors that have "nothing to do with commerce" and an "attenuated causal chain." States Br. 69-70. These arguments fundamentally mischaracterize the Rule and misunderstand the scope of federal authority under the Commerce Clause. The functions relevant to making case-specific significant nexus determinations include those that reflect the potential for upstream waters to significantly degrade or improve the integrity of downstream waters to which they are connected. TSD at 180-84, JAxxxx-xxxx. The Rule thus draws a direct connection between activities in upstream waters and their potential effects on downstream. As already discussed, Congress's power over channels of commerce is broad enough to allow for the regulation of upstream pollution that affects downstream waters. It is entirely reasonable for the Agencies to include upstream waters that may significantly affect downstream water quality as waters that are subject to the Act's restrictions on discharges.

2. Protection of some nonnavigable interstate waters under the Rule is a valid exercise of Congress's power to regulate classes of activities that substantially affect interstate commerce.

State Petitioners contend that the Rule's definitions of "tributary," "adjacent waters," and case-specific waters sweep in waters with no meaningful connection to interstate commerce. States Br. 69; *see also* Bus. Br. 88 (arguing that "ephemeral

trickle[s]," "dry wash[es]," and "isolated wetlands" allegedly covered by the Rule "have no substantial effect on[] interstate commerce"). In most cases, waters covered under the Rule comprise traditional navigable waters or nonnavigable tributaries, adjacent waters, and case-specific waters with a significant nexus to traditional navigable waters. For the reasons discussed above, these waters are within Congress's authority to regulate channels of commerce and Petitioners' argument that these waters have no substantial effect on interstate commerce is inapposite.

The Rule's inclusion of interstate waters as waters of the United States without regard to navigability, however, does raise the possibility that some nonnavigable interstate waters lacking a connection to traditional navigable waters will come within the CWA's reach. But that possibility does not render the Rule unconstitutional. The "Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981). Congress could rationally conclude that regulation of discharges to or reaching any interstate water, navigable or not, is necessary to address the substantial effects of water pollution on interstate commerce. *Cf. id.* at 281-82 (finding nationwide coal mining regulation necessary to "insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders").

State Petitioners' argument that the CWA "rests entirely upon Congress' authority to regulate channels of interstate commerce" is unsupported. States Br. 65-66. *SWANCC*, upon which States rely, addressed migratory birds as the sole basis for jurisdiction over "nonnavigable, isolated, *intrastate*" ponds, 531 U.S. at 171-72 (emphasis added), and has no bearing on whether Congress's Commerce Clause authority extends to nonnavigable *interstate* waters. Moreover, Petitioners disregard that "Congress's intent in enacting the [1972 CWA] was clearly to establish an all-encompassing program of water pollution regulation." *City of Milwaukee*, 451 U.S. at 318. As Justice Kennedy recognized in *Rapanos*, "the Act protects downstream States from out-of-state pollution that they cannot themselves regulate." 547 U.S. at 777 (citation omitted); *cf. City of Milwaukee*, 451 U.S. at 317 (concluding that in enacting the 1972 Amendments Congress displaced federal common law for resolving interstate nuisance disputes regarding water pollution). Omission of nonnavigable interstate waters from the Rule would "leave a gaping hole" in Congress's comprehensive scheme to regulate water pollution. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

Petitioners' attempt to analogize the CWA to the statutory schemes that the Supreme Court found to be beyond Congress's Commerce Clause power in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), is unavailing. States Br. 67-70; Bus. Br. 88. Unlike the CWA, the statutory schemes in *Lopez* (possession of guns near schools) and in *Morrison* (domestic violence) sought to regulate purely intrastate, noneconomic activity that could *only* be found to have substantial effects on interstate

commerce when viewed in the aggregate. In other words, those statutory schemes had nothing to do with commerce and were not part of a larger congressional scheme to regulate interstate commerce that would be undercut unless the intrastate activity were regulated. Regulation of *interstate* waters under the CWA's comprehensive scheme for addressing water pollution is markedly different than the local, noneconomic activity at issue in *Lopez* and *Morrison*. Indeed, as explained above, the vast majority of activities in waters of the United States as interpreted by the Agencies fall under Congress's authority to regulate channels of interstate commerce.

Moreover, "[t]here can be no doubt that, unlike the class of activities Congress was attempting to regulate in [*Morrison* and *Lopez*], … the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons." *SWANCC*, 531 U.S. at 193 (Stevens, J., dissenting). Indeed, one need only consider the number of business entities and associations that are parties to this suit to comprehend the economic nature of the activities involved. Similarly, the state highway and pipeline projects that the States complain will be impacted by the Rule are indisputably economic activities. It is also indisputable that the consequences of water pollution discharged in one state and flowing to another are economic in nature. *Cf. Hodel*, 452 U.S. at 281-82. Such pollution also destroys or diminishes the value of water to "public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes" that the CWA protects. 33 U.S.C. § 1313(c)(2)(A). Congress clearly had a rational basis to conclude that discharges of

pollutants to nonnavigable interstate waters, alone and in the aggregate, substantially affect national water quality and interstate commerce. Therefore, the Agencies' inclusion of nonnavigable interstate waters as waters of the United States does not violate the Commerce Clause.

B. The Rule comports with the Tenth Amendment.

Petitioners argue that the Rule violates the Tenth Amendment because it addresses areas of state authority over land and water resources, regulates states as states, and interferes with traditional state power and functions. *See, e.g.,* States Br. 58-64; Bus. Br. 88-89. These arguments rely on principles rejected decades ago and merit no attention here.

First, the Supreme Court "long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Hodel*, 452 U.S. at 291. The question under the Tenth Amendment is "whether an incident of state sovereignty is protected by a limitation on an Article I power." *New York v. United States*, 505 U.S. 144, 157 (1992). Because the Commerce Clause allows Congress to regulate discharges of pollutants to waters identified in the Rule, *see supra* 152-160, it raises no Tenth Amendment concerns. *See Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1153 (9th Cir. 2013). To hold otherwise would "be a radical departure from long-established precedent." *Hodel*, 452 U.S. at 292.

Second, Petitioners' contention that the Rule "regulates 'states as states' *because* of the extensive cooperative federalism" framework embodied in the CWA misunderstands how cooperative federalism works. States Br. 60 (emphasis added). The CWA authorizes willing States to participate in the implementation of the Act through the various provisions State Petitioners identify in their brief. States Br. 60 (citing 33 U.S.C. §§ 1313, 1341(a)(1), 1342, 1344). However, a State that does not wish to implement these CWA provisions may decline to do so and the "full regulatory burden will be borne by the Federal Government." *Hodel*, 452 U.S. at 288; *see* 33 U.S.C. §§ 1313(c)(4), (d)(2), 1342(a), 1344(a). Nothing in the Rule changes this.

The Supreme Court has "repeatedly affirm[ed] the constitutionality of federal statutes," like the CWA "that allow States to administer federal programs but provide for direct federal administration if a State chooses not to administer it." *Texas v. EPA*, 726 F.3d 180, 196-97 (D.C. Cir. 2013) (citations omitted). An enactment runs afoul of the Tenth Amendment only when through coercion or compulsion it requires States to administer a federal statute. *See New York*, 505 U.S. at 175-76 (holding that Congress could not require states to regulate radioactive waste in a certain manner or be required to take title to the waste). Petitioners do not claim that the Rule compels or coerces States to implement any CWA provisions. Rather, they contend that the Rule commandeers States because it expands federal jurisdiction and thus adds to the waters they would otherwise regulate when implementing the CWA provisions they

choose to administer. *See* States Br. 60, 63.[40] The notion that the Rule regulates "states as states" because they "will be required to" regulate more waters (and allegedly incur the related financial cost, States Br. 63) is illusory because States are not being compelled or coerced to regulate any waters under the CWA. As the Supreme Court recognized in *New York*, it does not offend the Tenth Amendment "to offer States the choice of regulating … to federal standards or having state law pre-empted," as is the option under "numerous federal statutory schemes … includ[ing] the CWA." 505 U.S. at 167. [41]

The D.C. Circuit rejected a similar argument in *Mississippi Commission on Environmental Quality v. EPA*, 790 F.3d 138, 174-75 (D.C. Cir. 2015). In that case, the State of Texas argued that EPA's designation of new areas in that State as not meeting federal air quality standards under the Clean Air Act violated the Tenth Amendment because the designation purportedly "compel[led] State regulators to enforce a myriad of federal requirements involving emissions controls, clean fuel programs, transportation and land use limitations in the designated area." *Id.* The court disagreed, holding that the Clean Air Act does not compel states to enforce or administer federal requirements at all; it gives states the option to do so. *Id.* Here,

[40] We address *infra* at 164-66 the States' argument that the Rule will trigger federal permitting requirements for state projects.

[41] Moreover, Petitioners' characterization of the Rule as expanding federal jurisdiction is exaggerated. *See supra* at 31-33; 80 Fed. Reg. at 37,084; TSD at 30-34, JAxxxx-xxxx.

too, no state is required to take any of the actions that State Petitioners claim they "must." If a state chooses not to administer any CWA provisions, the federal government must do so.[42] Thus, as in *Mississippi Commission*, State Petitioners' commandeering argument should be rejected.

Put another way, a state does not gain a constitutional right to control the reach of the CWA merely by opting into the Act's cooperative federalism program. *See Islander East Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 92-93 (2d Cir. 2006) (a state's grant or denial of water quality certification under the CWA is "not a sovereign state right under the Tenth Amendment," and therefore judicial review of the certification did not unconstitutionally interfere with the state's control of sovereign lands). When a state elects to administer provisions of the CWA, such as when it promulgates water quality standards under 33 U.S.C. § 1313, or certifies an activity as compliant with those standards under 33 U.S.C. § 1341, or issues a NPDES permit under 33 U.S.C. § 1342, it is acting in the shoes of the federal government. *See Islander East*, 482 F.3d at 92-93. The Rule does not intrude on state sovereignty or violate the Tenth Amendment by defining those areas where the CWA applies.

It bears emphasizing that the CWA addresses discharges of pollutants into the Nation's waters. By identifying waters subject to the CWA's provisions, the Rule does

[42] State Petitioners do not—and cannot—argue, as Texas did in *Mississippi Commission*, that the CWA imposes sanctions if a state chooses not to implement one of the CWA's programs.

not displace all of the states' authority over those waters, as the States suggest, States Br. 61-62. While States may not permit more pollution of waters of the United States than the CWA allows, that is a function of the Supremacy Clause and Congress's exercise of its Commerce Clause authority, not a Tenth Amendment violation. The Tenth Amendment reserves to States those powers "*not* delegated to the United States by the Constitution." U.S. Const., amend. X (emphasis added); *New York*, 505 U.S. at 155 (citation omitted).

Third, Petitioners' contention that the Rule violates the Tenth Amendment because it intrudes on "traditional state functions" is foreclosed by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985), and this Court's decision in *Dressman v. Costle*, 759 F.2d 548, 557 (6th Cir. 1985). Petitioners argue that they are required to obtain CWA permits for state highway, transmission line, and pipeline projects that would impact waters they claim were not subject to the CWA before the Rule. States Br. 60, 63. In *Garcia*, however, the Supreme Court held that the Tenth Amendment poses no obstacle to Congress regulating state activities the same as private activities. 469 U.S. at 554. At issue in that case was whether Congress could require States to comply with federal minimum wage and overtime requirements of the Fair Labor Standards Act. In rejecting the transit authority's claim, the Supreme Court overruled its prior holding in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the Tenth Amendment prevented the federal government from directly regulating States when compliance would impair "traditional [state] functions."

Garcia, 469 U.S. at 546-47.[43] Following *Garcia*, this Court in *Dressman*, 759 F.2d at 557, rejected claims by Kentucky and local governments that the Tenth Amendment shielded them from penalties for noncompliance with a vehicle inspection and maintenance program required by the Clean Air Act.

Garcia and *Dressman* make clear that the Tenth Amendment poses no impediment to the direct regulation of States to the same extent of private parties when their activities involve "discharges of pollutants." *See Reno v. Condon*, 528 U.S. 141, 151 (2000) (Tenth Amendment posed no bar to federal limits on sale of personal information from databases because it regulated State as "owners of data bases"); *City of Abilene v. EPA*, 325 F.3d 657, 662-63 (5th Cir. 2003) (imposition of CWA permit conditions on city was not Tenth Amendment violation). Thus, State Petitioners cannot mount a Tenth Amendment challenge to the Rule merely by alleging interference with "traditional state functions." *See also Equal Employment Opportunity Comm'n v. Kentucky Retirement Sys.*, 16 F. App'x 443, 453 (6th Cir. 2001) (holding that while Congress cannot require Kentucky to provide retirement plans, if Kentucky

[43] Therefore, Petitioners' reliance on *Hodel*, 452 U.S at 286-87, to the extent it reiterated the "traditional state functions" test, is unavailing. *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 555 n.2 (6th Cir. 1987) (explaining that the "traditional concept of [state] sovereignty … is no longer the focus of this analysis"). As the Supreme Court noted in *Garcia*, the "traditional governmental functions" test was not only unworkable, it was inconsistent with established principles of federalism. 469 U.S. at 449-50.

elects to do so, it must comply with federal law governing such plans). Accordingly, Petitioners fail to show that the Rule violates the Tenth Amendment.

C. The Rule comports with the Due Process Clause.

State and Business Petitioners' arguments that the Rule is unconstitutionally vague also lack merit. A statute or regulation is "void for vagueness" if it wholly "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); *United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012) (citations omitted, emphasis in original). The Rule is neither too vague for ordinary people to understand, nor so standardless that it fails to provide adequate guidelines for agency discretion. Moreover, a person who is uncertain about the jurisdictional status of an aquatic feature may seek a formal determination from the Corps, which is subject to judicial review.

1. The Rule provides fair notice to the public and clear standards for regulators.

The Rule provides notice of what waters are subject to the CWA's prohibition on discharges of pollutants, *viz.*, all primary waters; all impoundments of waters of the United States; all tributaries, as defined by the Rule; and all adjacent waters, as defined by the Rule. 33 C.F.R. § 328.3(a)(1)-(6). The Rule further clarifies permissible and impermissible conduct by identifying waters that are categorically excluded from the CWA's reach. *Id.* § 328.3(b). The Rule clarifies these categories by defining relevant

terms, including "tributary," "adjacent," and "neighboring." *Id.* § 328.3(c). And, although the Rule requires a case-specific significant-nexus analysis for certain categories of waters, it limits the waters requiring such analysis and provides clear guidance about what qualifies as a significant nexus. *Id.* § 328.3(a)(7)-(8), (c)(5). The Rule thus provides fair notice to the ordinary person of where the CWA's restrictions on pollutant discharges apply and clear standards for agency personnel and courts to apply in determining whether violations of the prohibition have occurred. That is all the Due Process Clause requires.

The Rule is wholly unlike the enactments found to be unconstitutionally vague in the cases cited by Petitioners. For example, in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court found the residual clause of the Armed Career Criminal Act to be impermissibly vague because of the "indeterminacy of the wide-ranging inquiry" required by the clause and the repeated failures of the courts to craft an objective standard in applying the provision. The clause "tied the judicial assessment of risk [it takes to trigger the enhanced sentencing under the clause] to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Johnson*, 135 S. Ct. at 2557. The clause compounded that uncertainty by providing no measure for how much risk it takes to make a crime "violent" under the clause. *Id.* at 2558. The combination of imagined crimes and a confusing standard "produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

The Rule leads to no such unpredictability or arbitrariness. It defines waters that are jurisdictional and those that are not jurisdictional with clearly identified regulatory standards that refer to real-world facts. For example, the Rule defines a jurisdictional tributary as a water that contributes flow to a primary water and "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). In contrast to the residual clause at issue in *Johnson*, the Rule does not require the regulated public, agency regulators, or courts to imagine what qualifies as "ordinary high water mark." 33 C.F.R. § 328.3(c)(6) (defining "ordinary high water mark"). Similarly, the Rule provides clear standards for what categories of waters may be subject to a case-specific significant-nexus analysis (33 C.F.R. § 328.3(a)(7) and (a)(8)), and it provides meaningful guidelines for what is required to establish a significant nexus by defining what "significant" means and identifying the specific types of functions that are relevant to that analysis (*id.* § 328.3(a)(5)). Thus, the Rule is a far cry from the "indeterminacy" and "unpredictability" that doomed the residual clause in *Johnson*.

Contrary to State Petitioners' argument, States Br. 75-76, the statement in *Johnson* that a "failure of 'persistent efforts [by the courts] to establish a standard' may provide evidence of vagueness" has no application to the Rule, which has not been interpreted by any court. The Rule in fact adds clarity to the significant nexus standard that the Supreme Court has consistently recognized—in Justice Kennedy's

concurrence in *Rapanos*, in *SWANCC*, and implicitly in *Riverside Bayview*—as a reasonable standard for identifying the boundaries of waters of the United States.

The Rule is likewise distinguishable from cases like *Chicago v. Morales*, 527 U.S. 41 (1999), and *Kolender v. Lawson*, 461 U.S. 352 (1983), cited by Petitioners. These cases involved statutes that did not define the relevant legal standard or provide *any* criteria by which police officers could determine whether an individual conformed his conduct to the law. Rather, whether one had an "apparent purpose" for his presence on a public sidewalk, in *Morales*, 527 U.S. at 62-63, or had offered "credible and reliable identification" to establish his identity, in *Kolender*, 461 U.S. at 360-61, was left to the complete subjective discretion of the police officer. Not so under the Rule. While the presence of a water of the United States may contain an element of discretion, that discretion is bounded by the definitions and factors set forth in the Rule. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) ("As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible.").

State and Business Petitioners argue that the Rule is impermissibly vague because it may be difficult for some would-be dischargers to determine whether certain waters are jurisdictional under the Rule. States Br. 72-74; Bus. Br. 82-86. Petitioners' arguments demand more precision than the Due Process Clause requires. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather

the indeterminacy of precisely what that fact is." *United States v. Maslenjack*, 821 F.3d 675, 694-95 (6th Cir. 2016), *petition for cert. docketed* (Sept. 9, 2016) (citing *Williams*, 553 U.S. at 306). The Due Process Clause "does not impose drafting requirements of mathematical precision or impossible specificity." *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1336 (6th Cir. 1978); *Williams*, 553 U.S. at 304 ("perfect clarity and precise guidance have never been required"). "[I]t is often sufficient that the proscription mark out the rough area of prohibited conduct, allowing law-abiding individuals to conform their conduct by steering clear of the prohibition." *United States v. Thomas*, 864 F.2d 188, 194 (D.C. Cir. 1988); *see also Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) ("no more than a reasonable degree of certainty can be demanded"). The Rule provides fair notice under these standards.

Petitioners also fail to show that the Rule is so standardless that it will lead to arbitrary enforcement. Petitioners argue that the challenged aspects of the Rule are so ambiguous and subjective that whether a water is covered by the Rule is left entirely to a regulator's discretion. States Br. 74-75; Bus. Br. 79-86. This is not an accurate characterization of the Rule. It also misstates the law. An enactment does not violate the Due Process Clause merely because it allows regulators some discretion to enforce the law. "[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). It is "wholly subjective judgments without statutory definitions, narrowing context, or settled legal

meanings" that render a statute unconstitutionally vague. *Williams*, 553 U.S. at 306 (citation omitted). The Supreme Court has recognized that "enforcement requires the exercise of some degree of police judgment." *Grayned*, 408 U.S. at 114. Where, as here, a regulation sets forth "explicit standards for those who apply them," arbitrary enforcement is avoided. *Id.* Petitioners fail to show that the Rule is so "standardless" that it sanctions arbitrary enforcement.

2. Petitioners fail to identify any provision of the Rule that is unconstitutionally vague.

Petitioners' arguments that specific provisions of the Rule are vague are themselves vague and conclusory and should be rejected.

Ordinary High Water Mark. The term "ordinary high water mark" is neither impossible to understand nor subject to arbitrary enforcement. The Rule incorporates the Corps' longstanding definition of "ordinary high water mark," which refers to "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). However, identification of any jurisdictional water under the Rule is not based solely on the presence of an ordinary high water mark. For example, to be jurisdictional, a "tributary" must have physical characteristics of an ordinary high water mark and a bed and banks and it also must contribute flow to a primary water. 33 C.F.R. § 328.3(c)(3).

Contrary to Petitioners' argument, the Rule does not allow regulators to rely on "whatever 'other . . . means' they deem 'appropriate'" to identify the ordinary high water mark. Bus. Br. 79. Rather, it directs regulators to rely on specific enumerated types of physical characteristics or on other means appropriate to the "surrounding areas," 33 C.F.R. § 328.3(c)(6). Agency guidance further refines what are appropriate means for identifying ordinary high water mark. *See*, *e.g.,* 2005 RGL at 2-3, JAxxxx-xxxx. This allows regulators sufficient flexibility to address different circumstances that may be present in different parts of the country, while providing at least the "minimal guidelines" necessary to comport with due process. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 737 (D.C. Cir. 2016) (citation omitted) ("a regulation is not impermissibly vague because it is 'marked by flexibility and reasonable breadth, rather than meticulous specificity'").

State and Business Petitioners' contention that identifying the ordinary high water mark might be subject to ambiguities, especially in the arid West, does not establish that the term is impermissibly vague. *See* States Br. 72 n.10; Bus. Br. 80-81. Petitioners ignore that, as explained *supra* at 72-75, methods for identifying the ordinary high water mark have been the focus of significant efforts across the country and especially in the West for more than a decade. Those efforts have led to the creation of several studies and technical guides that have improved the accuracy and consistency of ordinary high water mark identification while also enhancing the Agencies' familiarity with the various indicators of flow in rivers and streams in the

West. *Supra* at 72-74; TSD at 56-67, 237, 239-240, 268, JAxxxx-xxxx, xxxx, xxxx-xxxx, xxxx; RTC Topic 8 at 314, JAxxxx. The Agencies also published field guides, subject to extensive internal and external peer review, for identifying ordinary high water marks in regions where physical conditions present challenges. TSD at 237, JAxxxx; RTC Topic 8 at 317-18, JAxxxx-xxxx. These manuals provide guidance to the public and regulators facilitating a consistent approach to ordinary high water mark identification.

Also unavailing is Petitioners' claim that the use of remote sensing tools and historical evidence render the Rule unconstitutionally vague.[44] States Br. 72; Bus. Br. 80-81. That different tools may be used to determine the physical characteristics of waters under the Rule is unremarkable, and certainly does not render the defined term "tributary" vague. As the Agencies explained, these mechanisms are particularly relevant in an enforcement context, where physical characteristics of ordinary high water mark might be absent due to unpermitted conduct such as stream alteration. 80 Fed. Reg. at 37,077/3. Indeed, it would create a vast loophole in the CWA's prohibition on discharges if a jurisdictional water lost its protected status merely because its defining characteristics have been unlawfully manipulated.

[44] Remote sensing involves evidence other than direct field observation. 80 Fed. Reg. at 37,076. The Rule preamble discusses remote sensing sources of information and mapping. *Id.* at 37,076-077. Historical evidence may include maps, aerial photographs, local surface water management plans, street maintenance data, and wetlands conservation program plans. *Id.* at 37,078-79.

The Agencies have used remote sensing and historical evidence to make jurisdictional determinations for many years, and the Agencies' record establishes their reliability. 80 Fed. Reg. at 37,076-77; TSD at 238-39, JAxxxx-xxxx; *see also* 2005 RGL at 2, 3, JAxxxx, xxxx. And courts have long accepted such evidence. *See, e.g., United States v. Sawyer*, 825 F.3d 287, 296 (6th Cir. 2016); *Deerfield Plantation Phase II-B Prop. Owners Ass'n v. U.S. Army Corps of Eng'rs*, 501 F. App'x 268 (4th Cir. 2012); *United States v. Lucas*, 516 F.3d 316, 326-27 (5th Cir. 2008). Petitioners' rank speculation that remote sensing tools and historical evidence will lead to arbitrary enforcement is unfounded, especially since an assertion of jurisdiction in a judicial enforcement action must be supported by sufficient evidence to convince a court or jury. The "mere fact that close cases can be envisioned [does not] render[] a statute vague." *Williams*, 553 U.S. at 305-06. That problem is addressed not by the vagueness doctrine, but "by the requirement of proof beyond a reasonable doubt," *id.,* in a criminal proceeding or by a preponderance of the evidence in a civil action.

Case-specific significant nexus. Business and State Petitioners' arguments that the case-specific significant nexus analysis is subjective and opaque also fail. States Br. 73-74; Bus. Br. 82-85. The Rule identifies two defined categories of waters that are subject to case-specific significant nexus analysis. 33 C.F.R. § 328.3(a)(7), (a)(8). Waters that do not fall within subsections (a)(7) or (a)(8) are not subject to case-specific significant nexus analysis and are not jurisdictional unless they qualify under another provision. 80 Fed. Reg. 37,095. Thus, the Rule makes clear what

waters may be considered jurisdictional under a case-specific significant-nexus analysis, in contrast to the pre-Rule situation, where more individual waters were subject to case-specific analysis. *Id.*

Petitioners' contention that the category of "Texas Coastal Prairie Wetlands" is vague, Bus. Br. 86, is especially weak. The Rule defines these wetlands with specificity: "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." 33 C.F.R. § 328.3(a)(7)(v); *see* TSD at 348-49, JAxxxx-xxxx. And the preamble to the Rule explains precisely where these wetlands are located for purposes of subsection (a)(7): the Lissie and Beaumon Geological Formations and the Ingleside Sand. 80 Fed. Reg. at 37,073/1. Contrary to Petitioners' argument, Bus. Br. 86, the Constitution does not require that the Rule spell out exactly how near the coast, or how tightly packed, the wetlands must be to fall within subsection (a)(7). *Williams*, 553 U.S. at 304 ("perfect clarity and precise guidance have never been required").

Petitioners also fail to show that the significant nexus standard is unconstitutionally vague. *See* Bus. Br. 83; States Br. 74, 75. The Rule adds substance and clarity to the standard articulated by the Supreme Court by specifying the magnitude of effect a water identified in subsections (a)(7) and (a)(8) must have on the chemical, physical, or biological integrity of a primary water ("more than speculative or insubstantial"), and describing the specific types of functions relevant to that

determination. 33 C.F.R. § 328.3(c)(5)(i)-(ix). The Rule need not precisely quantify the effect any particular function must have on a downstream water to pass constitutional muster. *Johnson*, 135 S. Ct. at 2561; *Diebold,* 585 F.2d at 1336. The concept of significant nexus is one that has been used frequently under the CWA since *SWANCC*. As one commenter observed, these "cases do not suggest that any particular type of evidence, quantitative or otherwise, is required for determining a nexus' significance." Envtl. Law Inst. Comment, AR-16406, at 5, JAxxxx. "As a general matter, [courts] do not doubt the constitutionality of laws that call for the application of a qualitative standard [] to real-world conduct." *Johnson*, 135 S. Ct. at 2561.

Exclusions. Business Petitioners claim that the Rule's exclusions for puddles and erosional features are unconstitutionally vague because it will not always be easy to distinguish between a jurisdictional water and an excluded water. Bus. Br. 83-85. They are wrong.

The Rule provides more than adequate guidance to distinguish between a puddle and a wetland. In fact, the Agencies added the exclusion for "puddles" at the suggestion of commenters. That term means "a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event." 80 Fed. Reg. at 37,099. The term "wetland," by contrast, has been defined in the regulations since at least 1986 to mean "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." 33 C.F.R. § 328.3(c)(4). Identification of wetlands is further aided by the Corps' 1987 Wetland Delineation Manual and its regional supplements. Thus, whether any particular feature, such as the feature in Figure 7 of Business Petitioners' Brief, is a puddle or a "depressional wetland" will be determined with reference to the Rule, the preamble, and the Agencies' longstanding guidance. [45]

Petitioners' argument that a "depressional wetland" may be determined to be jurisdictional "without regard for size or permanence," Bus. Br. 83-84, also fails to establish that the Rule is impermissibly vague. Under the Rule, a depressional wetland is a water of the United States if (1) it is jurisdictional under 33 C.F.R. § 328.3(a)(1)-(6), or (2) it falls within the categories identified in § 328.3(a)(7) or (a)(8) and has a significant nexus to a primary water. Petitioners' grievance is thus with the Agencies' use of the significant nexus standard—as opposed to a standard based on "size or

[45] Business Petitioners' allegation that the Corps determined *in 2007*, eight years before the Rule was promulgated, that the aquatic feature pictured in Figure 8, Bus. Br. 85, was a "jurisdictional wetland" is irrelevant here. It is also factually incorrect. The Corps determined that the feature pictured in Figure 8 was a wetland that had been disturbed by the repeated driving of cars through it. But because the wetland was found not to have a "significant nexus" to the nearest downstream traditional navigable water, it was determined to be not jurisdictional. *See* Approved Jurisdictional Determination, File No. SPK-2007-1474, available at http://web.archive.org/web/20161228173203/http://www.spk.usace.army.mil/Portals/12/documents/regulatory/jd/2008/july/SPK-2007-01474.pdf .

permanence"—for purposes of determining the jurisdictional status of a wetland. That argument fails for the reasons explained *supra* at 43-57.

Petitioners' assertion, Bus. Br. 85, that "there is no way for the regulated public to know" whether a feature qualifies as a tributary, as opposed to an erosional feature, misreads the Rule. A tributary is identified by contribution of flow to a downstream primary water and physical indicators of a bed and bank and an ordinary high water mark. 33 C.F.R. § 328.3(c)(3). The regulatory status of a stream thus turns on contribution of flow and the presence of the physical indicators, but not on the regulated public's ability to assess "volume, frequency, and duration of flow." *Contra* Bus. Br. 85. The requirement for these physical indicators also sufficiently confines the Agencies' discretion to satisfy enforcement-related due process concerns. *See Grayned*, 408 U.S. at 114 ("As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible.").

Thus, the Rule does not violate due process principles.

3. Any potential uncertainty about the jurisdictional status of particular waters may be addressed by seeking guidance from the Agencies.

To the extent a landowner or developer is uncertain about whether a particular water is jurisdictional, it may seek a formal determination. The Corps recently reaffirmed its historic practice of providing jurisdictional determinations to the public upon request. Regulatory Guidance Letter 16-01 (Oct. 2016), available at

http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl_6-01_app1-2.pdf?ver=2016-11-01-091706-840. A party may request a jurisdictional determination from the Corps regardless of whether a section 402 or section 404 permit is being sought, or even if no permit at all is envisioned. The Corps provides information about the jurisdictional status of waters in the form of preliminary and approved jurisdictional determinations. *Id.* Approved jurisdictional determinations may be administratively appealed and are then judicially reviewable. *Hawkes*, 136 S. Ct. 1807.

Business Petitioners' contention that the availability of jurisdictional determinations is insufficient to cure potential ambiguities in the Rule, Bus. Br. 87, is unsupported. Courts have found that the opportunity to obtain clarity from a regulatory agency, through the administrative process, can avoid inadvertent violations and alleviates any lingering due process concerns. *See United States Telecom Ass'n*, 825 F.3d at 738 (citing *DiCola v. Food and Drug Admin.*, 77 F.3d 504, 509 (D.C. Cir. 1996); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)). This is true even where the agency's guidance is non-binding. *United States Telecom Ass'n*, 825 F.3d at 738 (finding that the agency's ability to change its views after issuing an advisory opinion does not negate the procedure's usefulness).

Business Petitioners' argument that jurisdictional determinations do not address the potential for arbitrary enforcement also fails. As already discussed, the Rule provides clear standards that prevent arbitrary enforcement. And the availability of

administrative and judicial review, even before any enforcement process begins, and of judicial review if there is an enforcement action, fully protects against any possibility of arbitrary enforcement.

D. Resort to canons of construction cited by Petitioners is unwarranted.

Business and State Petitioners argue that the Court should avoid reaching the constitutional issues raised in their briefs by applying various canons of construction. These canons have no applicability here. This case presents ordinary questions of statutory interpretation, which should be resolved under the familiar two-step *Chevron* framework and principles of APA review. Petitioners' attempt to make an end-run around the deference afforded the Agencies under *Chevron* and the APA should be rejected. *See supra* at 42-43.

"[T]he burden of establishing unconstitutionality is on the challenger." *Miss. Comm'n on Envtl. Quality*, 790 F.3d at 178. Petitioners' appeal to the constitutional avoidance canon and clear statement rule is an attempt to avoid that burden. The Supreme Court rejected a similar attempt in *Rust v. Sullivan*, explaining that the avoidance canon "will not be pressed to the point of disingenuous evasion." 500 U.S. 173, 191 (1991) (quotation omitted). Thus, even though the Court believed that the constitutional challenges raised in *Rust* had "some force," it declined to apply the avoidance canon because it did not believe those arguments "raise[d] … 'grave and doubtful constitutional questions,' … that would lead us to assume Congress did not

intend to authorize" the regulatory actions at issue, and instead upheld those actions under *Chevron*. *Id.* (citation omitted). Because the Rule is grounded in the significant nexus standard, it avoids the commerce clause and federalism concerns Petitioners raise. *See Rapanos*, 547 U.S. at 782-83 (Kennedy, J., concurring). Petitioners' attempt to invoke the rule of lenity is even further from the mark. *See Babbitt v. Sweet Home*, 515 U.S. 687, 704 n.18 (1995) ("We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement.").

Petitioners' constitutional arguments rest almost entirely on their hyperbolic attempt to cast the Rule as a usurpation of state authority over land use. The Rule in fact effectuates Congress's clearly stated objective to establish a comprehensive framework to address water pollution, a problem that does not respect state boundaries and has national economic consequences, thus requiring a national solution. Because Petitioners' constitutional arguments have no force, the canons of construction they advocate should not weigh in their favor—or indeed be considered at all—when analyzing the statutory issues that lie at the heart of this case.

VI. The Agencies complied with all applicable procedural requirements.

Petitioners erroneously contend that the Agencies provided inadequate notice of and opportunity to comment on aspects of the Rule, engaged in improper "lobbying" and "propaganda," and violated the Regulatory Flexibility Act. The record

shows the opposite to be true, as the Agencies met or exceeded all procedural requirements in promulgating the Rule.

A. The Agencies satisfied the APA.

Petitioners raise an assortment of arguments related to the procedural requirements of the APA. All Petitioners assert that the Agencies did not provide adequate notice as to one or more provisions of the Rule. States Br. 46-52; Bus. Br. 26-28; Ass'n Br. 27-28; Waterkeeper Br. 54. Business Petitioners further contend that the public was denied the opportunity to comment on the Science Report, and that the Agencies failed to consider and respond to important comments. Bus. Br. 28-34. As explained below, the Agencies adhered to the procedural requirements of the APA by providing notice of the subjects and issues involved in the rulemaking, providing the scientific and technical bases for the Rule, and responding to significant public comments.

1. The Rule is a logical outgrowth of the Agencies' proposal.

Under the APA, a "[g]eneral notice" of proposed rulemaking must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved" and provide the public an opportunity to comment. 5 U.S.C. § 553(b)(3), (c). The purpose of these procedures is "to get public input so as to get the wisest rules," to "ensure fair treatment for persons to be affected by regulations," and "to ensure that affected parties have an opportunity to participate in and influence

agency decision making at an early stage." *Dismas Charities, Inc. v. U.S. Dep't of Justice,* 401 F.3d 666, 678, 680 (6th Cir. 2005) (internal quotation marks and citation omitted).

An agency may promulgate a rule that differs from a proposed rule. *Chrysler Corp. v. Dep't of Transp.*, 515 F.2d 1053, 1061 (6th Cir. 1975). If that were not the case, one of the key purposes of notice and comment—to allow an agency to reconsider, and perhaps revise, a proposed rule based on the comments submitted—would be undermined. *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000). Agencies could be "forced into perpetual cycles of new notice and comment periods" or "refuse to make changes in response to comments." *Id.* Thus, even substantial changes to a proposal may be made, provided the final rule is a "logical outgrowth" of the proposed rule. *Leyse v. Clear Channel Broadcasting, Inc.*, 545 F. App'x 444, 453 (6th Cir. 2013) (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007)); *see also Alto Dairy v. Veneman*, 336 F.3d 560, 569-70 (7th Cir. 2003) ("The purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced … but to refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding.").

A proposed rule satisfies the logical outgrowth test if it "expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). The requirements of APA section 553 are thus satisfied "if affected parties should have anticipated that the relevant modification was

possible," *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014), or if additional notice and comment "would not provide commenters with their first occasion to offer new and different criticisms." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (quotation omitted).

Here, the Agencies clearly described the subjects and issues involved in the rulemaking and invited comment from the public, including the issues for which Petitioners challenge the notice provided. The voluminous and detailed comments on the proposal left no stone unturned. While the final Rule is different from the proposal, the revisions reflect the Agencies' conscientious efforts to respond to the robust debate with the additional clarity requested by commenters. The modifications to the Proposed Rule were foreseeable and, at least in part, the result of comments, including some from Petitioners.

a. The distance limitations in the definition of "neighboring" are a logical outgrowth of the proposal.

The Rule retained the 1986 regulation's definition of "adjacent" as "bordering, contiguous [to], or neighboring." 33 C.F.R. § 328.3(c)(1); *see id.* § 328.3(a)(6). Petitioners do not challenge the Rule's inclusion of "bordering" or "contiguous," and those terms are unchanged from the 1986 regulation. *See* 80 Fed. Reg. at 37,080/2. Rather, Petitioners assert that in defining "neighboring" the Agencies failed to provide adequate notice regarding the distance limitations, specifically: waters (1) within 100 feet of the ordinary high water mark of a primary water, impoundment, or tributary;

(2) within the 100-year floodplain (but not more than 1,500 feet from the ordinary high water mark) of primary water, impoundment, or tributary; or (3) within 1,500 feet of the high tide line of a primary water or within 1,500 feet of the ordinary high water mark of the Great Lakes. 33 C.F.R. § 328.3(c)(2). *See* Bus. Br. 26-27; States Br. 46-47. Notably, the distances in the definition of "neighboring" provide a boundary between waters that are jurisdictional as "adjacent waters" and waters that must be evaluated for significant nexus on a case-specific basis.

In the proposal, the Agencies sought comment on a number of ways to address and clarify jurisdiction over "adjacent waters," including establishing a floodplain interval (e.g., a 50-year or 100-year floodplain) and providing clarity on reasonable proximity as an important aspect of adjacency. Petitioners were on notice in the Proposed Rule that adjacent waters would likely be jurisdictional by rule. The distances contained in the Rule provide clarity and in fact identify a smaller subset of waters as "neighboring" than proposed, as requested by some of the Petitioners now challenging that modification. Although the Agencies did not propose the precise distance limitations that were adopted in the final Rule, those limitations are a logical outgrowth of the proposal.

From the opening sentences of the Proposed Rule, the Agencies made clear that the goal of the rulemaking was to "increase CWA program predictability and consistency by increasing clarity as to the scope of 'waters of the United States.'" 79 Fed. Reg. at 22,188/1; *see id.* at 22,198/2 (stating intention of establishing "bright line

categories of waters that are and are not jurisdictional"). For "adjacent" waters, the Agencies stated their intent to bring "greater clarity to the meaning of 'neighboring'" by "defin[ing] the lateral reach" of that term. *Id.* at 22,207/1; *see id.* at 22,208-09. The Agencies noted that the term "neighboring," which was historically part of the definition of "adjacent," "has generally been interpreted broadly in practice," and that the clarification of "neighboring" was intended to capture those waters that in practice the Agencies "have identified as having a significant effect" on the chemical, physical, or biological integrity of primary waters. *Id.* at 22,207/3.

The proposed definition of "neighboring" encompassed waters located within the distance limitations established by the riparian area or floodplain of a primary water, impoundment, or tributary, and waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to a primary water, impoundment, or tributary. *Id.*; *id.* at 22,263. To the extent "neighboring" would be defined based on a shallow subsurface hydrologic connection or confined surface hydrologic connection, the Agencies made clear in the proposal that they would "assess the distance" between the water body and the jurisdictional water, as the Agencies have "always included an element of reasonable proximity" in the application of the definition of "adjacent." *Id.* at 22,207 (citing *Riverside Bayview*, 474 U.S. at 133-34); *see also* 42 Fed. Reg. at 37,128. Recognizing that in some circumstances "the distance between water bodies may be sufficiently far that even the presence of a hydrologic connection may not support an adjacency

determination," the Agencies requested comment on a number of other options, including "establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency" and a specific floodplain interval. 79 Fed. Reg. at 22,208-09. The Agencies thus informed the public that the definition of "neighboring" was intended to set a clear spatial limit that would provide certainty as to the geographic scope of adjacent waters, based on riparian area, floodplain, and/or some distance limits, and invited comment on how best to accomplish that objective.

Petitioners' arguments that they could not have anticipated the distance limits included in the definition of "neighboring" are further belied by the plethora of comments submitted to the Agencies on this point. Many commenters flatly rejected the idea of *any* distance limitations (whether based on a riparian area or floodplain or on a set distance). For example, some commenters asserted that the *Rapanos* plurality opinion, not Justice Kennedy's opinion, should be followed, and that a hydrologic connection rather than distance should be considered. *See, e.g.*, Comments of N.M. Cattle Growers Ass'n, AR-19595 at 12, JAxxxx; Tex. Comm'n on Envtl. Quality, AR-14279 at 6, JAxxxx. Others commented that there should be no distance limitation in the definition of "neighboring," asserting that chemical and biological connectivity can extend well beyond a riparian area or floodplain. Comments of Clean Water Action, AR-15015 at 6, JAxxxx; S. Envtl. Law Ctr., AR-19613 at 16-17, JAxxxx-xxxx; Earthjustice, AR-14564 at 7, JAxxxx; NRDC, AR-15437 at 62, JAxxxx; *see also*

Comments of Minn. Dept. of Nat'l Res., AR-15742 at 2, JAxxxx (suggesting hydrologic criteria to determine adjacency rather than "geographic proximity"); Ducks Unlimited, AR-11014, Attachment 1 at 9/111, JAxxx ("reasonable proximity" indicates wetlands would be excluded due to distance).

Other commenters responded to the Agencies' request for suggested distance limits by proposing specific floodplain intervals set by FEMA, riparian areas, and numerical distances. *See, e.g.*, Comments of Ky. Oil & Gas Ass'n, AR-16527, at 8, JAxxxx (recommending 100-year floodplain for larger order streams, and the riparian zone within 50 feet of the ordinary high water mark for smaller order streams); Ctr. for Rural Affairs, AR-15029, at 5, JAxxxx (recommending floodplains and riparian areas as "clear, water body-specific, physical boundaries"); Nat'l Lime Ass'n, AR-14428, at 15, JAxxxx (supporting 5-year floodplain); NAIOP, AR-14621, at 5, JAxxxx (recommending 100 feet from a subsection (a)(1)-(5) water or the floodplain of such a water); Fla. Crystals Corp., AR-17922, at 10 JAxxxx (suggesting a 200 foot limit); AASHTO, AR-17172, at 8, JAxxxx (supporting floodplain, riparian zone, or specific geographic limits such as distance limitations based on the bank-to-bank width of the jurisdictional water); Hancock Cnty. Drainage Bd., AR-11979, at 1, JAxxxx (suggesting a distance in feet from the jurisdictional water); N.M. Mining Ass'n, AR-8644, at 2-3, JAxxxx-xxxx (suggesting one-half mile); *see also* NAM Comments, AR-15410, at 22, JAxxxx (citing a case in which a water 125 feet from a tributary was found to have no significant nexus). The Agencies appropriately responded to the

thousands of comments on the proposed definition of "neighboring" by streamlining and clarifying the definition with a specific floodplain interval and numerical distance limits. 80 Fed. Reg. at 37,082-84.

As this Court has recognized, comments that address an issue resolved in a final rule "provide evidence that the notice was adequate." *Leyse*, 545 F. App'x at 454; *cf. Am. Trucking Ass'ns, Inc. v. FMCSA*, 724 F.3d 243, 253 (D.C. Cir. 2013). The comments described above provide ample evidence that the floodplain and numerical distance limitations in the definition of "neighboring" were entirely foreseeable. *Cf. E. Tenn. Natural Gas Co. v. FERC*, 677 F.2d 531, 536 (6th Cir. 1982) (rejecting notice claim where parts of a final rule were shaped by the comments on the proposal).

Some Petitioners suggest that the only way notice here could pass muster would be if the Agencies had proposed the precise numerical distance limits that might be chosen. States Br. 48 n.8. But the APA imposes no such requirement. *See, e.g., Chrysler Corp.*, 515 F.2d at 1061 (proposed rule provided adequate notice regarding headlamp specifications, even though the agency did not mention any time limitation attached to the specifications in proposal); *Ala. Power Co. v. OSHA*, 89 F.3d 740, 744 (11th Cir. 1996) (final standard setting out specific weight of fabrics for clothing worn by employees exposed to flames or electrical arcs was a logical outgrowth of proposal that did not propose any weights but did state objective to prevent burn injuries); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548 (D.C. Cir. 1983) (although proposal "did not list specific 'loopholes' that EPA might try to close," the

final rule's past production requirements for "small" refiners was a logical outgrowth of the proposal).

Moreover, the Agencies provided sufficient notice of a range of possibilities by proposing to define "neighboring" in terms of riparian areas, floodplains, and distances beyond floodplains. 79 Fed. Reg. at 22,207/1-2, 22,208/1. *Cf. Kennecott v. EPA*, 780 F.2d 445, 452 (4th Cir. 1985) ("the agency is not required to specify every precise proposal that it may eventually adopt"). Commenters recognized that a distance limitation based on a floodplain could result in the inclusion of waters "miles away" from a jurisdictional water, depending on the flood interval selected. *See*, *e.g.*, Comments of N. Dakota, AR-15365, at 9, JAxxxx; Water Advocacy Coal., AR-14568, at 50, JAxxxx. Several commenters understood that the term "floodplain" could mean a 500-year floodplain. Comments of Water Advocacy Coal., AR-14568, at 50, JAxxxx; AFBF, AR-18005, at 12, JAxxxx; V. Watson, AR-11819, JAxxxx. As such, the distances adopted in the Rule constituted a "natural subset" of what these informed commenters believed to be within the potential scope of the proposal's treatment of "neighboring." *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1081 (D.C. Cir. 2003) (upholding a "natural subset" of the proposal against a logical outgrowth challenge).

Because the definition of "neighboring" in the Rule was a logical outgrowth of the proposal, APA section 553(b)(3)'s purpose—fair notice—was satisfied.

b. The distance limitations for case-specific waters are a logical outgrowth of the proposal.

In the Rule, waters within the 100-year floodplain of a primary water, or within 4,000 feet of the high tide line or ordinary high water mark of a primary water, impoundment, or tributary, are subject to case-specific significant nexus determinations. 33 C.F.R. § 328.3(a)(8). Notably, these waters were already subject to a case-specific determination of significant nexus following *Rapanos,* so their treatment in the Rule has not changed.[46] In addition, the waters subject to case-by-case determinations in the Rule are a subset of those proposed for case-specific determination in the Proposed Rule. Nevertheless, State and Business Petitioners contend that the distance limitations contained in the case-specific category of waters were "unexpectedly" included in the Rule. States Br. 50; *see also* Bus. Br. 27.

The distance limitations for case-specific waters are a logical outgrowth of the proposal, which made clear the Agencies' intention to provide clarity and predictability by limiting the case-specific category of waters to those waters "sufficiently close" to a jurisdictional water. 79 Fed. Reg. at 22,200, 22,211, 22,213, 22,217, 22,247, 22,263. Specifically, the Agencies proposed that case-specific significant nexus determinations be based on a record that included all available

[46] For wetlands adjacent to traditional navigable waters, the case-specific determination was limited to whether the wetlands were adjacent. *Rapanos* Guidance at 1, 4, JAxxxx, xxxx.

information, the first item of which would be the "location" of the water body, and the Agencies sought comments on this approach. *Id.* at 22,214. Thus, even though the proposal did not contain the specific distances adopted in the Rule, at least the "germ" of a distance limitation was contained in the proposal, *NRDC v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988), and was thoroughly debated by commenters.[47]

As with the proposal to define "neighboring" by reference to a specific lateral limit, the Agencies received numerous comments on case-specific determinations of significant nexus. These comments provide evidence of adequate notice. For example, some commenters recognized the distance component in the proposal and asked that the Agencies specify what distance would be considered "sufficiently close." *See, e.g.*, Comments of Wis. Wetlands Ass'n, AR-15629, at 3, JAxxxx; Nat'l Lime Ass'n, AR-14428, at 11, JAxxxx; Water Advocacy Coal., AR-17921, at 58, JAxxxx; NAIOP, AR-14621, at 2, JAxxxx. Others rejected the use of distance limitations altogether, or suggested that distance should not be the sole factor in considering whether a water should be subject to a case-specific analysis. Comments of Mo. Coal. for the Env't., AR-16372 at 6, JAxxxx; NRDC, AR-15437 at 54-55, JAxxxx-xxxx; NWF, AR-10520, at 59-60, JAxxxx-xxxx; *see also* SAB Proposed Rule

[47] State Petitioners' reliance on an April 24, 2015 internal Corps memorandum, States Br. 48, is misplaced, as the memorandum, AR-20882, at 1, JAxxxx, only reveals that some individuals at the Corps were unaware that the Agencies were homing in on a specific 4,000 or 5,000 foot limitation for case-specific waters for a portion of the time between the proposal and the final Rule.

Review at 3, JAxxxx (suggesting that distance not be the sole indicator for evaluation of case-specific waters).

The stated purpose of the rulemaking was to provide greater certainty, and the Agencies proposed to limit case-specific analyses to waters "sufficiently close" to a jurisdictional water, which would be determined based in part on their location. As shown by the comments received on the proposal, notice was adequate to meet the requirements of the APA.

c. Any failure by the Agencies to provide specific notice that adjacent waters do not include waters used for certain agricultural activities was harmless error.

State and Associational Petitioners contend that the Proposed Rule did not provide adequate notice that the Agencies might conclude that waters used for normal farming, silviculture, and ranching activities should not be considered "adjacent." States Br. 51; Ass'n Br. 27; *see* 33 C.F.R. § 328.3(c)(1). Under the Rule, jurisdiction over such waters will be determined only after a case-specific significant nexus analysis is conducted, which was generally the status quo prior to the Rule. It is well-recognized that one logical outgrowth of rulemaking is that an agency will retain the status quo. *New York v. EPA*, 413 F.3d 3, 43-44 (D.C. Cir. 2005); *Am. Iron & Steel Inst*, 886 F.2d at 400. That is precisely what happened here with respect to adjacent waters used for normal agricultural activities.

In any event, to the extent there was a deficiency in notice, the APA directs reviewing courts to take "due account" of "the rule of prejudicial error." 5 U.S.C. §

706. As this Court recognized in *United States v. Utesch*, courts generally apply a "harmless-error rule" in the APA review context when any procedural deficiency does not defeat the purpose of the bypassed requirements. 596 F.3d 302, 312 (6th Cir. 2010) (citing examples). Even where a final rule is an abrupt departure from a proposed rule, "if parties directed comments to such a denouement, it might well be properly regarded as a harmless error—depending on how pointed were the comments and by who[m] made." *Allina Health Servs.*, 746 F.3d at 1109-10. Where a petitioner itself made such a comment, "it would presumably be hoist on its own petard." *Id.* And where a comment was made by others, if it were the same comment the petitioner would have made, "it would still presumably be non-prejudicial because all that is necessary in such a situation is that the agency had an opportunity to consider the relevant views." *Id.* Here, as discussed below, the merits arguments made by these Petitioners were advanced during the rulemaking by numerous commenters, including some Petitioners themselves, and there is no harm as a result of any deficiency in notice.

State Petitioners do not (and cannot) assert they are injured by the portion of the definition of adjacency that provides for a case-specific jurisdictional determination, as opposed to categorical jurisdiction, for waters used for normal agricultural activities. *See Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930 (D.C. Cir. 2006) (rejecting challenge to a less stringent standard that did not prejudice petitioners). Instead, they merely contend that they would have pressed for a

definition of "tributary" that also subjected waters used for normal agricultural activities to a case-specific significant nexus analysis. States Br. 52. Yet the record contains many examples of comments that tributaries should be more narrowly defined and should not be determined to be jurisdictional as a category rather than on a case-specific basis. *See e.g.*, Comments of Mich. Farm Bureau, AR-4779, at 7, JAxxxx; Water Advocacy Coal., AR-14568, at 45-47, JAxxxx-xxxx. Further, numerous commenters requested specialized treatment for agricultural activities in virtually all aspects. *See, e.g.*, Comments of Texas AR-5143, at 4, JAxxxx; Western States Water Coalition, AR-9842, at 2, 5, JAxxxx, xxxx; Nevada DNR, AR-16932, at 6, JAxxxx; W. Va. DEP, AR-15415, at 9, JAxxxx; Kansas Agric. Alliance, AR-14424, at 4, JAxxxx; *see also* RTC Topic 8 at 30-31, JAxxxx-xxxx. It was reasonably foreseeable that the Agencies might adopt special treatment for agricultural use waters in some contexts but not others. *See Long Island Care at Home*, 551 U.S. at 175. In any event, the Agencies already had the full benefit of these comments. *Cf. Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1059 (D.C. Cir. 2000) (no prejudicial error where petitioners commented on alternative standards in all contexts but agency only adopted alternative standards in one context).

In a similar vein, Associational Petitioners contend that they would have objected to the different treatment of waters used for normal agricultural activities, arguing that the disparate treatment in the definition of "adjacent" is legally and scientifically indefensible. Ass'n Br. 28. *See, e.g.*, Comments of Nat'l Wildlife Fed'n,

AR-15020, at 19-23, 43-45, 50, 53-55, 64-66, 68, JAxxxx-xxxx, xxxx-xxxx, xxxx, xxxx-xxxx, xxxx-xxxx, xxxx; Waterkeeper AR-16413, at 24-25, 38-39, 56, JAxxxx-xxxx, xxxx-xxxx, xxxx; L.A. Waterkeeper, AR-15060, at 2-3, JAxxxx-xxxx; *see also* RTC Topic 3 at 112, 118, JAxxx, xxxx. But Associational Petitioners and others raised the same legal and scientific contentions with respect to several of the other proposed regulatory exclusions related to normal agricultural activities, including artificially irrigated areas that could revert to dry land, farm and stock watering ponds, irrigation ponds, settling basins, and fields flooded for rice production. *See, e.g.*, Comments of Earthjustice, AR-14564, at 13-14, JAxxxx-xxxx; Ky. Waterways Alliance, AR-17168, at 12, JAxxxx; Ctr. For Biological Diversity, AR-15233, at 1-2, 10, JAxxxx-xxxx, xxxx; Hackensack Riverkeeper, AR-15377, at 14-15, JAxxxx-xxxx; Del. Riverkeeper, AR-15383, at 5, JAxxxx; Wis. Wetlands Ass'n, AR-15629, at 5, JAxxxx; Ducks Unlimited, AR-11034, at 21, JAxxxx; Clean Water Action, AR-15015, at 4-5, JAxxxx-xxxx; Columbia Riverkeeper, AR-15210, at 2, JAxxx; Robert J. Goldstein & Assocs., AR-16577, at 2, JAxxxx; Idaho Conservation League, AR-15053, at 13, JAxxxx.

In sum, any deficiency in notice regarding the scope of adjacent waters with respect to waters used for normal agriculture is harmless, both because the treatment of those waters generally retained the status quo and because the Agencies had the full benefit of related comments from Petitioners and others. Thus, the purpose of notice was not frustrated.

2. The Agencies fully apprised the public of the scientific basis for the Rule.

Business Petitioners contend that the Agencies "withheld" information upon which the Rule would be based. Bus. Br. 28-31. Specifically, Petitioners claim that they had no meaningful opportunity to comment on the final Science Report prior to the close of the public comment period in November 2014. *Id.* This argument is unavailing.

Under the APA's notice and comment requirements, technical studies and data upon which an agency relies must be made available for public evaluation. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008). In order to participate meaningfully in the rulemaking process, however, a party need not have an opportunity to comment on "every bit of information influencing an agency's decision." *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 326 (5th Cir. 2001) (citation and internal quotation marks omitted); *see also Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (same). Moreover, an agency may add supporting documentation for a final rule in response to comments, and an agency may use supplementary data that expands on or confirms the information contained in the proposed rule, so long as no prejudice is shown. *Kern Cnty. Farm Bureau*, 450 F.3d at 1076.

A party objecting to an agency's delayed publication of documents must indicate with "reasonable specificity" what portions of the documents are objected to

and how the challenger may have responded if given the opportunity. *Texas v. Lyng*, 868 F.2d 795, 799 (5th Cir. 1989). Petitioners do not even attempt to meet that burden here.

Concurrent with the publication of the Proposed Rule, the Agencies made available the Draft Science Report, which contained a review and synthesis of nearly 1,000 peer-reviewed scientific studies on the "connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans." Draft Science Report at 1-1, JAxxxx; 79 Fed. Reg. at 22,189/2. The Draft Science Report had been through several rounds of internal review by EPA and Corps technical staff, as well as external review by scientists in government, academic, nonprofit, and industry organizations. TSD at 94, JAxxxx; Independent External Peer Review Report, AR-0005, JAxxxx-xxxx. The Agencies also extended the comment period to allow for comment on the SAB peer review of the draft Report. 79 Fed Reg. 61,591 (Oct. 14, 2014), AR-7500, JAxxxx.

Petitioners assert that the final Science Report "introduced a new, continuum-based approach that analyzed … connectivity." Bus. Br. 28. This conclusory argument is refuted by the Proposed Rule, which expressly stated that "[t]here is a gradient in the relation of waters to each other, and this is documented in the [Draft Science] Report." 79 Fed. Reg. at 22,193/2. Further, the Draft Science Report defined "connectivity" as "the degree to which components of a [river] system are joined, or connected, by various transport mechanisms." Draft Science Report at 1-4,

JAxxxx-xxxx. The Draft Science Report discussed, *inter alia*, (1) the "River Continuum Concept" in the scientific literature (*id.* at 3-4, 4-21 to 4-23, 6-3, JAxxxx, xxxx-xxxx, xxxx); (2) the factors that "determine where components of a [river] system fall on the connectivity-isolation gradient at a given time" (*id.* at 3-33, JAxxxx); and (3) the "continuum of connectivity" in wetlands such as prairie potholes (*id.* at 5-57, JAxxxx).

In its September 2014 Review of the Draft Science Report, the SAB recommended that the Agencies put greater emphasis on the gradient nature of connectivity. SAB Science Report Review at 2, JAxxxx. But the Draft Science Report already contained the information the SAB sought to emphasize. Indeed, the SAB stated that the Draft Science Report was "a thorough and technically accurate review of the literature on the connectivity of streams and wetlands to downstream waters." *Id.* at cover letter, JAxxxx. The SAB recommended revisions to "improve the clarity of the Report, better reflect the scientific evidence, expand the discussion of approaches to quantifying connectivity, and make the document more useful to decision-makers," *id.*, but the SAB did not recommend a "new" approach, nor did the Science Report adopt one.

Rather, the Science Report merely clarified and expanded upon concepts and topics in the Draft Science Report, including the continuum of connectivity. For example, where some sections of the Draft Science Report used the term "connected" or "isolated" as shorthand for a subset of values within the connectivity gradient—which is a continuum ranging from highly connected to highly isolated—the Science

Report was revised to emphasize the obvious point that connectivity is not a "binary" or static state but rather a dynamic property of all aquatic systems, and that some beneficial effects of tributaries and wetlands result from low or variable connectivity.

Further, many Petitioners and others commented on the SAB's review of the Draft Science Report and on the concept of connectivity on a gradient and submitted their comments to the rulemaking docket. *See, e.g.*, Comments of Water Advocacy Coal. AR-17921, at 24-28, JAxxxx-xxxx; NRDC, AR-16674, at 33-34, 36 JAxxxx-xxxx, xxxx. These comments show that the public was fully able to provide input to the Agencies on this topic.

Petitioners also suggest that they were deprived of the opportunity to submit comments regarding scientific sources added to the Science Report and on other changes to the Draft Science Report. Bus. Br. 29. But nowhere do they identify a specific source or even hint at the substance of such additional comments, or how they would have differed from those already submitted. In fact, the majority of the 353 supplementary sources were posted to or identified in the rulemaking docket prior to the close of the comment period, including: 102 scientific citations included on the Agencies' list of additional supporting materials (AR-8591, JAxxxx-xxxx, posted Oct. 21, 2014); 59 citations included in the SAB review of the Draft Science Report (AR-8046, at B-1 through B-5, JAxxxx-xxxx, posted Oct. 17, 2014); 22 citations in references that were added to the docket and are part of the record, including the references cited in the Arid West Report (AR-8280, at 77-102, JAxxxx-

xxxx, posted Oct. 21, 2014); and one cite listed in the Proposed Rule. Other citations were included in Business Petitioners' comments to the Proposed Rule or in attachments to such comments. *See*, *e.g.,* James P. Hurley et al., *Influences of Watershed Characteristics on Mercury Levels in Wisconsin Rivers*. 29 ENVTL. SCI. & TECH. 1867 (1995), cited in Utility Water Act Group Comment, AR-15016, at App. A-1.

Of the remaining citations, 120 provided additional support for statements and conclusions already in the Draft Science Report; 23 provided new information, mostly on effects of human-altered systems to address comments in the SAB's peer review of the Draft Science Report; and six discuss various methods and metrics to quantify connectivity in response to the SAB's peer review, an issue that has not been raised by any Petitioner. In any event, Petitioners fail to identify a single scientific source that would have caused them to provide new or additional comment. Their claim that they had no meaningful opportunity to comment on the science rings hollow.

3. The Agencies appropriately responded to significant comments.

When an agency promulgates a final rule, it must incorporate "a concise general statement of [its] basis and purpose," 5 U.S.C. § 553(c), including a response to public comments on proposed rulemaking. *Navistar Int'l Transp. Corp. v. EPA*, 941 F.2d 1339, 1359 (6th Cir. 1991). An agency "need not respond to every comment, but it must respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how

that resolution led the agency to the ultimate rule." *Id.* (internal quotation marks and citation omitted). *See also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."). Business Petitioners contend that the Agencies failed to adequately respond to three topics discussed in comments, Bus. Br. 31-34, but the preamble to the Rule, the Technical Support Document, and the nearly 7,500-page Response to Comments plainly demonstrate otherwise.

The first topic Petitioners raise relates to comments expressing concern that the Rule would "unduly expand" federal jurisdiction and encroach on areas of "traditionally local land-use regulation." Bus. Br. 31. The Agencies provided a considered response to those comments, explaining that the Rule does not regulate land use or change the relationship between federal, state, tribal and local authorities, and that the Rule is not an expansion of federal authority. *See* RTC Topic 1 at 171-72, 186-88, JAxxxx-xxxx, xxxx-xxxx; 80 Fed. Reg. at 37,055/2-3, 37,058-60, 37,096-101; TSD at 30-34, JAxxxx-xxxx. In their Response to Comments, the Agencies quoted many of the comments cited by Petitioners in their briefs, and responded substantively to all the comments cited by Petitioners. RTC Topic 4 at 453-55, Topic 5 at 18-19, and Topic 6 at 86-87, JAxxxx-xxxx, xxxx-xxxx, xxxx-xxxx.

The second topic raised by Petitioners relates to the definition of "tributary" in connection with waters in the arid West that have intermittent or ephemeral flow. Bus. Br. 31-32. The Agencies' response to comments on this issue reveals careful

consideration of the comments, including those cited by Petitioners. RTC Topic 8 at 144-47, 186, 213-14, 313-14, 316, 345-46, 528-31 and Topic 9 at 25-28, 63-65 JAxxxx-xxxx, xxxx, xxxx-xxxx, xxxx-xxxx, xxxx, xxxx-xxxx, xxxx-xxxx, xxxx-xxxx, xxxx-xxxx; 80 Fed. Reg. at 37,064; TSD at 265-68, JAxxxx-xxxx. As the preamble to the Rule explains, the Agencies made modifications to the definition of "tributary" after considering comments related to indicators of flow in intermittent or ephemeral streams, such as those in the arid West. 80 Fed. Reg. at 37,079-80; *see also supra* Argument Section II.A (discussing flow with respect to tributaries).

The third topic raised in comments cited by Petitioners pertains to concerns that the Rule would effectively eliminate CWA permitting exemptions for agricultural activities. Bus. Br. 33. But the Agencies explained that the Rule "not only maintains current statutory exemptions, it expands regulatory exclusions … to make it clear that this rule does not add any additional permitting requirements on agriculture." RTC Topic 1 at 13-14, JAxxxx-xxxx. Further, the Rule "does not regulate shallow subsurface connections nor any type of groundwater, erosional features, or land use, nor does it affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers." *Id.* Far from "turn[ing] a blind eye" to such comments, Bus. Br. 33, the Agencies responded by explaining that the Rule recognizes and retains the statutory exemptions for normal agricultural activities. 80 Fed. Reg. at 37,055/2, 37,080/2-3, 37097-98; RTC Topic 6

at 30-31, Topic 7 at 311, Topic 12 at 747, 750-51, 755-56 JAxxxx-xxxx, xxxx, xxxx, xxxx-xxxx, xxxx-xxxx.

Finally, Petitioners' attempt to cast the Agencies as closed-minded, Bus. Br. 34, is flatly refuted by the record.[48] The Agencies began engaging with states, tribes, business entities, environmental organizations, and other stakeholders in 2011—years before the Proposed Rule was published—and continually sought input from stakeholders and the public throughout the rulemaking process. 80 Fed. Reg. at 37,102-03; Summary: Small Entities Outreach Meeting on the Proposed Rule for Redefining Waters of the United States under the Clean Water Act, AR-13172, JAxxxx-xxxx; Final Report of the Discretionary Small Entity Outreach for the Clean Water Rule: Definition of "Waters of the United States;" Final Rule, AR-20865, JAxxxx-xxxx;; Tribal Consultation Summary, AR-20868, JAxxxx-xxxx; 2014 EPA Regional Proposed Rule Meetings/Events, AR-13182, JAxxxx-xxxx; 2014 EPA Headquarters Proposed Rule Meetings/Events, AR-13183, JAxxxx-xxxx; Federalism

[48] The Court should not consider the extra-record article on the website Farm Futures cited by Petitioners. Bus. Br. 34. In any event, the article and evidence in the record demonstrate that Administrator McCarthy made many visits to agricultural communities to hear their concerns and assure them that none of the exemptions for agricultural activities would be changed as a result of the rulemaking. *See, e.g.*, AGWEEK, "McCarthy addresses 'misinformation' about Waters of the US rule" (July 14, 2014), AR-18005 at App. Q, JAxxxx (describing Administrator's trip to Missouri to discuss "legitimate concerns" and to dispel claims that the Rule would regulate puddles on lawns and playgrounds, groundwater, or normal farming practices); *see also* Murray Energy Comments, AR-13954, at 3, JAxxxx (acknowledging the Agencies' attempts to respond to "some of the more fringe 'myths,' such as 'whether a permit is needed for walking cows across a wet field or stream.'").

Report, AR-20864, JAxxxx-xxxx; Summary of Additional Outreach to States, AR-13454, JAxxxx-xxxx.

Commenters expressed appreciation for the Agencies' "open process," which "invite[d] the public, Congress and all interested parties to participate in the discussion." Comments of Nat'l Res. Mgr., Lake County, IL Forest Preserve Dist. AR-3834, at 1, JAxxxx. The Agencies held hundreds of public meetings on the Rule across the country, and provided a comment period of 207 days, far in excess of the 30 days required under 5 U.S.C. § 553(d). 80 Fed. Reg. at 37,057; 79 Fed. Reg. 35,712 (June 24, 2014), AR-2733, JAxxxx (extending comment period); 79 Fed. Reg. at 61,591, AR-7500 (same), JAxxxx. The Agencies considered more than one million public comments and made many revisions to the Proposed Rule based on the comments of Petitioners and others. *See* 80 Fed. Reg. at 37,079-80, 37,082-84, 37,095-96, 37,097, 37,099 (describing revisions in response to comments). Any suggestion that the Agencies acted with an "unalterably closed mind," *Miss. Comm'n on Envtl. Quality*, 790 F.3d at 183-84, is especially weak.

The non-record report prepared by the majority staff for the Committee on Oversight and Government Reform of the U.S. House of Representatives, relied on by the Business Petitioners and one amicus curiae, Bus. Br. 24 n.5 and Wash. Legal Found. Br. 22, should receive no consideration at all from the Court. "Allegations of government misconduct are easy to allege and hard to disprove, so courts must insist on a meaningful evidentiary showing." *Coal. for Advancement of Reg'l Transp. v. Fed.*

Highway Admin., 576 F. App'x 477, 487 (6th Cir. 2014). With one narrow exception, this Court has denied motions to supplement the record in this case with the type of evidence cited in the majority staff's report. Doc. 119-2.

Moreover, Congressional committee reports authored by majority staff over the dissent of minority staff, and for which there is doubt as to the completeness or accuracy, are given no weight. *Barry v. Trustees of the Int'l Ass'n Full-Time Salaried Officers & Employees of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 97-101 (D.D.C. 2006) (describing cases). Here, the minority staff issued a statement and background information explaining their dissent from the majority staff report. Minority Statement, http://democrats.oversight.house.gov/news/press-releases/cummings-issues-statement-and-backgrounder-on-republican-staff-report-on-clean; Background, http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Backgrounder%20on%20WOTUS.pdf. As the minority correctly noted in their background statement, the report—aptly entitled "Politicization of the Waters of the United States Rulemaking"—suggests procedural irregularities where the Government Accountability Office found the rule to be procedurally proper, and minimizes or completely ignores the transcribed testimony of numerous agency officials that directly contradicted the Report's conclusions. The Report's conclusions are not supported by the totality of the evidence collected by the Committee, much of which the Committee has not released and which involves mostly deliberative

materials of the type that this Court has already found to be outside the scope of review. Notably, the members of Congress who filed a nearly 7,000 word amicus curiae brief in support of the State and Business Petitioners barely mention the report. Doc. 138 at 30 n.20.

In sum, the Agencies have complied with—and in many instances gone far beyond—the requirements of the APA.

4. Business Petitioners' anti-lobbying and "propaganda" claims lack merit.

Business Petitioners' assertions of unlawful advocacy, Bus. Br. 34-38, do not set forth a justiciable claim and are irrelevant to their allegation that the Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or was promulgated "without observance of procedure required by law," *id.* § 706(2)(D).

Petitioners base their challenge on two appropriations act provisions that do not set forth "procedures that are required by law." Bus. Br. 35-37 (citing Pub. L. No. 113-76, div. E, § 718; Pub. L. No. 113-235, div. E, §§ 715, 718). One provision prohibits the expenditure of funds for indirect lobbying of Congress in support of, or in opposition to, pending legislation; the other prohibits the expenditure of funds for publicity that is self-aggrandizing, purely partisan, or conceals an agency's role in sponsoring the material. *Id.* In contrast, statutes that provide a basis for a procedural claim under 5 U.S.C. § 706(2)(D) set forth specific procedures that an agency must

affirmatively undertake, such as the APA's requirements for notice and comment and the Regulatory Flexibility Act. 5 U.S.C. § 603. Here, the Government Accountability Office ("GAO") concluded that the Agencies completed all applicable procedural requirements in promulgating the Rule. July 15, 2016, GAO letter at 2, available at http://gao.gov/products/GAO-15-750R ("Our review of the procedural steps taken indicates that the agencies complied with the applicable requirements.").

It is well-established that there is no private right of action for a claim that an agency has misused appropriated funds under either an appropriations act or under 18 U.S.C. § 1913, which prohibits the use of appropriated funds to pay for a communication (e.g., letter or advertisement) that is intended or designed to influence a member of Congress to favor, adopt, or oppose legislation. *Nat'l Treasury Emp. Union v. Campbell*, 654 F.2d 784, 790-93 (D.C. Cir. 1981); *Grassley v. Legal Servs. Corp.*, 535 F. Supp. 818, 825-6 (S.D. Iowa 1982). The GAO's role is to "investigate all matters related to the receipt, disbursement, and use of public money" and to "make an investigation and report ordered by either House of Congress or a committee of Congress having jurisdiction over revenue, appropriations, or expenditures." 31 U.S.C. § 712(1), (4). Congress may take appropriate legislative action after an investigation or report by the GAO, but there is no remedy for a private party to enforce what Petitioners generally refer to as "anti-lobbying laws," Bus. Br. 36-37. *See*

Nat'l Treasury Emp. Union, 654 F.2d at 794.[49] The GAO opinion relied on by Business Petitioners, Op. B-326944, 2015 WL 8618591 (Comp. Gen. Dec. 14, 2015), is not to the contrary.

Even if the GAO opinion were correct—which it is not—it is irrelevant to whether the Rule was promulgated "without observance of procedure required by law."[50] 5 U.S.C. § 706(2)(D). The GAO opinion in no way found that EPA acted in

---

[49] Similarly, Petitioners do not satisfy the minimal constitutional requirements for standing set in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992), with respect to this claim. Those requirements are: (1) an injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) the likelihood that a favorable decision will remedy the injury. *Id.* Petitioners have not stated how the asserted anti-lobbying and publicity spending restrictions, or any resulting anti-deficiency violation, affect them. Nor do they state how a judicial finding of such violations would translate into a meaningful remedy with respect to the Rule.

[50] As background, a U.S. Senator asked the GAO to provide an opinion as to whether EPA's use of certain social media tools during the rulemaking violated restrictions on the use of federal funds either (1) to indirectly lobby Congress in support of or in opposition to pending legislation or (2) to engage in publicity that is self-aggrandizing, purely partisan, or conceals the agency's role in sponsoring the material. 2015 WL 8618591, at *1. After examining an entire database of social media outreach materials, the GAO concluded that (1) the indirect lobbying restriction had been violated based on a single blog post that contained two hyperlinks to articles on third party websites and (2) the publicity restriction had been violated based on EPA's use of a social media tool called "Thunderclap." *Id.* at *1, 5.

EPA vigorously disagrees with the GAO opinion's conclusions. As EPA has explained, the opinion's conclusion that EPA violated appropriations act restrictions was based on the actions of third parties over which EPA had no control. Sept. 15, 2016 EPA Letter to GAO, Attachment at 2-10, JAxxxx-xxxx (available at https://www.epa.gov/sites/production/files/2016-11/documents/epa_reply_to_gao_social_media_op_9-15-16_0.pdf). The GAO opinion is also in conflict with that agency's prior opinions and unsupported by any case law, which render the opinion of little value. *See id.* at 1; Aug. 7, 2015 EPA Letter

Cont.

bad faith, or that the Agencies "had closed minds all along." Bus. Br. 38. Upon its own finding that no violations occurred, EPA took no disciplinary action, and no further steps are required on the part of EPA. In any event, the GAO Opinion regarding the expenditure of funds has no relevance to the procedural requirements that the Agencies were required to follow, or to whether the Rule is arbitrary, capricious, or otherwise contrary to law. *Cf. Miss. Comm'n on Envtl. Quality*, 790 F.3d at 184-85 (finding that claim of violation of the Information Quality Act did not give rise to a right of action or bear on the petitions for review of EPA decision that specific areas were not in attainment of air quality standards).

The Agencies acted with an open mind and complied with all applicable procedural requirements in promulgating the Rule. Petitioners have failed to demonstrate otherwise.

B. The Agencies complied with the Regulatory Flexibility Act.

As part of the rulemaking, the Agencies found, pursuant to the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-612, that the Rule would not have a significant adverse economic impact on a substantial number of small entities. The RFA is a procedural statute with no substantive requirements. *See U.S. Cellular Corp. v.*

---

to GAO, Attachment at 4-10, 14-16 (available at https://www.epa.gov/sites/production/files/2016-01/documents/2015_8_7_epa_response_to_gao_re_social_media.pdf; *Delta Chem. Corp. v. West*, 33 F.3d 380, 382 (4th Cir. 1994) (finding GAO opinion to be "undeserving of judicial deference" where it was inconsistent with other opinions).

FCC, 254 F.3d 78, 88 (D.C. Cir. 2001). It requires agencies to prepare a "regulatory flexibility analysis" describing the impact certain rules will have on small entities. 5 U.S.C. §§ 603, 604. A regulatory flexibility analysis is not required, however, if the head of the agency, as here, certifies "that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." *Id.* § 605(b).

Business Petitioners' challenge to the Agencies' finding of no significant adverse economic impact, Bus. Br. 38-42, lacks merit. Even if the RFA section 605(b) certification were flawed, any error was harmless because the Agencies engaged in voluntary outreach to small entities.

1. The Rule does not directly impose regulatory requirements or costs on small entities.

This Court has already observed that "the Rule is definitional only and does not *directly* impose any restriction or limitation." *In re U.S. Dep't of Def.,* 817 F.3d at 269 (McKeague, J.) (emphasis in original). As Judge McKeague noted, the limitations that do derive from the Rule are "not self-executing." *Id.*; *see also id.* at 276 (Griffin, J., concurring) (noting that the Rule is definitional and not self-executing). The Rule simply clarifies *where* restrictions on discharging pollutants may apply, but it does not impose those restrictions–any accompanying costs are incurred through the distinct permitting process. *See, e.g.*, Economic Analysis at vii, 1, JAxxxx, xxxx (the costs assessed in the Economic Analysis "would be incurred only indirectly"); 80 Fed. Reg.

at 37,102 (the Rule "is not designed to subject any entities of any size to any specific regulatory burden").

In enacting the RFA, Congress "did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy." *Mid-Tex Elec. Coop., Inc. v. F.E.R.C.*, 773 F.2d 327, 342-43 (D.C. Cir. 1985). In *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001), the D.C. Circuit warned that expanding the regulatory flexibility analysis beyond directly regulated entities would require a "massive exercise in economic modeling" for all rulemaking activities. Thus, courts have repeatedly found that an RFA section 605(b) certification is "justified" where the economic impacts on regulated entities are indirect. *See, e.g., Michigan v. EPA*, 213 F.3d 663, 689 (D.C. Cir. 2000) (finding EPA's section 605(b) certification justified because the Clean Air Act action in question only required *the States* to decide what entities would be subject to air emission reductions); *Mid-Tex*, 773 F.2d at 342 (concluding that Congress intended to limit the regulatory flexibility analysis to small entities "directly regulated" by the rule in question); *Am. Trucking Ass'n, Inc. v. U.S. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1999), *judgment aff'd in part and rev'd in part on other grounds*, *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457 (2001) (internal quotation and citation omitted) (concluding that the RFA places "no obligation upon an agency to conduct a small entity impact analysis of effects on entities which [the agency] does not regulate").

Petitioners nonetheless assert that the Rule imposes costs, relying primarily on declarations that are outside the administrative record. Bus. Br. 40-41. The Court should disregard these extra-record materials and the arguments made in reliance upon them. *See* Memorandum Opinion and Order on Administrative Record (ECF No. 119-2) (denying motions to supplement the administrative record with the exception of a single document); *Rybachek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990) (striking portions of brief that relied on extra-record material). Regardless, the declarations do not demonstrate that the Rule imposes direct costs. The declarants' assertions regarding costs are speculative and based on unfounded assumptions about a presumed change in the jurisdictional status of specific waters. Even then, any costs would only be an indirect effect of the Rule.

Underlying Petitioners' argument is a faulty assumption that the Agencies could have promulgated a definition of "waters of the United States" tailored to small entities. But by its own terms, the RFA does not change the objectives or decisional factors of the underlying statute. "The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action." 5 U.S.C. § 606. Sections 603(c) and 604(a)(5) further provide that any alternatives to a proposed and final rule must "accomplish" and be "[c]onsistent with the stated objectives of applicable statutes." *See Associated Fisheries of Maine, Inc. v. Daley,* 127 F.3d 104, 114 (1st Cir. 1997) ("Congress emphasized that the RFA should not be construed to undermine other legislatively mandated goals."). As noted above,

multiple courts have held that the Agencies may not remove categories of "point sources," such as those operated by small entities, from the permitting requirements of the Act. *See supra* at 134 (discussing, *inter alia*, *Costle*, 568 F.2d at 1377). Thus, even if any costs associated with the Rule were direct, which none are, a flexible alternative that would provide a less "burdensome" definition of waters of the United States for small entities would not be permitted under the CWA.

2. The Agencies reasonably used the 1986 regulation as the baseline for its regulatory flexibility analysis.

Business Petitioners mischaracterize the Agencies' second rationale for the RFA section 605(b) certification as "historic practices dating to 1986." Bus. Br. 41-42. The baseline used by the Agencies was not the amorphous concept of "historic practices," but rather the prior version of 33 C.F.R. Part 328, promulgated in 1986. 80 Fed. Reg. at 37,102/1 ("Because fewer waters will be subject to the CWA under the rule than are subject to regulation under existing [i.e., 1986] *regulations*, this action will not affect small entities to a greater degree than the existing [i.e., 1986] *regulations*.") (emphasis added). EPA's guidance suggests that such comparison is the best practice when performing a regulatory flexibility analysis for rules revising an existing regulation. EPA Final Guidance for EPA Rulewriters: Regulatory Flexibility Act (Nov. 30, 2006) at 29, available at https://www.epa.gov/reg-flex/epas-action-development-process-final-guidance-epa-rulewriters-regulatory-flexibility-act

("Generally, in the case of a rule revising an existing rule, you should assess only the incremental cost of the rule revision.").[51]

Ignoring EPA's guidance on this subject, Petitioners suggest that the baseline should have been the Agencies' practice under guidance issued after the *Rapanos* decision. Bus. Br. 42. That argument is flawed because *Rapanos* did not displace the 1986 regulation, and Business Petitioners read the effects of *SWANCC* and *Rapanos* on CWA jurisdiction too broadly. Indeed, Associational Petitioners interpret the impact of *SWANCC* and *Rapanos* on CWA jurisdiction as quite marginal. Ass'n Br. 9-10; Waterkeeper Br. 36-38. The varying positions advocated by the Petitioners demonstrate how the scope of the CWA jurisdiction after *Rapanos* lacked clarity. (That, of course, is what made the Rule necessary.) While the Agencies sought to increase administrative clarity and consistency through post-*Rapanos* guidance, that guidance was not binding and actual agency practice varied by region or district. TSD at 79, JAxxxx; *id.* at 81, JAxxxx (noting "some inconsistencies in practice in

[51] The agency guidance documents that Petitioners rely on are distinguishable because they address a distinct type of analyses that may be required under Executive Order 12,866, not the RFA. *Compare* Executive Order No. 12,866, Sec. 6(a)(3)(B), 58 Fed. Reg. 51,735 (Oct. 4, 1993) (requiring an assessment of potential costs and benefits of the regulatory action for significant actions) and *id.* Sec. 6(a)(3)(C) (requiring an additional assessment of anticipated costs and benefits of the regulatory action and its feasible alternatives for economically significant rules) *with* 5 U.S.C. §§ 603(b), 603(a) (setting out requirements for initial and final regulatory flexibility analyses, respectively). *Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior*, 344 F. Supp. 2d 108, 127-28 (D.D.C. 2004), is likewise distinguishable, as it evaluated an analysis under a provision of the Endangered Species Act, 16 U.S.C. § 1533.

implementing the 2008 guidance"). In contrast, the Rule, like the prior 1986 regulation, constitutes binding law. Given EPA's RFA guidance, it was entirely reasonable for the Agencies to use the most recent binding definition of "waters of the United States" as the baseline for their RFA section 605(b) certification.

Petitioners do not and cannot dispute that the Rule is narrower than its 1986 predecessor. The Rule deletes from the definition of "waters of the United States" all "other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats … the use, degradation or destruction of which could affect interstate or foreign commerce." *See* 33 C.F.R. § 328.3(a)(3) (1987). Waters lacking any connection to a primary water are no longer jurisdictional. The Rule expressly excludes some features and waters over which the Agencies have not generally asserted jurisdiction and in so doing eliminates the authority of the Agencies to determine in case-specific circumstances that some such waters are jurisdictional. The Rule reduces the totality of tributaries by requiring a bed, banks and an ordinary high water mark, and also imposes a floodplain or 4,000-foot distance limit on waters that can be found jurisdictional on a case-specific basis. Together these changes narrow the scope of the definition in comparison to the 1986 regulation. TSD at 30-34, JAxxxx-xxxx. Thus, the rulemaking did not affect small entities to a greater extent than the prior rule.

Petitioners mistakenly assert that the Agencies "conceded" in the Economic Analysis that the Rule will result in an expansion of CWA regulatory jurisdiction. Bus.

Br. 41. The Economic Analysis did not come to that conclusion. Rather, the figures cited by Petitioners represent hypothetical scenarios based on conservative assumptions that looked *only* at the potential for *increases* in CWA jurisdiction, without assessing any *reductions* in jurisdiction. *See* Economic Analysis at vi-ix, JAxxxx-xxxx (summarizing analysis and key conclusions). The Economic Analysis did not consider how the limitations in the Rule might result in certain waters no longer being jurisdictional. Thus, the Economic Analysis was a modeling exercise that was inherently inclined toward predicting an increase in CWA regulatory jurisdiction when it calculated a potential 2.84 to 4.65 percent expansion.

Moreover, the Economic Analysis only assessed post-*Rapanos* data. Economic Analysis at 5, JAxxxx. Because the Agencies were "unable to develop quantitative estimates of the impact of the rule relative to historic practice," *id.*, the Economic Analysis could not use the same baseline as the Agencies' RFA section 605(b) certification. The Economic Analysis does note, however, that "[b]ecause the final rule is *narrower* in jurisdictional scope than the existing regulations, there would be *negative* costs and benefits in comparison to this baseline." *Id.* (emphasis added); *see also id.* at v, JAxxxx ("The analysis compared to historic practice is conceptually straightforward because the narrowed jurisdictional scope results in negative or zero impact.").

Petitioners also rely on a letter from the Small Business Administration ("SBA") Office of Advocacy, which asserts the same arguments presented by

Petitioners. Bus. Br. 39. The role of the SBA Office of Advocacy is to advocate on behalf of small businesses, not to administer the RFA, much less the CWA. Its letter is not entitled to any weight. *See Am. Trucking*, 175 F.3d at 1044 ("we do not defer to the SBA's interpretation of the RFA"); *Mid-Tex*, 773 F.2d at 341 (concluding SBA advocacy not persuasive).

Petitioners' assertion that the record does not support the Agencies' RFA section 605(b) certification is also baseless. Bus. Br. 42 (citing *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 919 F.2d 1148, 1157 (6th Cir. 1990)). The Agencies responded to numerous comments regarding the baseline and the assertion that the Rule would have an economic impact on small entities. *See, e.g.,* RTC Topic 11-1 at 112-16, 213-15, JAxxx-xxxx, xxxx-xxxx; *id.*, Topic 11-2 at 9-12, 208-14, JAxxx-xxxx, xxxx-xxxx. Thus, this case is easily distinguishable from *National Truck Equipment,* where the court concluded that the National Highway Traffic Safety Administration made only a "conclusory statement with no evidentiary support" that the standard in question would not have a significant economic impact on small businesses. 919 F.2d at 1157.

In sum, the Agencies reasonably focused on the definitional nature of the Rule when they certified it under 5 U.S.C. § 605(b), and they also reasonably compared the Rule to its 1986 predecessor. This "good-faith effort" satisfies the RFA's requirements. *N. Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 95 (D.D.C. 2007) ("What is required of the agency is not perfection, but rather a

reasonable, good-faith effort to take those steps and therefore satisfy the statute's mandate."); *see also State of Mich. v. Thomas*, 805 F.2d 176, 188 (6th Cir. 1986) (RFA judicial review considers whether the agency's reasoning was "so defective as to render its final decision unreasonable" or whether any analysis is absent in response to public comments).

3. The Agencies' small entity consultation renders any procedural error harmless.

If there were a procedural error under the RFA, it would be harmless under 5 U.S.C. § 706. "[T]he key to whether an agency's procedural error in promulgating a rule is harmless error hinges not on whether the same rule would have issued absent the error, but whether the affected parties had sufficient opportunity to weigh in on the proposed rule." *United States v. Stevenson*, 676 F.3d 557, 565 (6th Cir. 2012).

Although the Agencies reasonably determined they were not required to convene a Small Business Advocacy Review Panel for the Rule, they nonetheless engaged in substantial outreach to small entities. The Agencies sought wide input from representatives of small entities in developing both the proposed and final definition of "waters of the Unites States." In 2011, coordinating with the Office of Management and Budget and the SBA, the Agencies convened an informal group of small entities to exchange ideas on potential jurisdictional policies. EPA Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of "Waters of the United States," AR-1927, at 3, 6-8, JAxxxx, xxxx-xxxx (summarizing

meeting with small business participants from the oil and gas sector, farming/agriculture, construction and equipment, municipal storm sewer systems or publicly owned treatment plants, the manufacturing sector, and non-governmental organizations). A second outreach meeting was held with small entities in October 2014. Final Report of the Discretionary Small Entity Outreach for the Clean Water Rule: Definition of "Waters of the United States;" Final Rule, AR-20865, at 3, 6-8, JAxxxx, xxxx-xxxx (summarizing meeting with participants from aforementioned and additional sectors, such as mining, fertilizer and pesticide use, and power industry). In addition, the Agencies held hundreds of public meetings and sought feedback from a broad audience of stakeholders that included small entities. *See, e.g.*, 2014 EPA Regional Proposed Rule Meetings/Events, AR-13182, JAxxxx-xxxx; 2014 EPA Headquarters Proposed Rule Meetings/Events, AR-13183, JAxxxx-xxxx; Local Government Advisory Committee Letter to the Administrator on Proposed Rule, AR-10584, JAxxxx-xxxx (thanking the Agencies for public outreach meetings).

The Agencies also thoroughly responded to comments about the economic effects of the Rule, including concerns about its effect on small entities. *See, e.g.,* RTC Topic 11-1 at 112-16, 213-15, JAxxxx-xxxx, xxxx-xxxx. The Agencies made numerous changes in response to small entities' concerns, such as including exclusions for construction, agriculture, and stormwater management features. *See, e.g.*, RTC Topic 7 at 205, 312, 325, JAxxxx, xxxx, xxxx.

Thus, the objectives of the RFA were achieved here.

VII. Petitioners' NEPA and ESA claims lack merit.

A. Petitioners' NEPA arguments lack merit.

Petitioners' NEPA claims must be rejected because the CWA expressly exempts the Rule from NEPA's requirements. As such, the Agencies were not required to complete an Environmental Assessment ("EA") or an Environment Impact Statement ("EIS"). Even assuming that NEPA applied, the Army's voluntary EA and Finding of No Significant Impact ("FONSI") (AR-20867, JAxxxx) met NEPA's requirements.

1. The CWA exempts the Rule from NEPA.

With two exceptions not relevant here, "no action of the [EPA] Administrator taken pursuant to [the CWA] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]." 33 U.S.C. § 1371(c)(1). As the Senate Conference Report advised: "If the actions of the Administrator under [the CWA] were subject to the requirements of NEPA, administration of the Act would be greatly impeded." S. Conf. Rep. No. 92-1236, *as reprinted in* 1972 U.S.C.C.A.N. 3776, 3827.

The statutory exemption applies here even though EPA jointly promulgated the Rule with the Army. The CWA does not state that only actions taken by EPA alone are exempt. As this Court previously concluded in this case: "That the Clean Water Rule was promulgated jointly by the EPA Administrator *and* the Secretary of the Army does not defeat the fact that it represents action, in substantial part, of the

Administrator." *In re Dep't of Def.*, 817 F.3d at 273 (emphasis in original); *see also Municipality of Anchorage v. United States*, 980 F.2d 1320, 1328-29 (9th Cir. 1992) (holding that an action "does not cease to be 'action of the Administrator' merely because it was adopted and negotiated in conjunction with the Secretary of the Army and the Corps"). The *Municipality* court found that a Memorandum of Agreement between EPA and the Corps providing guidance for administration of the section 404 permitting program was exempt from NEPA under section 1371(c). 980 F.2d at 1329. Here, the Rule broadly concerns the jurisdictional scope of the entire Act, including the myriad CWA programs administrated only by EPA (EPA shares its CWA authority with the Army only with respect to section 404, 33 U.S.C. § 1344). *See* 80 Fed. Reg. at 37,054/1-2. EPA has the ultimate authority to determine the scope of CWA jurisdiction and took the lead role in the rulemaking process. *See* Respondents' Combined Opp'n to Mots. to Dismiss, ECF No. 58, at 32-34; 43 Op. Att'y Gen. 197, 1979 WL 16529 (U.S.A.G. Sept. 5, 1979); 80 Fed. Reg. at 37,055/3 (describing at least six exclusively EPA programs in which the term "waters of the United States" is used). It is beyond question that the Rule is an "action of the Administrator." *In re Dep't of Def.,* 817 F.3d at 273.

Waterkeeper Petitioners argue that the Army's revision of its regulations takes this case outside the statutory NEPA exemption. Waterkeeper 28 n.13 (citing 33 U.S.C. § 1371(c)(1)). The Army's regulations regarding jurisdictional limits under the CWA, however, must conform with EPA's authority under the same statute since the

same statutory term—"waters of the United States"—applies to *all* CWA programs. *See* 43 Op. Att'y Gen. 197, 1979 WL 16529, at *3. Given EPA's ultimate authority over the geographic scope of the CWA, the Army lacks discretion to adopt a different definition. The Army's amendment of its own regulations, therefore, does not subject the Rule to NEPA.

Petitioners attempt to avoid the statutory NEPA exemption by characterizing the Rule as "the issuance of a permit" under CWA section 402. Waterkeeper Br. 28 n.13 (quoting 33 U.S.C. § 1371(c)(1)). But in determining that it has subject matter jurisdiction, this Court did not hold, and the Agencies did not argue, that the Rule is the functional equivalent of a permit. Rather, the Court concluded that CWA section 509(b)(1)(F), 33 U.S.C. § 1369(b)(1), should be interpreted functionally to include regulations relating to the issuance or denial of permits. *In re Dep't of Def.*, 817 F.3d at 273. That practical ruling does not convert the Rule to a section 402 NPDES permit requiring NEPA review.

And the Army's voluntary preparation of an EA does not create a NEPA obligation where none previously existed. *See Kandra v. United States*, 145 F. Supp. 2d 1192, 1203 n.4 (D. Or. 2001) (rejecting the contention that agency, by issuing an EA, had admitted NEPA's applicability) (citing 40 C.F.R. § 1501.3(b)); *accord Olmsted Citizens for a Better Cmty. v. United States*, 793 F.2d 201, 208 n.9 (8th Cir. 1986) (agency's belief regarding degree of required NEPA analysis irrelevant to such question).

2. Even if NEPA did apply, the Army's EA and FONSI were consistent with NEPA's requirements.

Even if the statutory NEPA exemption did not apply here, the Army's voluntary EA satisfied any NEPA requirements. The Army appropriately considered the environmental impacts of the proposed action, including changes made to the Rule between the draft and final versions, and reasonably concluded that the Rule would have few—and mainly beneficial—impacts. Accordingly, even if NEPA applied, the Army would not have been required to complete an EIS, as the record demonstrates that the Rule would not have a significant impact on the human environment. In addition, given that the Rule was developed through an extensive rulemaking process and will have minimal impacts, the Army considered an appropriate range of alternatives.

"NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004). NEPA does not force an agency to reach a particular substantive outcome or to select the most environmentally-friendly option. *Kelley v. Selin*, 42 F.3d 1501, 1512 (6th Cir. 1995).

While an in-depth EIS is required for "major Federal action[s] significantly affecting the quality of the human environment," NEPA regulations provide that an agency may prepare "a shorter" EA and FONSI "if it determines … that the

proposed action will not have a significant impact on the environment." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 16 (2008) (citing 40 C.F.R. §§ 1508.9(a), 1508.13 (2007)). EAs are intended to be "concise public document[s]" that "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI]." 40 C.F.R. § 1508.9(a)(1).

The Court should not substitute its "judgment of the environmental impact for the judgment of the agency, once the agency has adequately studied the issue." *Kelley*, 42 F.3d at 1518 (citation and internal quotation omitted). When the resolution of the issues involves primarily questions of fact and "requires a high level of technical expertise [it] is properly left to the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). An agency's decision "that no EIS is required, can be overturned only if it is arbitrary, capricious, or an abuse of discretion." *Crounse Corp. v. I.C.C.*, 781 F.2d 1176, 1193 (6th Cir. 1986).

a. The Army reasonably concluded the Rule would not have a significant impact.

The proposed action here was a definition and clarification of the Agencies' jurisdiction under the CWA. Thus, the Army properly concluded that "[a]doption of the final proposed rule would have no direct effect on the environment." EA/FONSI, AR-20867, at 21, JAxxxx. Further, specific "proposals that would impact jurisdictional areas," such as applications for permits to discharge pollutants, will be subject to review under NEPA. EA/FONSI at 23, JAxxxx. The Agencies are

in a far better position to assess a proposed action's environmental consequences when a specific proposal is before them.

Accordingly, the Army not only reasonably concluded that promulgating the Rule would have no direct impacts, but also that any potential indirect impacts were speculative and not reasonably foreseeable. EA/FONSI at 23, JAxxxx; *see Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1253 (10th Cir. 2011) (holding that a rule did not require NEPA analysis because it "merely established an overarching framework for evaluating future [specific proposals for action], which generally would undergo their own NEPA evaluations"). State Petitioners complain, States Br. 84-86, that the EA's analysis of environmental conclusions is cursory, but the general analysis is a result both of the nature of an EA—defined by regulation as a concise document with brief discussions—and the lack of specific proposals for action.

In any event, the Army's finding in the EA/FONSI that the Rule will likely result at most in an incremental increase in CWA jurisdiction compared to the Agencies' post-*Rapanos* practices is well-supported by the record. The Agencies' analysis of a random selection of negative jurisdictional determinations "showed that with adoption of the rule there would be between a 2.8 to 4.6 percent increase in positive jurisdictional determinations," compared to post-*Rapanos* practices, with the majority of the increase in the category of case-specific waters. EA/FONSI at 21-23, 25-26, JAxxxx-xxxx, xxxx-xxxx. And, as previously discussed, this analysis was conservatively skewed toward finding an increase in CWA jurisdiction.

Contrary to Waterkeeper Petitioners' argument, Waterkeeper Br. 30, the EA addresses "the possibility that some wetlands that might have been found jurisdictional … would no longer be jurisdictional under the final proposed rule." EA/FONSI at 22, JAxxxx. In the Agencies' experience, "the vast majority of wetlands with a significant nexus are located within the 4,000 foot boundary." *Id.* at 22-23, JAxxxx-xxxx. Thus, the EA states that the decrease in jurisdictional determinations for wetlands outside the 4,000 foot boundary "would correspondingly be small." *Id.* at 23, JAxxxx. The Army also noted that it would be impossible to speculate on the environmental consequences of those waters no longer being subject to the section 404 permitting process because that would depend on the specific nature of activities proposed for such waters, the individual waters themselves, and other applicable requirements, such as the Endangered Species Act and state and local law. *Id.*

Petitioners rely on an internal Corps memorandum as evidence that the 4,000 foot cutoff will be significant. Waterkeeper Br. 31-32; April 25, 2015 Internal Corps Memorandum, JAxxxx.[52] That memorandum, however, does not demonstrate either that the cutoff will have significant impacts or that the EA's NEPA analysis is unreasonable. The memorandum contains examples that "were developed in a limited amount of time" to facilitate interagency discussion. Jurisdictional

[52] *See supra* at 123 n.30 for additional discussion of this internal Corps memorandum.

Determination Review Memorandum at 1, JAxxxx. The examples were not randomly selected or representative of a typical situation.[53] In addition, the internal memorandum represented the Corps' comments, not the Army's official position. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife,* 551 U.S. 644, 659 (2007) ("[T]hat a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious."). The law favors robust internal discussions that will form the foundation for well-informed decisions. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001).

Petitioners also argue that the Army failed to consider changes made between the Proposed Rule and final Rule. Waterkeeper Br. 29. This assertion is false. As discussed above, the EA addresses the 4,000 foot bright line boundary, finding that it would not lead to a significant decrease in CWA jurisdiction. *See* EA/FONSI at 7-8, 17, 22-23, JAxxxx-xxxx, xxxx, xxxx-xxxx. The EA also addresses the exclusion of certain ditches and ephemeral erosional features, and specifically notes that these exclusions reflect the Agencies' current practice. EA/FONSI at 5, 9, JAxxxx, xxxx. The revised definitions of "tributary" to require a bed and banks and an ordinary high

[53] EPA separately conducted a review of 199 jurisdictional determinations from across the United States and found only two instances of waters (wetlands) determined to be jurisdictional under the standing practice that fell outside the 4,000 foot boundary. This evidence is compelling because it involved a random sample and a larger number of determinations than the internal Corps memorandum. Jurisdictional Determination Review Memorandum, JAxxxx; *see supra* at 122-23.

water mark are reflected in the EA's definitions, and did not change from the Proposed Rule. *See* EA/FONSI at 4, 5, JAxxxx, xxxx; 80 Fed. Reg. at 37,076; 79 Fed. Reg. at 22,199. And a case-specific significant nexus determination for agricultural waters for purposes of "adjacency" was generally the status quo prior to promulgation of the Rule. In short, the EA reasonably assessed changes made in the Rule.

b. NEPA would not have required the Army to complete an EIS.

Notwithstanding State Petitioners' additional NEPA allegations, the Army was not required to prepare an EIS in this case, even if NEPA applied. Petitioners argue in conclusory fashion that the Army failed to analyze the significance and intensity factors and that these factors support a finding that the Rule will have significant impacts. States Br. 79. They are wrong.

Petitioners' argument that a detailed, time and resource intensive EIS was required simply because the Army did not explicitly address the context and intensity factors in 40 C.F.R. § 1508.27(b) is without merit. *See* States Br. 79. NEPA does not require a "formalistic" application of factors, particularly in an EA, which is intended to be a concise document. *Spiller v. White*, 352 F.3d 235, 242-43 (5th Cir. 2003) (holding that agency need not specifically address each of ten intensity factors in an EA); *Advocates for Transp. Alts., Inc. v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 2d 289, 301 (D. Mass. 2006) ("The list of intensity factors does not serve as a 'checklist.'").

The EA demonstrates that the Army in fact considered the context and intensity of the Rule's impacts. NEPA regulations provide that "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. Because the "affected region" here includes the entire United States, the Army acted properly in considering the nationwide effects of the Rule and was not required to analyze narrower state or regional impacts, as Petitioners assert. *See* 40 C.F.R. § 1502.4(c) (noting that when preparing an EIS on "broad actions," agencies may evaluate proposals "generically"); *Wyoming*, 661 F.3d at 1256 (holding that site-specific analysis was not required for "'broad' nationwide rule"). It would be impossible (and highly speculative) to fully examine the impacts on each locality, given the jurisdictional nature of the Rule and the intrinsic uncertainty in forecasting future permit applications, let alone their impacts.

Nor is the Rule "highly controversial." Under NEPA, "highly controversial" refers to a substantial dispute about the "size, nature, or *effect* of the major federal action" on the quality of the human environment, not to mere opposition. 40 C.F.R. § 1508.27; *Town of Cave Creek, Arizona v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003). "'Those courts that have addressed this issue have consistently held that when an agency's finding of no significant impact is based upon adequate data, the fact 'that the record also contains evidence supporting a different scientific opinion does not render the agency's decision arbitrary and capricious.'" *Indiana Forest All., Inc. v. U.S.*

Forest Serv., 325 F.3d 851, 860–61 (7th Cir. 2003) (quoting *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1120–21 (9th Cir. 2000)). In a rulemaking such as this, it would be impossible to have uniformity of opinion. The FONSI is also supported by ample data, and the agencies have discretion to rely on the reasonable opinions of their own qualified experts. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

Similarly, the Rule does not set a precedent for future actions with significant effects. States Br. 83 (citing 40 C.F.R. § 1508.27(b)(6)). "The purpose of that section is to avoid the thoughtless setting in motion of a 'chain of bureaucratic commitment that will become progressively harder to undo the longer it continues.'" *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1162-63 (9th Cir. 1998) (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir. 1985)). The Rule defines the scope of the CWA and thus what waters will need permits. It does not authorize any significant impacts, nor does it set a precedent for doing so in the future. *See* EA/FONSI at 21, JAxxxx; *see also Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 43 (D.D.C. 2000) (finding "significance" when in future projects the "Corps may feel bound to the conclusions reached" in FONSIs issued). Future actions affecting waters within the Agencies' jurisdiction will be subject to analysis under NEPA, the CWA, and other relevant statutes in the context of actual permit applications. *See* EA/FONSI at 22, JAxxxx (noting that proposals to impact jurisdictional areas will be

subject to review). Thus, the Rule in no way sets a precedent for future actions with significant impacts.

Finally, State Petitioners argue that the Rule "threatens a violation of Federal, State, or local law" based on their theory that the Rule violates the CWA. States Br. 83 (quoting 40 C.F.R. § 1508.27(b)(10)). NEPA does not require the Army to prepare an EIS to analyze the impacts of the Rule based on the premise that the Rule itself is invalid or in excess of the Agencies' authority. The Agencies reasonably concluded that the Rule is consistent with all applicable law, including the CWA.

c. The Army assessed an appropriate number of alternatives.

NEPA does not require a minimum number of alternatives, and courts have upheld EISs that examined only one alternative and the No Action alternative. *See Cal. ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of Interior*, 767 F.3d 781, 797 (9th Cir. 2014); *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1071 (9th Cir. 2012); *Partners in Forestry Coop. v. U.S. Forest Serv.*, 45 F. Supp. 3d 677, 688 (W.D. Mich. 2014), *aff'd sub nom. Partners in Forestry Coop., Northwood All., Inc. v. U.S. Forest Serv.*, 638 F. App'x 456 (6th Cir. 2015). The range of alternatives is "within an agency's discretion. In exercising that discretion, the agency should consider the purpose of the project, and the environmental consequences of the project." *Save Our Cumberland Mtns. v. Kempthorne*, 453 F.3d 334, 342 (6th Cir. 2006) (internal quotations and citations omitted). NEPA does not require an agency

to pursue alternatives that "present unique problems, or are impractical or infeasible." *Latin Ams. for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 756 F.3d 447, 470 (6th Cir. 2014).

Here, the Army properly concluded that the Rule and the No Action alternative were the only reasonable alternatives. The Rule was developed after years of extensive study and comment and reflects the best available peer-reviewed science and the Agencies' policy judgments, legal interpretations, and experience in implementing the CWA for more than 40 years. 80 Fed. Reg. at 37,057; EA/FONSI at 1, JAxxxx; *see Imperial Cty.*, 767 F.3d at 797 ("Discussing a hypothetical alternative that no one had agreed to (or would likely agree to) would have been unhelpful, and as a result, the [EIS] reasonably compared a hard-fought negotiated agreement to no agreement at all."); *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1231 (9th Cir. 2014) (noting that an agency does not violate NEPA by not discussing alternatives rejected in prior studies); *Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 65 (D.D.C. 2014) ("Where an issue is particularly complex, the scope of reasonable alternatives is necessarily limited.").

The Army also acted reasonably in not considering the Draft Rule Alternative further. EA/FONSI at 13, JAxxxx. The Draft Rule Alternative was "no longer a viable option to accomplish the purpose and need for action" because it had been modified based on comments received during the public comment process. EA/FONSI at 13, JAxxxx. While, as Waterkeeper Petitioners argue, Waterkeeper Br.

34–35, the Draft Rule Alternative was developed to meet the EA's project purpose, the comments demonstrated that it did not do so. In particular, commenters stated that the Draft Rule Alternative did not provide sufficient clarity or bright-line rules. *See, e.g.,* 80 Fed. Reg. at 37,057. As such, the Army reasonably concluded that the Draft Rule Alternative, which had already been publicly vetted, did not meet the Rule's purpose and need and eliminated it from further NEPA analysis.

Additional alternatives also would not be feasible given EPA's ultimate authority to define the scope of CWA jurisdiction. The Army cannot define its jurisdiction differently than does EPA. Thus, the Army need not examine other alternatives when it lacks the power to define the "waters of the United States" differently. *See Pub. Citizen*, 541 U.S. at 770 (holding that when agency does not have discretion to prevent an effect, EA need not consider it).

Finally, the alternatives analysis was reasonable given the Army's conclusion that the Rule would overall have only incremental effects on the environment. *See Save Our Cumberland Mtns.*, 453 F.3d at 342 ("When an agency permissibly identifies few if any environmental consequences of a project, it correspondingly has fewer reasons to consider environmentally sensitive alternatives to the project.").

In conclusion, the Rule was not subject to NEPA's requirements, but the Army met them in any event. If this Court were to determine otherwise, any error was harmless. The rulemaking process itself furthered NEPA's twin goals of informed decisionmaking and broad dissemination of relevant environmental information to the

public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981) (holding that no EIS was required because rulemaking itself furthered NEPA's purposes); *Wyoming v. Hathaway*, 525 F.2d 66, 68-69, 72 (10th Cir. 1975) (holding that rulemaking was akin to an EIS even without any NEPA documentation). Given the intensive study of the Proposed Rule, the extensive record, public participation, and consideration of a wide variety of factors, and the fact that EPA has the ultimate authority to determine the geographic scope of the CWA, remand to the Army for further NEPA analysis would not serve any purpose.

B. Waterkeeper Petitioners' ESA claim has been waived and lacks merit.

Section 7(a)(2) of the Endangered Species Act directs each federal agency to ensure, in consultation with the Secretary of Commerce or of the Interior, that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any threatened or endangered species, or to destroy or adversely modify such species' critical habitat. 16 U.S.C. § 1536(a)(2). Waterkeeper Petitioners assert that the Agencies promulgated the Rule in violation of section 7(a)(2).

Petitioners' claim fails for two reasons. First, Petitioners waived their ESA objections by not raising them during the rulemaking. Second, because the Rule merely defines the scope of the Agencies' regulatory jurisdiction under the CWA, but

does not exercise that jurisdiction in a manner that could affect listed species, section 7(a)(2) is not triggered.

1. Petitioners waived their ESA objections.

The Court should decline to reach the merits of Waterkeeper Petitioners' ESA arguments because neither they nor anyone else raised those issues during the rulemaking process. "It is well established that issues not raised in comments before the agency are waived.… Indeed, there is a near absolute bar against raising new issues—factual or legal—on appeal in the administrative context." *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002); *Mich. Dep't of Envtl. Quality*, 230 F.3d at 183 n. 1.

Petitioners had sufficient information to raise any ESA claims during the rulemaking. While they now assert that "the breadth of the Rule" alone "strongly suggests that ESA consultation was required," Waterkeeper Br. 20, "the breadth of the Rule" was evident from the proposal. 79 Fed. Reg. at 22,188. Several provisions that Petitioners now characterize as "[m]ost troubling," Waterkeeper Br. 22-24, including the groundwater exclusion and the treatment of ditches, were also in the proposal in the same or similar form. 79 Fed. Reg. at 22,193, 22,199, 22,218; Waterkeeper Comments, AR-16413, at 34-38, JAxxxx-xxxx, xxxx. The Agencies also identified the statutes they believed applied to the rulemaking. 70 Fed. Reg. at 22,219-22. If Petitioners believed that ESA section 7(a)(2) applied, they had ample opportunity to raise the issue during the comment period.

Petitioners' ESA claim also was not raised by other commenters or addressed in other parts of the record. Although Petitioners cite record excerpts indicating that ESA-listed species use wetlands, Waterkeeper Br. 22-23, such generic information is not a claim that a definitional CWA rule requires ESA consultation. "An objection must be made with sufficient specificity reasonably to alert the agency." *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001). "[A]gencies have no obligation to anticipate every conceivable argument about why they might lack … authority" to proceed. *Koretoff*, 707 F.3d at 398; *Nat'l Ass'n of Mfrs. v. U.S. Dep't. of Interior*, 134 F.3d 1095, 1111 (D.C. Cir. 1998).

Nor are Petitioners' ESA objections "so obvious that there [was] no need for a commentator to point them out specifically." *Pub. Citizen*, 541 U.S. at 765. On the contrary, Petitioners' ESA theory appears to be unprecedented. The Agencies have previously published regulations and guidance documents addressing the scope of jurisdictional waters and have made over 400,000 CWA jurisdictional determinations since 2008 alone. 80 Fed. Reg. at 37,065. Yet Petitioners have not identified a single prior instance in which anyone has asserted that determining the scope of CWA jurisdiction requires ESA consultation.

Finally, Petitioners cannot avoid waiver by pointing to their "notice of intent to sue" provided under the ESA's citizen suit provision. Waterkeeper Br. 18 n.10. Putting aside that the citizen suit provision (including the notice requirement) does not apply because the basis for this Court's jurisdiction is CWA section 509(b)(1),

Waterkeeper Br. 3-4; *see Ctr. for Biological Diversity v. EPA*, 106 F. Supp. 3d 95, 102 (D.D.C. 2015) (appeal pending); *Washington v. Daley*, 173 F.3d 1158, 1170 n.16 (9th Cir. 1999), Petitioners did not send their notice until *after* the Rule was promulgated. Consequently, the notice did not give the Agencies the requisite "fair opportunity" to address Petitioners' objections before making a final decision. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1298 (D.C. Cir. 2004). Petitioners' ESA claim is waived.

2. Petitioners' ESA claim lacks merit.

Even if it were not waived, Petitioners' ESA claim lacks merit. Because the Rule merely defines the scope of the Agencies' regulatory jurisdiction under the CWA, but does not exercise that jurisdiction in a manner that could affect listed species, ESA section 7(a)(2) does not apply.

a. Determining the scope of CWA jurisdiction does not trigger ESA section 7(a)(2).

Section 7(a)(2) applies when an agency exercises its power under its enabling act to authorize, fund, or carry out an action that may affect listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). But section 7 "does not expand the powers conferred on an agency by its enabling act." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992). Because section 7 confers no substantive powers, "EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA." *Am. Forest & Paper*

Ass'n v. EPA, 137 F.3d 291, 299 (5th Cir. 1998). Thus, where, as here, the Agencies are simply determining the scope of their CWA authority, section 7 does not apply; the bounds of the Agencies' jurisdiction are limited by the CWA to "waters of the United States," 33 U.S.C. § 1362(7), and cannot be expanded by the ESA.

Even if ESA consultation revealed waters of importance to listed species, the Agencies would lack authority to extend CWA jurisdiction to such waters on that basis alone. *See SWANCC*, 531 U.S. at 682-84 (use of isolated nonnavigable intrastate ponds by migratory birds not a sufficient basis for assertion of CWA jurisdiction).[54] In addition to other prerequisites that may apply depending on the nature of the waters involved, the CWA requires at least a significant nexus between those waters and primary waters. *See supra* at 44-49. Determining whether an area satisfies the significant nexus standard does not trigger ESA section 7. *See Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1225 (9th Cir. 2015) ("[D]etermining *whether* the statutory criteria have been achieved does not trigger ESA's consultation requirement") (emphasis in original). Because the Agencies lack authority to "consider the protection of listed species as an end in itself" in defining the bounds of their CWA

[54] The so-called Migratory Bird Rule addressed in *SWANCC* extended CWA jurisdiction to intrastate waters used as habitat by migratory birds or "for endangered species." 531 U.S. at 678. Petitioners offer no basis to conclude that *SWANCC*'s holding would have been different had the waters at issue been used by endangered species rather than by migratory birds.

jurisdiction, ESA consultation is not required. *Nat'l Ass'n of Home Builders*, 551 U.S. at 671.

Petitioners argue that consultation is required because the Rule "abdicates federal jurisdiction" over waters of importance to listed species, Waterkeeper Br. 17, improperly "limiting the reach of the Act." *Id.* at 19; *see id.* at 22-25. But that is merely an attack on the Agencies' interpretation of the CWA. Because the Agencies reasonably interpreted the CWA in defining the scope of jurisdictional waters, the Rule itself is the "authoritative" statement as to the reach of the Act. *Brand X*, 545 U.S. at 983. And because ESA consultation cannot be used to expand the CWA's reach, it would serve no purpose and is not required. *See Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 841-42 (9th Cir. 2013) (where agency reasonably determined that genetically-modified alfalfa was not a "plant pest" under enabling act, agency "had no jurisdiction to continue regulating the crop. The agency's deregulation … was thus a non-discretionary act that did not trigger the agency's duty to consult under the ESA."); *Alaska Wilderness League*, 788 F.3d at 1219-25 (ESA not triggered where agency reasonably interpreted governing statute and regulations in concluding that it lacked authority to condition proposed action on species protection); *Platte River*, 962 F.2d at 33-34 (same).

b. The Rule has no effect on listed species

Petitioners also fail to show that the Rule has any effect on listed species that could trigger section 7's duty to consult. Section 7 applies only when an agency action

"may affect" listed species; if the action will have no effect, section 7 is not applicable. 50 C.F.R. § 402.14(a); *Ctr. For Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 474-75 (D.C. Cir. 2009).

The Rule does not authorize any activity that could affect a listed species. Contrary to Petitioners' assertions, Waterkeeper Br. 21 n.12, any extension of CWA jurisdiction resulting from the Rule also would have no effect. Although future CWA permitting in jurisdictional waters could affect listed species, *id.*; EA/FONSI at 23-24, JAxxxx-xxxx, the permitting itself, and not the Rule, would trigger section 7. *See Ctr. For Biological Diversity*, 563 F.3d at 483 (consultation not triggered and ESA challenge unripe where agency's approval of leasing program itself did not affect listed species and species welfare was, "by design, only implicated at later stages of the program, each of which requires ESA consultation").

Petitioners argue that the Rule adversely affects listed species because excluded waters are not subject to CWA permitting and they "will lose all benefits that may flow from future ESA consultation." Waterkeeper Br. 22-23. But any harm to listed species resulting from future projects in non-jurisdictional waters would not be "caused by" the Rule and is not "reasonably certain to occur." 50 C.F.R. § 402.02 (defining indirect effects for consultation purposes).

To be the legal cause of an effect, an action must "be a substantial and foreseeable cause," and the connection must "be logical and not speculative." *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 615 (6th Cir. 2004). Here, the relationship

between the Rule and the potentially harmful effects of future third-party projects in non-jurisdictional waters is too attenuated to establish legal causality. The Rule itself does not dictate the location or parameters of any such projects, all of which would result from third-party planning and decision-making unrelated to the Rule. *Cf. Ctr. for Biological Diversity v. U.S. Dep't of Housing & Urban Dev.*, 359 F. App'x 781, 2009 WL 4912592 (9th Cir. 2009) (holding that "agencies' loan guarantees have such a remote and indirect relationship to the watershed problems allegedly stemming from the urban development that they cannot be held to be a legal cause of any effect on protected species for purposes of … the ESA").

Nor are the potentially harmful effects of future third-party projects reasonably certain to occur or sufficiently well-defined to be meaningfully analyzed in consultation. As the Agencies explained, it is "speculative and hypothetical as to what the environmental consequences would be" for non-jurisdictional waters not subject to CWA permitting. EA/FONSI at 22-23, JAxxxx. "The consequences would depend on other factors not related to this rule, such as the nature of any activity proposed for such waters and the waters affected, and any other requirements (e.g., Section 9 of the [ESA], or state and local law)." *Id.*

Projects in non-jurisdictional waters are not exempt from the ESA merely because they do not require a CWA permit. Any project requiring federal funding or approvals under other statutes would trigger consultation if listed species would be affected. *See* 50 C.F.R. § 402.14(a). Even in the absence of a federal nexus, such

projects would also remain subject to Section 9's "take" prohibition, 16 U.S.C. § 1538(a)(1)(B); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 703 (5th Cir. 2010), and applicable state law or tribal restrictions, 80 Fed. Reg. at 37,060.

Consequently, Petitioners cannot show that harmful future projects in non-jurisdictional waters "are free from regulatory and financial contingencies such that their occurrence would be reasonably foreseeable, much less reasonably certain." *Medina Cnty.*, 602 F.3d at 703. [55] As a result, Waterkeeper has not met its burden of demonstrating that the rulemaking triggered section 7(a)(2).

VIII. The appropriate remedy is to deny the petitions for review, but in no event should the Court vacate all or part of the Rule without supplemental briefing.

As this brief explains, all of the petitions for review should be denied because the Rule is not arbitrary, capricious, or otherwise contrary to law. But in the event that one or more sets of Petitioners prevail on any of their challenges, the Court should not automatically vacate the entire Rule, as Business and State Petitioners contend, Bus. Br. 93 and States Br. 90, or vacate certain components of the Rule, as Association and Waterkeeper Petitioners urge, Ass'n Br. 49-51 and Waterkeeper Br. 55-58. The Court should instead consider all relevant factors before deciding the

[55] In addition, the Rule's groundwater exclusion does not add any effects to the environmental baseline that could trigger a duty to consult because "the agencies have never interpreted [groundwater] to be a 'water of the United States.'" 80 Fed. Reg. at 37,073, 37,099; TSD at 16-17, JAxxxx-xxxx.

appropriate remedy—factors that will not be fully known until the Court completes its review of Petitioners' claims.

It is well established that, under the APA, judicial relief—whether in the form of vacatur or injunctive relief—does not issue automatically upon a finding of legal error. Courts have discretion to remand all or part of the challenged decision without vacatur, and the decision whether to do so "depends on the seriousness of the [agency action's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks and citation omitted). *See also Natural Res. Def. Council v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015); *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012).

Even where the *Allied-Signal* factors militate in favor of vacatur of some portion of a rule, courts retain discretion to stay vacatur for a period of time. *See, e.g., Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) (withholding issuance of the mandate while agency assessed the disruptive effect of vacating portions of a rule). That option may be instructive here, given the Court's earlier decision to stay the Rule pending further order. Regardless, the Court should not consider its options in a vacuum. Both *Allied-Signal* factors are fact-specific, turning on the nature of any deficiency the Court may identify and the state of affairs at the time the Court issues

its decision. *See, e.g., Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 267 (D.D.C. 2015).

Here, given the multitude of arguments presented by disparate sets of Petitioners, it would be difficult and impractical for the parties to address meaningfully the relevant factors until after the Court adjudicates Petitioners' claims. Accordingly, should the Court rule in Petitioners' favor on any issue, the Court should direct supplemental briefing to address remedy, including whether the affected portions of the Rule are severable and whether remand without vacatur is appropriate. *See, e.g.*, *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 658 (N.D. Ohio 2010); *Sierra Club v. USDA, Rural Utils. Serv.*, 841 F. Supp. 2d 349, 352 (D.D.C. 2012).

CONCLUSION

The petitions should be denied.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

s/ *Jessica O'Donnell*
DANIEL R. DERTKE
AMY J. DONA
ANDREW J. DOYLE
MARTHA C. MANN
KEVIN McARDLE
DEVON LEHMAN McCUNE
JESSICA O'DONNELL
Environment & Natural Res. Div.
U.S. Department of Justice

Of Counsel:

Of Counsel:
AVI S. GARBOW, General Counsel
KARYN I. WENDELOWSKI
U.S. Environmental Protection Agency

ALISSA STARZAK, General Counsel
CRAIG R. SCHMAUDER,
Deputy General Counsel
Department of the Army

DAVID COOPER, Chief Counsel
DANIEL INKELAS
U.S. Army Corps of Engineers

P.O. Box 7611
Washington, D.C. 20044
(202) 305-0851
jessica.o'donnell@usdoj.gov

JANUARY 13, 2017

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 61,196, as permitted by the Court's Case Management Order No. 2 (ECF No. 99-1), excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ *Jessica O'Donnell*
JESSICA O'DONNELL

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Jessica O'Donnell*
JESSICA O'DONNELL

Case No. 15-3751 and consolidated cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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 (June 29, 2015)

MURRAY ENERGY CORP., et al.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petitions for Review of a Final Rule of the United States Environmental Protection Agency and the United States Army

RESPONDENTS' STATUTORY AND REGULATORY ADDENDUM

Of Counsel:
AVI S. GARBOW, General Counsel
KARYN I. WENDELOWSKI
U.S. Environmental Protection Agency

ALISSA STARZAK, General Counsel
CRAIG R. SCHMAUDER, Deputy General Counsel
Department of the Army

DAVID COOPER, Chief Counsel
DANIEL INKELAS
U.S. Army Corps of Engineers

JOHN C. CRUDEN
Assistant Attorney General
DANIEL R. DERTKE
AMY J. DONA
ANDREW J. DOYLE
MARTHA C. MANN
KEVIN McARDLE
DEVON LEHMAN McCUNE
JESSICA O'DONNELL
Environment & Natural Res. Div.
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 305-0851

TABLE OF CONTENTS

Statutes:

Legislative History:

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter I. Research and Related Programs (Refs & Annos)

33 U.S.C.A. § 1251

§ 1251. Congressional declaration of goals and policy

Currentness

(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 processes 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

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter I. Research and Related Programs (Refs & Annos)

33 U.S.C.A. § 1252

§ 1252. Comprehensive programs for water pollution control

Currentness

(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 substitute for adequate treatment or other methods of controlling waste at the source.

(2) The need for and the value of storage for regulation of streamflow (other than for water quality) including but not limited to navigation, salt water intrusion, recreation, esthetics, and fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal agencies.

(3) The need for, the value of, and the impact of, storage for water quality control shall be determined by the Administrator, and his views on these matters shall be set forth in any report or presentation to Congress proposing authorization or construction of any reservoir including such storage.

(4) The value of such storage shall be taken into account in determining the economic value of the entire project of which it is a part, and costs shall be allocated to the purpose of regulation of streamflow in a manner which will insure that all project purposes, share equitably in the benefit of multiple-purpose construction.

(5) Costs of regulation of streamflow features incorporated in any Federal reservoir or other impoundment under the provisions of this chapter shall be determined and the beneficiaries identified and if the benefits are widespread or national in scope, the costs of such features shall be nonreimbursable.

(6) No license granted by the Federal Energy Regulatory Commission for a hydroelectric power project shall include storage for regulation of streamflow for the purpose of water quality control unless the Administrator shall recommend its inclusion and such reservoir storage capacity shall not exceed such proportion of the total storage required for the water quality control plan as the drainage area of such reservoir bears to the drainage area of the river basin or basins involved in such water quality control plan.

(c) Basins; grants to State agencies

(1) The Administrator shall, at the request of the Governor of a State, or a majority of the Governors when more than one State is involved, make a grant to pay not to exceed 50 per centum of the administrative expenses of a planning agency for a period not to exceed three years, which period shall begin after October 18, 1972, if such agency provides for adequate representation of appropriate State, interstate, local, or (when appropriate) international interests in the basin or portion thereof involved and is capable of developing an effective, comprehensive water quality control plan for a basin or portion thereof.

(2) Each planning agency receiving a grant under this subsection shall develop a comprehensive pollution control plan for the basin or portion thereof which--

(A) is consistent with any applicable water quality standards effluent and other limitations, and thermal discharge regulations established pursuant to current law within the basin;

(B) recommends such treatment works as will provide the most effective and economical means of collection, storage, treatment, and elimination of pollutants and recommends means to encourage both municipal and industrial use of such works;

(C) recommends maintenance and improvement of water quality within the basin or portion thereof and recommends methods of adequately financing those facilities as may be necessary to implement the plan; and

(D) as appropriate, is developed in cooperation with, and is consistent with any comprehensive plan prepared by the Water Resources Council, any areawide waste management plans developed pursuant to section 1288 of this title, and any State plan developed pursuant to section 1313(e) of this title.

(3) For the purposes of this subsection the term "basin" includes, but is not limited to, rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes, and portions thereof as well as the lands drained thereby.

CREDIT(S)

(June 30, 1948, c. 758, Title I, § 102, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 817; amended Pub.L. 95-91, Title IV, § 402(a)(1)(A), Aug. 4, 1977, 91 Stat. 583; Pub.L. 95-217, § 5(b), Dec. 27, 1977, 91 Stat. 1567; Pub.L. 104-66, Title II, § 2021(a), Dec. 21, 1995, 109 Stat. 726.)

Notes of Decisions (45)

33 U.S.C.A. § 1252, 33 USCA § 1252
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

33 U.S.C.A. § 1254

§ 1254. Research, investigations, training, and information

Effective: November 27, 2002
Currentness

(a) Establishment of national programs; cooperation; investigations; water quality surveillance system; reports

The Administrator shall establish national programs for the prevention, reduction, and elimination of pollution and as part of such programs shall--

(1) in cooperation with other Federal, State, and local agencies, conduct and promote the coordination and acceleration of, research, investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of pollution;

(2) encourage, cooperate with, and render technical services to pollution control agencies and other appropriate public or private agencies, institutions, and organizations, and individuals, including the general public, in the conduct of activities referred to in paragraph (1) of this subsection;

(3) conduct, in cooperation with State water pollution control agencies and other interested agencies, organizations and persons, public investigations concerning the pollution of any navigable waters, and report on the results of such investigations;

(4) establish advisory committees composed of recognized experts in various aspects of pollution and representatives of the public to assist in the examination and evaluation of research progress and proposals and to avoid duplication of research;

(5) in cooperation with the States, and their political subdivisions, and other Federal agencies establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of the navigable waters and ground waters and the contiguous zone and the oceans and the Administrator shall, to the extent practicable, conduct such surveillance by utilizing the resources of the National Aeronautics and Space Administration, the National Oceanic and Atmospheric Administration, the United States Geological Survey, and the Coast Guard, and shall report on such quality in the report required under subsection (a) of section 1375 of this title; and

(6) initiate and promote the coordination and acceleration of research designed to develop the most effective practicable tools and techniques for measuring the social and economic costs and benefits of activities which are subject to regulation under this chapter; and shall transmit a report on the results of such research to the Congress not later than January 1, 1974.

(b) Authorized activities of Administrator

In carrying out the provisions of subsection (a) of this section the Administrator is authorized to--

(1) collect and make available, through publications and other appropriate means, the results of and other information, including appropriate recommendations by him in connection therewith, pertaining to such research and other activities referred to in paragraph (1) of subsection (a);

(2) cooperate with other Federal departments and agencies, State water pollution control agencies, interstate agencies, other public and private agencies, institutions, organizations, industries involved, and individuals, in the preparation and conduct of such research and other activities referred to in paragraph (1) of subsection (a);

(3) make grants to State water pollution control agencies, interstate agencies, other public or nonprofit private agencies, institutions, organizations, and individuals, for purposes stated in paragraph (1) of subsection (a) of this section;

(4) contract with public or private agencies, institutions, organizations, and individuals, without regard to section 3324(a) and (b) of Title 31 and section 6101 of Title 41, referred to in paragraph (1) of subsection (a);

(5) establish and maintain research fellowships at public or nonprofit private educational institutions or research organizations;

(6) collect and disseminate, in cooperation with other Federal departments and agencies, and with other public or private agencies, institutions, and organizations having related responsibilities, basic data on chemical, physical, and biological effects of varying water quality and other information pertaining to pollution and the prevention, reduction, and elimination thereof; and

(7) develop effective and practical processes, methods, and prototype devices for the prevention, reduction, and elimination of pollution.

(c) Research and studies on harmful effects of pollutants; cooperation with Secretary of Health and Human Services

In carrying out the provisions of subsection (a) of this section the Administrator shall conduct research on, and survey the results of other scientific studies on, the harmful effects on the health or welfare of persons caused by pollutants. In order to avoid duplication of effort, the Administrator shall, to the extent practicable, conduct such research in cooperation with and through the facilities of the Secretary of Health and Human Services.

(d) Sewage treatment; identification and measurement of effects of pollutants; augmented streamflow

In carrying out the provisions of this section the Administrator shall develop and demonstrate under varied conditions (including conducting such basic and applied research, studies, and experiments as may be necessary):

(1) Practicable means of treating municipal sewage, and other waterborne wastes to implement the requirements of section 1281 of this title;

(2) Improved methods and procedures to identify and measure the effects of pollutants, including those pollutants created by new technological developments; and

(3) Methods and procedures for evaluating the effects on water quality of augmented streamflows to control pollution not susceptible to other means of prevention, reduction, or elimination.

(e) Field laboratory and research facilities

The Administrator shall establish, equip, and maintain field laboratory and research facilities, including, but not limited to, one to be located in the northeastern area of the United States, one in the Middle Atlantic area, one in the southeastern area, one in the midwestern area, one in the southwestern area, one in the Pacific Northwest, and one in the State of Alaska, for the conduct of research, investigations, experiments, field demonstrations and studies, and training relating to the prevention, reduction and elimination of pollution. Insofar as practicable, each such facility shall be located near institutions of higher learning in which graduate training in such research might be carried out. In conjunction with the development of criteria under section 1343 of this title, the Administrator shall construct the facilities authorized for the National Marine Water Quality Laboratory established under this subsection.

(f) Great Lakes water quality research

The Administrator shall conduct research and technical development work, and make studies, with respect to the quality of the waters of the Great Lakes, including an analysis of the present and projected future water quality of the Great Lakes under varying conditions of waste treatment and disposal, an evaluation of the water quality needs of those to be served by such waters, an evaluation of municipal, industrial, and vessel waste treatment and disposal practices with respect to such waters, and a study of alternate means of solving pollution problems (including additional waste treatment measures) with respect to such waters.

(g) Treatment works pilot training programs; employment needs forecasting; training projects and grants; research fellowships; technical training; report to the President and transmittal to Congress

(1) For the purpose of providing an adequate supply of trained personnel to operate and maintain existing and future treatment works and related activities, and for the purpose of enhancing substantially the proficiency of those engaged in such activities, the Administrator shall finance pilot programs, in cooperation with State and interstate agencies, municipalities, educational institutions, and other organizations and individuals, of manpower development and training and retraining of persons in, on entering into, the field of operation and maintenance of treatment works and related activities. Such program and any funds expended for such a program shall supplement, not supplant, other manpower

and training programs and funds available for the purposes of this paragraph. The Administrator is authorized, under such terms and conditions as he deems appropriate, to enter into agreements with one or more States, acting jointly or severally, or with other public or private agencies or institutions for the development and implementation of such a program.

(2) The Administrator is authorized to enter into agreements with public and private agencies and institutions, and individuals to develop and maintain an effective system for forecasting the supply of, and demand for, various professional and other occupational categories needed for the prevention, reduction, and elimination of pollution in each region, State, or area of the United States and, from time to time, to publish the results of such forecasts.

(3) In furtherance of the purposes of this chapter, the Administrator is authorized to--

(A) make grants to public or private agencies and institutions and to individuals for training projects, and provide for the conduct of training by contract with public or private agencies and institutions and with individuals without regard to section 3324(a) and (b) of Title 31 and section 6101 of Title 41;

(B) establish and maintain research fellowships in the Environmental Protection Agency with such stipends and allowances, including traveling and subsistence expenses, as he may deem necessary to procure the assistance of the most promising research fellows; and

(C) provide, in addition to the program established under paragraph (1) of this subsection, training in technical matters relating to the causes, prevention, reduction, and elimination of pollution for personnel of public agencies and other persons with suitable qualifications.

(4) The Administrator shall submit, through the President, a report to the Congress not later than December 31, 1973, summarizing the actions taken under this subsection and the effectiveness of such actions, and setting forth the number of persons trained, the occupational categories for which training was provided, the effectiveness of other Federal, State, and local training programs in this field, together with estimates of future needs, recommendations on improving training programs, and such other information and recommendations, including legislative recommendations, as he deems appropriate.

(h) Lake pollution

The Administrator is authorized to enter into contracts with, or make grants to, public or private agencies and organizations and individuals for (A) the purpose of developing and demonstrating new or improved methods for the prevention, removal, reduction, and elimination of pollution in lakes, including the undesirable effects of nutrients and vegetation, and (B) the construction of publicly owned research facilities for such purpose.

(i) Oil pollution control studies

The Administrator, in cooperation with the Secretary of the Department in which the Coast Guard is operating, shall--

(1) engage in such research, studies, experiments, and demonstrations as he deems appropriate, relative to the removal of oil from any waters and to the prevention, control, and elimination of oil and hazardous substances pollution;

(2) publish from time to time the results of such activities; and

(3) from time to time, develop and publish in the Federal Register specifications and other technical information on the various chemical compounds used in the control of oil and hazardous substances spills.

In carrying out this subsection, the Administrator may enter into contracts with, or make grants to, public or private agencies and organizations and individuals.

(j) Solid waste disposal equipment for vessels

The Secretary of the department in which the Coast Guard is operating shall engage in such research, studies, experiments, and demonstrations as he deems appropriate relative to equipment which is to be installed on board a vessel and is designed to receive, retain, treat, or discharge human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes with particular emphasis on equipment to be installed on small recreational vessels. The Secretary of the department in which the Coast Guard is operating shall report to Congress the results of such research, studies, experiments, and demonstrations prior to the effective date of any regulations established under section 1322 of this title. In carrying out this subsection the Secretary of the department in which the Coast Guard is operating may enter into contracts with, or make grants to, public or private organizations and individuals.

(k) Land acquisition

In carrying out the provisions of this section relating to the conduct by the Administrator of demonstration projects and the development of field laboratories and research facilities, the Administrator may acquire land and interests therein by purchase, with appropriated or donated funds, by donation, or by exchange for acquired or public lands under his jurisdiction which he classifies as suitable for disposition. The values of the properties so exchanged either shall be approximately equal, or if they are not approximately equal, the values shall be equalized by the payment of cash to the grantor or to the Administrator as the circumstances require.

(l) Collection and dissemination of scientific knowledge on effects and control of pesticides in water

(1) The Administrator shall, after consultation with appropriate local, State, and Federal agencies, public and private organizations, and interested individuals, as soon as practicable but not later than January 1, 1973, develop and issue to the States for the purpose of carrying out this chapter the latest scientific knowledge available in indicating the kind and extent of effects on health and welfare which may be expected from the presence of pesticides in the water in varying quantities. He shall revise and add to such information whenever necessary to reflect developing scientific knowledge.

(2) The President shall, in consultation with appropriate local, State, and Federal agencies, public and private organizations, and interested individuals, conduct studies and investigations of methods to control the release of pesticides into the environment which study shall include examination of the persistency of pesticides in the water

environment and alternatives thereto. The President shall submit reports, from time to time, on such investigations to Congress together with his recommendations for any necessary legislation.

(m) Waste oil disposal study

(1) The Administrator shall, in an effort to prevent degradation of the environment from the disposal of waste oil, conduct a study of (A) the generation of used engine, machine, cooling, and similar waste oil, including quantities generated, the nature and quality of such oil, present collecting methods and disposal practices, and alternate uses of such oil; (B) the long-term, chronic biological effects of the disposal of such waste oil; and (C) the potential market for such oils, including the economic and legal factors relating to the sale of products made from such oils, the level of subsidy, if any, needed to encourage the purchase by public and private nonprofit agencies of products from such oil, and the practicability of Federal procurement, on a priority basis, of products made from such oil. In conducting such study, the Administrator shall consult with affected industries and other persons.

(2) The Administrator shall report the preliminary results of such study to Congress within six months after October 18, 1972, and shall submit a final report to Congress within 18 months after such date.

(n) Comprehensive studies of effects of pollution on estuaries and estuarine zones

(1) The Administrator shall, in cooperation with the Secretary of the Army, the Secretary of Agriculture, the Water Resources Council, and with other appropriate Federal, State, interstate, or local public bodies and private organizations, institutions, and individuals, conduct and promote, and encourage contributions to, continuing comprehensive studies of the effects of pollution, including sedimentation, in the estuaries and estuarine zones of the United States on fish and wildlife, on sport and commercial fishing, on recreation, on water supply and water power, and on other beneficial purposes. Such studies shall also consider the effect of demographic trends, the exploitation of mineral resources and fossil fuels, land and industrial development, navigation, flood and erosion control, and other uses of estuaries and estuarine zones upon the pollution of the waters therein.

(2) In conducting such studies, the Administrator shall assemble, coordinate, and organize all existing pertinent information on the Nation's estuaries and estuarine zones; carry out a program of investigations and surveys to supplement existing information in representative estuaries and estuarine zones; and identify the problems and areas where further research and study are required.

(3) The Administrator shall submit to Congress, from time to time, reports of the studies authorized by this subsection but at least one such report during any six-year period. Copies of each such report shall be made available to all interested parties, public and private.

(4) For the purpose of this subsection, the term “estuarine zones” means an environmental system consisting of an estuary and those transitional areas which are consistently influenced or affected by water from an estuary such as, but not limited to, salt marshes, coastal and intertidal areas, bays, harbors, lagoons, inshore waters, and channels, and the term “estuary” means all or part of the mouth of a river or stream or other body of water having unimpaired natural connection with open sea and within which the sea water is measurably diluted with fresh water derived from land drainage.

(o) Methods of reducing total flow of sewage and unnecessary water consumption; reports

(1) The Administrator shall conduct research and investigations on devices, systems, incentives, pricing policy, and other methods of reducing the total flow of sewage, including, but not limited to, unnecessary water consumption in order to reduce the requirements for, and the costs of, sewage and waste treatment services. Such research and investigations shall be directed to develop devices, systems, policies, and methods capable of achieving the maximum reduction of unnecessary water consumption.

(2) The Administrator shall report the preliminary results of such studies and investigations to the Congress within one year after October 18, 1972, and annually thereafter in the report required under subsection (a) of section 1375 of this title. Such report shall include recommendations for any legislation that may be required to provide for the adoption and use of devices, systems, policies, or other methods of reducing water consumption and reducing the total flow of sewage. Such report shall include an estimate of the benefits to be derived from adoption and use of such devices, systems, policies, or other methods and also shall reflect estimates of any increase in private, public, or other cost that would be occasioned thereby.

(p) Agricultural pollution

In carrying out the provisions of subsection (a) of this section the Administrator shall, in cooperation with the Secretary of Agriculture, other Federal agencies, and the States, carry out a comprehensive study and research program to determine new and improved methods and the better application of existing methods of preventing, reducing, and eliminating pollution from agriculture, including the legal, economic, and other implications of the use of such methods.

(q) Sewage in rural areas; national clearinghouse for alternative treatment information; clearinghouse on small flows

(1) The Administrator shall conduct a comprehensive program of research and investigation and pilot project implementation into new and improved methods of preventing, reducing, storing, collecting, treating, or otherwise eliminating pollution from sewage in rural and other areas where collection of sewage in conventional, communitywide sewage collection systems is impractical, uneconomical, or otherwise infeasible, or where soil conditions or other factors preclude the use of septic tank and drainage field systems.

(2) The Administrator shall conduct a comprehensive program of research and investigation and pilot project implementation into new and improved methods for the collection and treatment of sewage and other liquid wastes combined with the treatment and disposal of solid wastes.

(3) The Administrator shall establish, either within the Environmental Protection Agency, or through contract with an appropriate public or private non-profit organization, a national clearinghouse which shall (A) receive reports and information resulting from research, demonstrations, and other projects funded under this chapter related to paragraph (1) of this subsection and to subsection (e)(2) of section 1255 of this title; (B) coordinate and disseminate such reports and information for use by Federal and State agencies, municipalities, institutions, and persons in developing new and improved methods pursuant to this subsection; and (C) provide for the collection and dissemination of reports and information relevant to this subsection from other Federal and State agencies, institutions, universities, and persons.

(4) Small flows clearinghouse

Notwithstanding section 1285(d) of this title, from amounts that are set aside for a fiscal year under section 1285(i) of this title and are not obligated by the end of the 24-month period of availability for such amounts under section 1285(d) of this title, the Administrator shall make available $1,000,000 or such unobligated amount, whichever is less, to support a national clearinghouse within the Environmental Protection Agency to collect and disseminate information on small flows of sewage and innovative or alternative wastewater treatment processes and techniques, consistent with paragraph (3). This paragraph shall apply with respect to amounts set aside under section 1285(i) of this title for which the 24-month period of availability referred to in the preceding sentence ends on or after September 30, 1986.

(r) Research grants to colleges and universities

The Administrator is authorized to make grants to colleges and universities to conduct basic research into the structure and function of freshwater aquatic ecosystems, and to improve understanding of the ecological characteristics necessary to the maintenance of the chemical, physical, and biological integrity of freshwater aquatic ecosystems.

(s) River Study Centers

The Administrator is authorized to make grants to one or more institutions of higher education (regionally located and to be designated as "River Study Centers") for the purpose of conducting and reporting on interdisciplinary studies on the nature of river systems, including hydrology, biology, ecology, economics, the relationship between river uses and land uses, and the effects of development within river basins on river systems and on the value of water resources and water related activities. No such grant in any fiscal year shall exceed $1,000,000.

(t) Thermal discharges

The Administrator shall, in cooperation with State and Federal agencies and public and private organizations, conduct continuing comprehensive studies of the effects and methods of control of thermal discharges. In evaluating alternative methods of control the studies shall consider (1) such data as are available on the latest available technology, economic feasibility including cost-effectiveness analysis, and (2) the total impact on the environment, considering not only water quality but also air quality, land use, and effective utilization and conservation of freshwater and other natural resources. Such studies shall consider methods of minimizing adverse effects and maximizing beneficial effects of thermal discharges. The results of these studies shall be reported by the Administrator as soon as practicable, but not later than 270 days after October 18, 1972, and shall be made available to the public and the States, and considered as they become available by the Administrator in carrying out section 1326 of this title and by the States in proposing thermal water quality standards.

(u) Authorization of appropriations

There is authorized to be appropriated (1) not to exceed $100,000,000 per fiscal year for the fiscal year ending June 30, 1973, the fiscal year ending June 30, 1974, and the fiscal year ending June 30, 1975, not to exceed $14,039,000 for the fiscal year ending September 30, 1980, not to exceed $20,697,000 for the fiscal year ending September 30, 1981, not to exceed $22,770,000 for the fiscal year ending September 30, 1982, such sums as may be necessary for fiscal years 1983 through 1985, and not to exceed $22,770,000 per fiscal year for each of the fiscal years 1986 through 1990, for carrying out the provisions of this section, other than subsections (g)(1) and (2), (p), (r), and (t), except that such authorizations are not for any research, development, or demonstration activity pursuant to such provisions; (2) not to exceed $7,500,000 for

fiscal years 1973, 1974, and 1975, $2,000,000 for fiscal year 1977, $3,000,000 for fiscal year 1978, $3,000,000 for fiscal year 1979, $3,000,000 for fiscal year 1980, $3,000,000 for fiscal year 1981, $3,000,000 for fiscal year 1982, such sums as may be necessary for fiscal years 1983 through 1985, and $3,000,000 per fiscal year for each of the fiscal years 1986 through 1990, for carrying out the provisions of subsection (g)(1); (3) not to exceed $2,500,000 for fiscal years 1973, 1974, and 1975, $1,000,000 for fiscal year 1977, $1,500,000 for fiscal year 1978, $1,500,000 for fiscal year 1979, $1,500,000 for fiscal year 1980, $1,500,000 for fiscal year 1981, $1,500,000 for fiscal year 1982, such sums as may be necessary for fiscal years 1983 through 1985, and $1,500,000 per fiscal year for each of the fiscal years 1986 through 1990, for carrying out the provisions of subsection (g)(2); (4) not to exceed $10,000,000 for each of the fiscal years ending June 30, 1973, June 30, 1974, and June 30, 1975, for carrying out the provisions of subsection (p); (5) not to exceed $15,000,000 per fiscal year for the fiscal years ending June 30, 1973, June 30, 1974, and June 30, 1975, for carrying out the provisions of subsection (r); and (6) not to exceed $10,000,000 per fiscal year for the fiscal years ending June 30, 1973, June 30, 1974, and June 30, 1975, for carrying out the provisions of subsection (t).

(v) Studies concerning pathogen indicators in coastal recreation waters

Not later than 18 months after October 10, 2000, after consultation and in cooperation with appropriate Federal, State, tribal, and local officials (including local health officials), the Administrator shall initiate, and, not later than 3 years after October 10, 2000, shall complete, in cooperation with the heads of other Federal agencies, studies to provide additional information for use in developing--

(1) an assessment of potential human health risks resulting from exposure to pathogens in coastal recreation waters, including nongastrointestinal effects;

(2) appropriate and effective indicators for improving detection in a timely manner in coastal recreation waters of the presence of pathogens that are harmful to human health;

(3) appropriate, accurate, expeditious, and cost-effective methods (including predictive models) for detecting in a timely manner in coastal recreation waters the presence of pathogens that are harmful to human health; and

(4) guidance for State application of the criteria for pathogens and pathogen indicators to be published under section 1314(a)(9) of this title to account for the diversity of geographic and aquatic conditions.

CREDIT(S)

(June 30, 1948, c. 758, Title I, § 104, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 819; amended Pub.L. 93-207, § 1(1), Dec. 28, 1973, 87 Stat. 906; Pub.L. 93-592, § 1, Jan. 2, 1975, 88 Stat. 1924; Pub.L. 95-217, §§ 4(a), (b), 6, 7, Dec. 27, 1977, 91 Stat. 1566, 1567; Pub.L. 95-576, § 1(a), Nov. 2, 1978, 92 Stat. 2467; Pub.L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695; Pub.L. 96-483, § 1(a), Oct. 21, 1980, 94 Stat. 2360; Pub.L. 100-4, Title I, §§ 101(a), 102, Feb. 4, 1987, 101 Stat. 8, 9; Pub.L. 102-154, Title I, Nov. 13, 1991, 105 Stat. 1000; Pub.L. 105-362, Title V, § 501(a)(1), (d)(2)(A), Nov. 10, 1998, 112 Stat. 3283, 3284; Pub.L. 106-284, § 3(a), Oct. 10, 2000, 114 Stat. 871; Pub.L. 107-303, Title III, § 302(b)(1), Nov. 27, 2002, 116 Stat. 2361.)

Notes of Decisions (3)

33 U.S.C.A. § 1254, 33 USCA § 1254

Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter III. Standards and Enforcement (Refs & Annos)

33 U.S.C.A. § 1311

§ 1311. Effluent limitations

Currentness

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved--

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically

and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub.L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F)) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that--

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification

If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants

(A) General authority

Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing

(i) Sufficient information

The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination

The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination

If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions

A petition for listing of a pollutant under this paragraph--

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition

A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof

The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants

The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that--

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such

marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and--

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time

for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures

(1) Any application filed under this section for a modification of the provisions of--

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later that [1] the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after February 4, 1987, and except as provided in paragraph (5);

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g)

(A) Effect of filing

An application for a modification under subsection (g) and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) Effect of disapproval

Disapproval of an application for a modification under subsection (g) shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) Deadline for subsection (g) decision

An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) Extension of application deadline

(A) In general

In the 180-day period beginning on October 31, 1994, the city of San Diego, California, may apply for a modification pursuant to subsection (h) of the requirements of subsection (b)(1)(B) with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) Application

An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will--

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) Additional conditions

The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies.

(D) Preliminary decision deadline

The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(l) Toxic pollutants

Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that--

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural[2] obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors

(1) General rule

The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 1317(b) of this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that--

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314(g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application--

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications

An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision

The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information

The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications

For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application

An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial

If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports

By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 1311 or 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(o) Application fees

The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations

(1) In general

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations

The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions

For purposes of this subsection--

(A) Coal remining operation

The term "coal remining operation" means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before August 3, 1977.

(C) Pre-existing discharge

The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws

Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C.A. § 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

CREDIT(S)

(June 30, 1948, c. 758, Title III, § 301, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 844; amended Pub.L. 95-217, §§ 42-47, 53(c), Dec. 27, 1977, 91 Stat. 1582-1586, 1590; Pub.L. 97-117, §§ 21, 22(a)-(d), Dec. 29, 1981, 95 Stat. 1631, 1632; Pub.L. 97-440, Jan. 8, 1983, 96 Stat. 2289; Pub.L. 100-4, Title III, §§ 301(a) to (e), 302(a) to (d), 303(a), (b)(1), (c) to (f),

304(a), 305, 306(a), (b), 307, Feb. 4, 1987, 101 Stat. 29-37; Pub.L. 100-688, Title III, § 3202(b), Nov. 18, 1988, 102 Stat. 4154; Pub.L. 103-431, § 2, Oct. 31, 1994, 108 Stat. 4396; Pub.L. 104-66, Title II, § 2021(b), Dec. 21, 1995, 109 Stat. 727.)

Notes of Decisions (309)

Footnotes

1 So in original. Probably should be “than”.

2 So in original. Probably should be “contractual”.

33 U.S.C.A. § 1311, 33 USCA § 1311

Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter III. Standards and Enforcement (Refs & Annos)

33 U.S.C.A. § 1313

§ 1313. Water quality standards and implementation plans

Effective: October 10, 2000
Currentness

(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 a waiting 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 effect 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), 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) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

CREDIT(S)

(June 30, 1948, c. 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.)

Notes of Decisions (131)

33 U.S.C.A. § 1313, 33 USCA § 1313
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter III. Standards and Enforcement (Refs & Annos)

33 U.S.C.A. § 1319

§ 1319. Enforcement

Currentness

(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 consented 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.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 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, , [1] or in a permit issued under section 1344 of this title by a State, 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 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.

CREDIT(S)

(June 30, 1948, c. 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.)

Notes of Decisions (386)

Footnotes

1 So in original.

33 U.S.C.A. § 1319, 33 USCA § 1319

Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1341

§ 1341. Certification

Currentness

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or

requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

CREDIT(S)

(June 30, 1948, c. 758, Title IV, § 401, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 877; amended Pub.L. 95-217, §§ 61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

Notes of Decisions (104)

33 U.S.C.A. § 1341, 33 USCA § 1341
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1342

§ 1342. National pollutant discharge elimination system

Effective: February 7, 2014
Currentness

(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 Administrator 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) 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) 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 application

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 Section [1] 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) [3] of this title, or to any other limitations that might be deemed to apply to the silviculture activities listed in 1342(l)(3)(A) [3] 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).

(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).

(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) if--

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

(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 discharges, 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.

CREDIT(S)

(June 30, 1948, c. 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 to 404(a), (c), formerly (d), 405, Feb. 4, 1987, 101 Stat. 65 to 67, 69; Pub.L. 102-580, Title III, § 364, Oct. 31, 1992, 106 Stat. 4862; Pub.L. 104-66, Title II, § 2021(e)(2), Dec. 21, 1995, 109 Stat. 727; 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.)

Notes of Decisions (231)

Footnotes

1 So in original. Probably should not be capitalized.

2 So in original. Probably should read “section 1342(p)(6)”.

3 So in original. Probably should read “section 1342(l)(3)(A)”.

33 U.S.C.A. § 1342, 33 USCA § 1342

Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

KeyCite Yellow Flag - Negative Treatment
Enacted LegislationNote in PL 114-322, December 16, 2016, 130 Stat 1628,

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1344

§ 1344. Permits for dredged or fill material

Currentness

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge 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 Administrator 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), 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.A. § 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 acton [1] 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 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.

CREDIT(S)

(June 30, 1948, c. 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.)

Notes of Decisions (479)

Footnotes

1 So in original. Probably should be “action”.

33 U.S.C.A. § 1344, 33 USCA § 1344

Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

KeyCite Yellow Flag - Negative Treatment
Enacted LegislationNote in PL 114-322, December 16, 2016, 130 Stat 1628,

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter V. General Provisions

33 U.S.C.A. § 1361

§ 1361. Administration

Currentness

(a) Authority of Administrator to prescribe regulations

The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.

(b) Utilization of other agency officers and employees

The Administrator, with the consent of the head of any other agency of the United States, may utilize such officers and employees of such agency as may be found necessary to assist in carrying out the purposes of this chapter.

(c) Recordkeeping

Each recipient of financial assistance under this chapter shall keep such records as the Administrator shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate effective audit.

(d) Audit

The Administrator and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and records of the recipients that are pertinent to the grants received under this chapter. For the purpose of carrying out audits and examinations with respect to recipients of Federal assistance under this chapter, the Administrator is authorized to enter into noncompetitive procurement contracts with independent State audit organizations, consistent with chapter 75 of Title 31. Such contracts may only be entered into to the extent and in such amounts as may be provided in advance in appropriation Acts.

(e) Awards for outstanding technological achievement or innovative processes, methods, or devices in waste treatment and pollution abatement programs

(1) It is the purpose of this subsection to authorize a program which will provide official recognition by the United States Government to those industrial organizations and political subdivisions of States which during the preceding year demonstrated an outstanding technological achievement or an innovative process, method, or device in their waste treatment and pollution abatement programs. The Administrator shall, in consultation with the appropriate State water pollution control agencies, establish regulations under which such recognition may be applied for and granted, except that no applicant shall be eligible for an award under this subsection if such applicant is not in total compliance with all applicable water quality requirements under this chapter, or otherwise does not have a satisfactory record with respect to environmental quality.

(2) The Administrator shall award a certificate or plaque of suitable design to each industrial organization or political subdivision which qualifies for such recognition under regulations established under this subsection.

(3) The President of the United States, the Governor of the appropriate State, the Speaker of the House of Representatives, and the President pro tempore of the Senate shall be notified of the award by the Administrator and the awarding of such recognition shall be published in the Federal Register.

(f) Detail of Environmental Protection Agency personnel to State water pollution control agencies

Upon the request of a State water pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this chapter.

CREDIT(S)

(June 30, 1948, c. 758, Title V, § 501, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 885; amended Pub.L. 100-4, Title V, § 501, Feb. 4, 1987, 101 Stat. 75.)

Notes of Decisions (8)

33 U.S.C.A. § 1361, 33 USCA § 1361
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter V. General Provisions

33 U.S.C.A. § 1362

§ 1362. Definitions

Effective: October 1, 2014
Currentness

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 stormwater 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.

CREDIT(S)

(June 30, 1948, c. 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.)

Notes of Decisions (198)

33 U.S.C.A. § 1362, 33 USCA § 1362
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter V. General Provisions

33 U.S.C.A. § 1369

§ 1369. Administrative procedure and judicial review

Currentness

(a) Subpenas

(1) For purposes of obtaining information under section 1315 of this title, or carrying out section 1367(e) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, 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, except that such paper, book, document, 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. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or 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 Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval,

promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(3) Award of fees

In any judicial proceeding under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.

(c) Additional evidence

In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

CREDIT(S)

(June 30, 1948, c. 758, Title V, § 509, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 891; amended Pub.L. 93-207, § 1(6), Dec. 28, 1973, 87 Stat. 906; Pub.L. 100-4, Title III, § 308(b), Title IV, § 406(d)(3), Title V, § 505(a), (b), Feb. 4, 1987, 101 Stat. 39, 73, 75; Pub.L. 100-236, § 2, Jan. 8, 1988, 101 Stat. 1732.)

Notes of Decisions (171)

33 U.S.C.A. § 1369, 33 USCA § 1369
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter V. General Provisions

33 U.S.C.A. § 1371

§ 1371. Authority under other laws and regulations

Currentness

(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.A. § 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.

CREDIT(S)

(June 30, 1948, c. 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.)

Notes of Decisions (12)

33 U.S.C.A. § 1371, 33 USCA § 1371
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

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 interagency 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.

CREDIT(S)

(June 30, 1948, c. 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.)

Notes of Decisions (125)

33 U.S.C.A. § 1251, 33 USCA § 1251
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 40. Oil Pollution (Refs & Annos)
Subchapter I. Oil Pollution Liability and Compensation

33 U.S.C.A. § 2701

§ 2701. Definitions

Effective: October 15, 2010
Currentness

For the purposes of this Act, the term--

(1) "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

(2) "barrel" means 42 United States gallons at 60 degrees fahrenheit;

(3) "claim" means a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident;

(4) "claimant" means any person or government who presents a claim for compensation under this subchapter;

(5) "damages" means damages specified in section 2702(b) of this title, and includes the cost of assessing these damages;

(6) "deepwater port" is a facility licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524);

(7) "discharge" means any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping;

(8) "exclusive economic zone" means the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983, including the ocean waters of the areas referred to as "eastern special areas" in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990;

(9) "facility" means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes;

(10) "foreign offshore unit" means a facility which is located, in whole or in part, in the territorial sea or on the continental shelf of a foreign country and which is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the seabed beneath the foreign country's territorial sea or from the foreign country's continental shelf;

(11) "Fund" means the Oil Spill Liability Trust Fund, established by section 9509 of Title 26;

(12) "gross ton" has the meaning given that term by the Secretary under part J of Title 46;

(13) "guarantor" means any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party under this Act;

(14) "incident" means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil;

(15) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and has governmental authority over lands belonging to or controlled by the tribe;

(16) "lessee" means a person holding a leasehold interest in an oil or gas lease on lands beneath navigable waters (as that term is defined in section 1301(a) of Title 43) or on submerged lands of the Outer Continental Shelf, granted or maintained under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.);

(17) "liable" or "liability" shall be construed to be the standard of liability which obtains under section 1321 of this title;

(18) "mobile offshore drilling unit" means a vessel (other than a self-elevating lift vessel) capable of use as an offshore facility;

(19) "National Contingency Plan" means the National Contingency Plan prepared and published under section 1321(d) of this title or revised under section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9605);

(20) "natural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government;

(21) "navigable waters" means the waters of the United States, including the territorial sea;

(22) "offshore facility" means any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(23) "oil" means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act [42 U.S.C.A. § 9601 et seq.];

(24) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(25) the term "Outer Continental Shelf facility" means an offshore facility which is located, in whole or in part, on the Outer Continental Shelf and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the Outer Continental Shelf;

(26) "owner or operator"--

(A) means--

(i) in the case of a vessel, any person owning, operating, or chartering by demise, the vessel;

(ii) in the case of an onshore or offshore facility, any person owning or operating such facility;

(iii) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(iv) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand;

(v) notwithstanding subparagraph (B)(i), and in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including for purposes of liability under section 2702 of this title, any State or local government that has caused or contributed to a discharge or substantial threat of a discharge of oil from a vessel or facility ownership or control of which was acquired involuntarily through--

(I) seizure or otherwise in connection with law enforcement activity;

(II) bankruptcy;

(III) tax delinquency;

(IV) abandonment; or

(V) other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign;

(vi) notwithstanding subparagraph (B)(ii), a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person--

(I) exercises decision making control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for oil handling or disposal practices related to the vessel or facility; or

(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility--

(aa) for the overall management of the vessel or facility encompassing day-to-day decision making with respect to environmental compliance; or

(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance; and

(B) does not include--

(i) A unit of state or local government that acquired ownership or control of a vessel or facility involuntarily through--

(I) seizure or otherwise in connection with law enforcement activity;

(II) bankruptcy;

(III) tax delinquency;

(IV) abandonment; or

(V) other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign;

(ii) a person that is a lender that does not participate in management of a vessel or facility, but holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility; or

(iii) a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person--

(I) forecloses on the vessel or facility; and

(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a removal action under section 1321(c) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition,

if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements;

(27) "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body;

(28) "permittee" means a person holding an authorization, license, or permit for geological exploration issued under section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. 1340) or applicable State law;

(29) "public vessel" means a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce;

(30) "remove" or "removal" means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(31) "removal costs" means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident;

(32) "responsible party" means the following:

(A) Vessels

In the case of a vessel, any person owning, operating, or demise chartering the vessel. In the case of a vessel, the term "responsible party" also includes the owner of oil being transported in a tank vessel with a single hull after December 31, 2010 (other than a vessel described in section 3703a(b)(3) of Title 46.

(B) Onshore facilities

In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(C) Offshore facilities

In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(D) Deepwater ports

In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524), the licensee.

(E) Pipelines

In the case of a pipeline, any person owning or operating the pipeline.

(F) Abandonment

In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility.

(33) "Secretary" means the Secretary of the department in which the Coast Guard is operating;

(34) "tank vessel" means a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that--

(A) is a vessel of the United States;

(B) operates on the navigable waters; or

(C) transfers oil or hazardous material in a place subject to the jurisdiction of the United States;

(35) "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 3 miles;

(36) "United States" and "State" mean the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States;

(37) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel;

(38) "participate in management"--

(A)(i) means actually participating in the management or operational affairs of a vessel or facility; and

(ii) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations; and

(B) does not include--

(i) performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility;

(ii) holding a security interest or abandoning or releasing a security interest;

(iii) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(iv) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(v) monitoring or undertaking one or more inspections of the vessel or facility;

(vi) requiring a removal action or other lawful means of addressing a discharge or substantial threat of a discharge of oil in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

(vii) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

(viii) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(ix) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(x) conducting a removal action under section 1321(c) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan,

if such actions do not rise to the level of participating in management under subparagraph (A) of this paragraph and paragraph (26)(A)(vi);

(39) "extension of credit" has the meaning provided in section 9601(20)(G)(i) of Title 42;

(40) "financial or administrative function" has the meaning provided in section 9601(20)(G)(ii) of Title 42;

(41) "foreclosure" and "foreclose" each has the meaning provided in section 9601(20)(G)(iii) of Title 42;

(42) "lender" has the meaning provided in section 9601(20)(G)(iv) of Title 42;

(43) "operational function" has the meaning provided in section 9601(20)(G)(v) of Title 42; and

(44) "security interest" has the meaning provided in section 9601(20)(G)(vi) of Title 42.

CREDIT(S)

(Pub.L. 101-380, Title I, § 1001, Aug. 18, 1990, 104 Stat. 486; Pub.L. 105-383, Title III, § 307(a), Nov. 13, 1998, 112 Stat. 3421; Pub.L. 108-293, Title VII, § 703(a), (b), Aug. 9, 2004, 118 Stat. 1069, 1071; Pub.L. 111-281, Title VII, § 713, Oct. 15, 2010, 124 Stat. 2988.)

Notes of Decisions (16)

33 U.S.C.A. § 2701, 33 USCA § 2701
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 9. Protection of Navigable Waters and of Harbor and River Improvements Generally (Refs & Annos)
Subchapter I. In General

33 U.S.C.A. § 407

§ 407. Deposit of refuse in navigable waters generally

Currentness

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

CREDIT(S)

(Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152.)

Notes of Decisions (151)

33 U.S.C.A. § 407, 33 USCA § 407
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

UNITED STATES CODE

1952 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES, IN FORCE
ON JANUARY 2, 1953

Prepared and published under authority of Title 1, U. S. Code, Section 202 (c)
by the Committee on the Judiciary of the House of Representatives

VOLUME THREE

TITLE 26—INTERNAL REVENUE CODE

TO

TITLE 33—NAVIGATION AND NAVIGABLE WATERS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1953

no liability for the alteration, amendment, or repeal thereof to the city of New York, or to the owner or owners, or any other persons interested in any obstruction which shall have been constructed under its provisions. (June 25, 1910, ch. 436, §§ 1, 2, 36 Stat. 866, 867; July 26, 1947, ch. 343, title II, § 205 (a), 61 Stat. 501.)

CHANGE OF NAME

The Department of War was designated the Department of the Army and the title of the Secretary of War was changed to Secretary of the Army by act July 26, 1947.

POTOMAC RIVER AND TRIBUTARIES IN DISTRICT OF COLUMBIA

§§ 461—464. Repealed. Mar. 3, 1901, ch. 854, § 1636, 31 Stat. 1434.

CODIFICATION

Sections, act May 19, 1896, ch. 208, §§ 1—4, 29 Stat. 126, 127, related to the District of Columbia, and are now covered by District of Columbia Code, 1951 Ed., § 22–1701 et seq.

NAVIGABLE WATERS OF MARYLAND

§ 465. Authority to dredge; riparian rights of United States.

Subject to the provisions of section 403 of this title authority is granted to dredge, without cost to the United States, in the navigable waters of the United States included within the State of Maryland and outside the limits of projects for improvement of navigation facilities approved by Congress, regardless of rights accruing to the United States as riparian owner under the laws of the State of Maryland: *Provided*, That in the opinion of the Chief of Engineers such dredging will improve facilities for navigation. (July 3, 1930, ch. 847, § 12, 46 Stat. 949.)

WATER POLLUTION CONTROL

§ 466. Congressional declaration of policy in controlling water pollution.

In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the abatement of stream pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution, to support and aid technical research to devise and perfect methods of treatment of industrial wastes which are not susceptible to known effective methods of treatment, and to provide Federal technical services to State and interstate agencies and to industries, and financial aid to State and interstate agencies and to municipalities, in the formulation and execution of their stream pollution abatement programs. To this end, the Surgeon General of the Public Health Service (under the supervision and direction of the Federal Security Administrator) and the Federal Security Administrator shall have the responsibilities and authority relating to water pollution control vested in them respectively by sections 466—466j of this title. (June 30, 1948, ch. 758, § 1, 62 Stat. 1155; June 30, 1949, ch. 288, title I, § 103 (a), 63 Stat. 380; 1950 Reorg. Plan No. 16, § 1, eff. May 24, 1950, 15 F. R. 3176, 64 Stat. 1268.)

TRANSFER OF FUNCTIONS

All functions of the Administrator of General Services under sections 466—466j of this title, together with so much of any other function of the Administrator of General Services or of the General Services Administration as is incidental to or necessary for the carrying out of the provisions of such sections, were transferred to the Federal Security Administrator by 1950 Reorg. Plan No. 16 and set out in note under section 133z–15 of Title 5, Executive Departments and Government Officers and Employees. Section 2 of such Plan vested authority in the Federal Security Administrator to delegate such transferred functions to any other officer, or to any agency or employee, of the Federal Security Agency. For transfer of records, property, personnel, and funds, see section 3 of such Plan.

All functions of the Federal Works Agency and of all agencies thereof, together with all functions of the Federal Works Administrator were transferred to the Administrator of General Services by section 103 (a) of act June 30, 1949. Both the Federal Works Agency and the office of Federal Works Administrator were abolished by section 103 (b) of said act. Said section 103 is set out as section 630 (b) of Title 5, Executive Departments and Government Officers and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions to Administrator of General Services as effective July 1, 1949, see note set out under section 471 of Title 40, Public Buildings, Property, and Works.

SHORT TITLE

Congress in enacting sections 466—466j of this title provided by section 13 of act June 30, 1948 that it should be popularly known as the "Water Pollution Control Act".

SEPARABILITY PROVISIONS

Section 12 of act June 30, 1948 provided: "If any provision of this Act [sections 466—466j of this title], or the application of any provision of this Act [sections 466—466j of this title] to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act [sections 466—466j of this title], shall not be affected thereby".

EX. ORD. NO. 10014. COOPERATION OF FEDERAL AND STATE AGENCIES TO PREVENT POLLUTION OF SURFACE AND UNDERGROUND WATERS

Ex. Ord. No. 10014, Nov. 5, 1948, 13 F. R. 6601, provided: By virtue of the authority vested in me as President of the United States, and pursuant to the policy expressed in section 1 of the Water Pollution Control Act approved June 30, 1948 (Public Law 845, 80th Congress) [this section], of recognizing, preserving, and protecting the primary responsibilities and rights of the States in controlling water pollution, I hereby direct the heads of the departments, agencies, and independent establishments of the executive branch of the Government to take such action as may be practicable, in cooperation with State and local authorities concerned with control of water pollution, to insure the disposal of sewage, garbage, refuse, and other wastes accumulated in the course or as a result of Federal activities, and industrial or manufactured foodstuffs and other products destroyed by order or under the supervision of Federal regulatory authorities, in such manner as will conform with programs formulated under State law and applicable to State agencies and the public generally for the preservation and improvement of the quality of surface and underground waters.

§ 466a. Preparation and adoption of comprehensive water pollution programs by Surgeon General—(a) Cooperation with Federal agencies and State and interstate agencies; joint investigations.

The Surgeon General shall, after careful investigation, and in cooperation with other Federal agencies, with State water pollution agencies and interstate agencies, and with the municipalities and industries involved, prepare or adopt comprehensive

programs for eliminating or reducing the pollution of interstate waters and tributaries thereof 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 public water supplies, propagation of fish and aquatic life, recreational purposes, and agricultural, industrial, and other legitimate uses. For the purpose of this subsection the Surgeon General 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 deleteriously affect such waters.

(b) Cooperative activities by States; uniform State laws; State compacts.

The Surgeon General shall encourage cooperative activities by the States for the prevention and abatement of water pollution; encourage the enactment of uniform State laws relating to water pollution; encourage compacts between States for the prevention and abatement of water pollution; collect and disseminate information relating to water pollution and the prevention and abatement thereof; support and aid technical research to devise and perfect methods of treatment of industrial wastes which are not susceptible to known effective methods of treatment; make available to State and interstate agencies, municipalities, industries, and individuals the results of surveys, studies, investigations, research, and experiments relating to water pollution and the prevention and abatement thereof conducted by the Surgeon General and by authorized cooperating agencies; and furnish such assistance to State agencies as may be authorized by law.

(c) Consent of Congress to State compacts.

The consent of the Congress is given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and abatement of water pollution and the enforcement of their respective laws relating thereto, and (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts. No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by the Congress.

(d) Pollution declared public nuisance; notification to persons responsible; suit for abatement; joinder of parties; venue; jurisdiction; definition.

(1) The pollution of interstate waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of persons in a State other than that in which the discharge originates, is declared to be a public nuisance and subject to abatement as herein provided.

(2) Whenever the Surgeon General, on the basis of reports, surveys, and studies, finds that any pollution declared to be a public nuisance by paragraph (1) of this subsection is occurring, he shall give formal notification thereof to the person or persons discharging any matter causing or contributing to such pollution and shall advise the water pollution agency or interstate agency of the State or States where such discharge or discharges originate of such notification. This notification may outline recommended remedial measures which are reasonable and equitable in that case and shall specify a reasonable time to secure abatement of the pollution. If action calculated to secure abatement of the pollution within the time specified is not commenced, this failure shall again be brought to the attention of the person or persons discharging the matter and of the water pollution agency or interstate agency of the State or States where such discharge or discharges originate. The notification to such agency may be accompanied by a recommendation that it initiate a suit to abate the pollution in a court of proper jurisdiction.

(3) If, within a reasonable time after the second notification by the Surgeon General, the person or persons discharging the matter fail to initiate action to abate the pollution or the State water pollution agency or interstate agency fails to initiate a suit to secure abatement, the Federal Security Administrator is authorized to call a public hearing, to be held in or near one or more of the places where the discharge or discharges causing or contributing to such pollution originate, before a board of five or more persons appointed by the Administrator, who may be officers or employees of the Federal Security Agency or of the water pollution agency or interstate agency of the State or States where such discharge or discharges originate (except that at least one of the members of the board shall be a representative of the water pollution agency of the State or States where such discharge or discharges originate and at least one shall be a representative of the Department of Commerce, and not less than a majority of the board shall be persons other than officers or employees of the Federal Security Agency). On the basis of the evidence presented at such hearing the board shall make its recommendations to the Federal Security Administrator concerning the measures, if any, which it finds to be reasonable and equitable to secure abatement of such pollution.

(4) After affording the person or persons discharging the matter causing or contributing to the pollution reasonable opportunity to comply with the recommendations of the board, the Federal Security Administrator may, with the consent of the water pollution agency (or of any officer or agency authorized to give such consent) of the State or States in which the matter causing or contributing to the pollution is discharged, request the Attorney General to bring a suit on behalf of the United States to secure abatement of the pollution.

(5) Before or after any suit authorized by paragraph (4) of this subsection is commenced, any person who is alleged to be discharging matter contributing to the pollution, abatement of which is sought, may, with the consent of the water pollution agency (or of any officer or agency authorized to

466—466j of this title; and (b) to collect, or provide for the collection of, interest on and principal of such bonds or other obligations. All moneys received as proceeds from such sales, and all moneys so collected, shall be covered into the Treasury as miscellaneous receipts.

(d) Regulations.

The Surgeon General and the Federal Security Administrator are each authorized to prescribe such regulations as are necessary to carry out their respective functions under sections 466—466j of this title. (June 30, 1948, ch. 758; § 9, 62 Stat. 1160; June 30, 1949, ch. 288, title I, § 103 (a), 63 Stat. 380; 1950 Reorg. Plan No. 16, § 1, eff. May 24, 1950, 15 F. R. 3176, 64 Stat. 1268.)

TRANSFER OF FUNCTIONS

All functions of the Administrator of General Services under sections 466—466j of this title, together with so much of any other function of the Administrator of General Services or of the General Services Administration as is incidental to or necessary for the carrying out of the provisions of such sections, were transferred to the Federal Security Administrator by 1950 Reorg. Plan No. 16 and set out in note under section 133z–15 of Title 5, Executive Departments and Government Officers and Employees. Therefore, among other changes, the provisions of the first sentence of paragraph (c) (1) of this section, which required the Federal Security Administrator, upon written request of the Administrator of General Services, from time to time submitted to him, containing specifications as to particular projects, to transfer to the Administrator of General Services the total sum for the purpose of making loans for such projects under section 466d of this title, and the final clause of such paragraph, which required the Administrator of General Services to furnish written reports to the Federal Security Administrator on the progress of the work, were omitted. Section 2 of such Plan vested authority in the Federal Security Administrator to delegate such transferred functions to any other officer, or to any agency or employee, of the Federal Security Agency. For transfer of records, property, personnel, and funds, see section 3 of such Plan.

All functions of the Federal Works Agency and of all agencies thereof, together with all functions of the Federal Works Administrator were transferred to the Administrator of General Services by section 103 (a) of act June 30, 1949. Both the Federal Works Agency and the office of Federal Works Administrator were abolished by section 103 (b) of said act. Said section 103 is set out as section 630b of Title 5, Executive Departments and Government Officers and Employees.

EFFECTIVE DATE OF TRANSFER OF FUNCTIONS

Transfer of functions to Administrator of General Services as effective July 1, 1949, see note set out under section 471 of Title 40, Public Buildings, Property, and Works.

§ 466i. Definitions.

When used in sections 466—466j of this title—

(a) The term "State water pollution agency" means the State health authority, except that, in the case of any State in which there is a single State agency, other than the State health authority, charged with responsibility for enforcing State laws relating to the abatement of water pollution, it means such other State agency;

(b) The term "interstate agency" means an agency of two or more States having powers or duties pertaining to the abatement of pollution of waters;

(c) The term "treatment works" means the various devices used in the treatment of sewage or industrial waste of a liquid nature, including the necessary intercepting sewers, outfall sewers, pumping, power, and other equipment, and their appurtenances, and includes any extensions, improvements, remodeling, additions, and alterations thereof;

(d) The term "State" means a State, the District of Columbia, Hawaii, Alaska, Puerto Rico, or the Virgin Islands;

(e) The term "interstate waters" means all rivers, lakes, and other waters that flow across, or form a part of, State boundaries; and

(f) The term "municipality" means a city, town, district, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes. (June 30, 1948, ch. 758, § 10, 62 Stat. 1160.)

§ 466j. Application to other laws.

Sections 466—466j of this title shall not be construed as (1) superseding or limiting the functions, under any other law, of the Surgeon General or of the Public Health Service, or of any other officer or agency of the United States, relating to water pollution, or (2) affecting or impairing the provisions of the Oil Pollution Act, 1924, or sections 407—409 and 411—413 of this title, or (3) affecting or impairing the provisions of any treaty of the United States. (June 30, 1948, ch. 758, § 11, 62 Stat. 1161.)

REFERENCES IN TEXT

The Oil Pollution Act, 1924, referred to in the text, is classified to sections 431—437 of this title.

Chapter 10.—ANCHORAGE GROUNDS AND HARBOR REGULATIONS GENERALLY

Sec.

§ 471. Establishment by Secretary of the Army of anchorage grounds and regulations generally.

The Secretary of the Army is authorized, empowered, and directed to define and establish anchorage grounds for vessels in all harbors, rivers, bays, and other navigable waters of the United States whenever it is manifest to the said Secretary that the maritime or commercial interests of the United States require such anchorage grounds for safe navigation and the establishment of such anchorage grounds shall have been recommended by the Chief of Engineers, and to adopt suitable rules and regulations in relation thereto; and such rules and regulations shall be enforced by the Coast Guard under the direction of the Secretary of the Treasury: *Provided*, That at ports or places where there is no Coast Guard vessel available such rules and regulations may be

UNITED STATES CODE

1964 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES, IN FORCE
ON JANUARY 3, 1965

Prepared and published under authority of Title 1, U. S. Code, Section 202 (c)
by the Committee on the Judiciary of the House of Representatives

VOLUME EIGHT

TITLE 33—NAVIGATION AND NAVIGABLE WATERS
TO
TITLE 41—PUBLIC CONTRACTS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1965

of Health, Education, and Welfare. (June 30, 1948, ch. 758, § 7, 62 Stat. 1159; July 17, 1952, ch. 927, 66 Stat. 755; July 9, 1956, ch. 518, § 1, 70 Stat. 503; July 20, 1961, Pub. L. 87–88, §§ 1 (b)—(d), 6(a), (b), 75 Stat. 204, 207.)

AMENDMENTS

1961—Subsec. (a). Pub. L. 87–88, §§ 1(b), (d), 6(a), (b), substituted "Department of Health, Education, and Welfare" for "Public Health Service" and "composed of the Secretary or his designee" for "composed of the Surgeon General or a sanitary officer designated by him" in par. (1), inserted cl. (iii) in par. (2)(A), and substituted "Secretary" for "Surgeon General" and for "Secretary of Health, Education, and Welfare" in par. (2)(B).

Subsec. (b). Pub. L. 87–88, § 1(b), substituted "Secretary" for "Surgeon General."

Subsec. (c). Pub. L. 87–88, § 1(c), substituted "Department of Health, Education, and Welfare" for "Public Health Service."

1956—Act July 9, 1956, provided for the establishment of the Water Pollution Control Advisory Board, its composition, compensation of members, and its duties, which provisions were formerly contained in section 466e(b) of this title. Former provisions of this section which authorized appropriations for loans for construction of sewerage treatment works are now covered by section 466e(d) of this title.

1952—Act July 17, 1952, extended duration of section from June 30, 1953 to June 30, 1956.

CONTINUATION OF TERM OF OFFICE

Section 6(c) of Pub. L. 87–88 provided that: "Members of the Water Pollution Control Advisory Board (established pursuant to section 7(a) of the Federal Water Pollution Control Act [subsec. (a) of this section] as in effect prior to enactment of this Act [July 20, 1961]) serving immediately before the date of enactment of this Act shall be members of the Water Pollution Control Advisory Board, established by the amendment made by subsection (a) of this section, until the expiration of the terms of office for which they were appointed."

EXPIRATION OF TERMS OF OFFICE OF MEMBERS OF WATER POLLUTION CONTROL ADVISORY BOARD

Section 3 of act July 9, 1956, provided that: "Terms of office as members of the Water Pollution Control Advisory Board (established pursuant to section 6 (b) of the Water Pollution Control Act [section 466e (b) of this title], as in effect prior to the enactment of this Act [July 9, 1956] subsisting on the date of enactment of this Act [July 9, 1956] shall expire at the close of business on such date."

§ 466g. Enforcement measures against pollution of interstate or navigable waters.

(a) Pollution of waters subject to abatement.

The pollution of interstate or navigable waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of any persons, shall be subject to abatement as provided in sections 466—466g and 466h—466k of this title.

(b) Encouragement of State and interstate action.

Consistent with the policy declaration of sections 466—466g and 466h—466k of this title, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (g) of this section, be displaced by Federal enforcement action.

(c) Notification of pollution; conference of State and interstate agencies; notice of conference date; summary of conference discussions.

(1) Whenever requested by the Governor of any State or a State water pollution control agency, or (with the concurrence of the Governor and of the State water pollution control agency for the State in which the municipality is situated) the governing body of any municipality, the Secretary shall, if such request refers to pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originates, give formal notification thereof to the water pollution control agency and interstate agency, if any, of the State or States where such discharge or discharges originate and shall call promptly a conference of such agency or agencies and of the State water pollution control agency and interstate agency, if any, of the State or States, if any, which may be adversely affected by such pollution. Whenever requested by the Governor of any State, the Secretary shall, if such request refers to pollution of interstate or navigable waters which is endangering the health or welfare of persons only in the requesting State in which the discharge or discharges (causing or contributing to such pollution) originate, give formal notification thereof to the water pollution control agency and interstate agency, if any, of such State and shall promptly call a conference of such agency or agencies, unless, in the judgment of the Secretary, the effect of such pollution on the legitimate uses of the waters is not of sufficient significance to warrant exercise of Federal jurisdiction under this section. The Secretary shall also call such a conference whenever, on the basis of reports, surveys, or studies, he has reason to believe that any pollution referred to in subsection (a) of this section and endangering the health or welfare of persons in a State other than that in which the discharge or discharges originate is occurring.

(2) The agencies called to attend such conference may bring such persons as they desire to the conference. Not less than three weeks' prior notice of the conference date shall be given to such agencies.

(3) Following this conference, the Secretary shall prepare and forward to all the water pollution control agencies attending the conference a summary of conference discussions including (A) occurrence of pollution of interstate or navigable waters subject to abatement under sections 466—466g and 466h—466k of this title; (B) adequacy of measures taken toward abatement of the pollution; and (C) nature of delays, if any, being encountered in abating the pollution.

(d) Recommendation of Secretary to State agency to take remedial action.

If the Secretary believes, upon the conclusion of the conference or thereafter, that effective progress toward abatement of such pollution is not being made and that the health or welfare of any persons is being endangered, he shall recommend to the appropriate State water pollution control agency that it take necessary remedial action. The Secretary shall allow at least six months from

UNITED STATES CODE

1970 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES, IN FORCE
ON JANUARY 20, 1971

Prepared and published under authority of Title 1, U.S. Code, Section 202 (c)
by the Committee on the Judiciary of the House of Representatives

VOLUME EIGHT

TITLE 32—NATIONAL GUARD
TO
TITLE 41—PUBLIC CONTRACTS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1971

this title. Former provisions of this section, which authorized appropriations for loans for construction of sewerage treatment works are, now covered by section 1158(d) of this title.

1952—Act July 17, 1952, extended duration of section from June 30, 1953 to June 30, 1956.

TRANSFER OF FUNCTIONS

The Water Pollution Control Advisory Board and its functions were transferred to the Environmental Protection Agency and all functions of the Secretary of the Interior and the Department of the Interior administered through the Federal Water Quality Administration, all functions which were transferred to the Secretary of the Interior by Reorg. Plan No. 2 of 1966, and all functions vested in the Secretary of the Interior or the Department of the Interior by the Federal Water Pollution Control Act were transferred to the Administrator of the Environmental Protection Agency by Reorg. Plan No. 3 of 1970, § 2(a)(1), (b)(1)(1), eff. Dec. 2, 1970, 35 F.R. 15623, 84 Stat. —, set out in the Appendix to Title 5, Government Organization and Employees.

All functions of the Secretary of Health, Education, and Welfare and of the Department of Health, Education, and Welfare under the Federal Water Pollution Control Act [this chapter], with certain specified exceptions, were transferred to the Secretary of the Interior and to the Department of the Interior by section 1(a) of 1966 Reorg. Plan No. 2, set out as a note under section 1151 of this title.

Functions of Secretary of Health, Education, and Welfare (including those of his designee) under this section were transferred to Secretary of the Interior by section 1(c)(2) of Reorg. Plan No. 2 of 1966, set out as a note under section 1151 of this title.

MEMBERSHIP ON WATER POLLUTION CONTROL BOARD

Secretary of Health, Education, and Welfare as an additional member of Board, see section 1(c)(3) of Reorg Plan No. 2 of 1966, set out as a note under section 1151 of this title.

EXPIRATION OF TERMS OF OFFICE OF MEMBERS OF WATER POLLUTION CONTROL ADVISORY BOARD

Section 3 of act July 9, 1956, provided that: "Terms of office as members of the Water Pollution Control Advisory Board (established pursuant to section 6 (b) of the Water Pollution Control Act [section 1158 (b) of this title now covered by this section], as in effect prior to the enactment of this Act [July 9, 1956]) subsisting on the date of enactment of this Act shall expire at the close of business on such date."

CONTINUATION OF TERM OF OFFICE

Section 6(c) of Pub. L. 87–88 provided that: "Members of the Water Pollution Control Advisory Board (established pursuant to section 7(a) of the Federal Water Pollution Control Act [subsec. (a) of this section] as in effect prior to enactment of this Act [July 20, 1961]) serving immediately before the date of enactment of this Act shall be members of the Water Pollution Control Advisory Board, established by the amendment made by subsection (a) of this section, until the expiration of the terms of office for which they were appointed."

§ 1160. Enforcement measures against pollution of interstate or navigable waters.

(a) Pollution of waters subject to abatement.

The pollution of interstate or navigable waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of any persons, shall be subject to abatement as provided in this chapter.

(b) Encouragement of State and interstate action.

Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action.

(c) Water quality standards; procedure for establishment; considerations governing establishment; approval or modification by Hearing Board; violations.

(1) If the Governor of a State or a State water pollution control agency files, within one year after October 2, 1965, a letter of intent that such State, after public hearings, will before June 30, 1967, adopt (A) water quality criteria applicable to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted, and if such criteria and plan are established in accordance with the letter of intent, and if the Administrator determines that such State criteria and plan are consistent with paragraph (3) of this subsection, such State criteria and plan shall thereafter be the water quality standards applicable to such interstate waters or portions thereof.

(2) If a State does not (A) file a letter of intent or (B) establish water quality standards in accordance with paragraph (1) of this subsection, or if the Administrator or the Governor of any State affected by water quality standards established pursuant to this subsection desires a revision in such standards, the Administrator may, after reasonable notice and a conference of representatives of appropriate Federal departments and agencies, interstate agencies, States, municipalities and industries involved, prepare regulations setting forth standards of water quality to be applicable to interstate waters or portions thereof. If, within six months from the date the Administrator publishes such regulations, the State has not adopted water quality standards found by the Administrator publishes such regulations, the State has not adopted water quality standards found by the Administrator to be consistent with paragraph (3) of this subsection, or a petition for public hearing has not been filed under paragraph (4) of this subsection, the Administrator shall promulgate such standards.

(3) Standards of quality established pursuant to this subsection shall be such as to protect the public health or welfare, enhance the quality of water and such standards the Administrator, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses. In establishing such standards the Administrator, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for navigation.

(4) If at any time prior to 30 days after standards have been promulgated under paragraph (2) of this subsection, the Governor of any State affected by such standards petitions the Administrator for a hearing, the Administrator shall call a public hearing, to be held in or near one or more of the places where the water quality standards will take effect, before a Hearing Board of five or more persons appointed by the Administrator. Each State which

6857, 80 Stat. 1608; renumbered § 22 and amended Apr. 3, 1970, Pub. L. 91–224, title I, §§ 102, 104, 84 Stat. 91, 110; 1970 Reorg. Plan No. 3, § 2(a)(1), eff. Dec. 2, 1970, 35 F.R. 15623, 84 Stat. ——.)

CODIFICATION

"Administrator" was substituted for "Secretary" and "Environmental Protection Agency" was substituted for "Department of the Interior" pursuant to 1970 Reorg. Plan No. 3, set out in the Appendix to Title 5, Government Organization and Employees, which abolished the Federal Water Quality Administration in the Department of the Interior and transferred to the Administrator of the Environmental Protection Agency, all functions of the Secretary of the Interior and the Department of the Interior formerly administered through the Federal Water Quality Administration.

"Department of the Interior" was substituted for "Department of Health, Education, and Welfare" in accordance with the transfer of all functions of the Secretary of Health, Education, and Welfare and of the Department of Health, Education, and Welfare under the Federal Water Pollution Control Act [this chapter], with certain specified exceptions, to the Secretary of the Interior and to the Department of the Interior by section 1(a) of 1966 Reorg. Plan No. 2. See Transfer of Functions note set out below.

AMENDMENTS

1970—Subsec. (f). Pub. L. 91–224, § 104, added subsec. (f).

1965—Subsecs. (d), (e). Pub. L. 89–234 added subsecs. (d) and (e).

1961—Subsec. (a). Pub. L. 87–88, § 1(b), (e), substituted "Secretary" for "Surgeon General", and eliminated provisions which required the Secretary of Health, Education, and Welfare to approve regulations of the Surgeon General and which permitted the Surgeon General to delegate his powers and duties.

Subsec. (b). Pub. L. 87–88, § 1(d), substituted "Secretary" for "Secretary of Health, Education, and Welfare."

1956—Act July 9, 1956, provided for administration, utilization of other personnel, and authorized appropriations to the Department of Health, Education, and Welfare. Former provisions of this section which defined terms used in this chapter, are now covered by section 1173 of this title.

TRANSFER OF FUNCTIONS

All functions of the Secretary of the Interior and the Department of the Interior administered through the Federal Water Quality Administration, all functions which were transferred to the Secretary of the Interior by Reorg. Plan No. 2 of 1966, and all functions vested in the Secretary of the Interior or the Department of the Interior by the Federal Water Pollution Control Act were tranferred to the Administrator of the Environmental Protection Agency by Reorg. Plan No. 3 of 1970, § 2(a)(1), eff. Dec. 2, 1970, 35 F.R. 15623, 84 Stat. ——, set out in the Appendix to Title 5, Government Organization and Employees.

All functions of the Secretary of Health, Edueation, and Welfare and of the Department of Health, Education, and Welfare under the Federal Water Pollution Control Act [this chapter], with certain specified exceptions, were transferred to the Secretary of the Interior and to the Department of the Interior by section 1(a) of 1966 Reorg. Plan No. 2, set out as a note under section 1151 of this title.

§ 1173. Definitions.

When used in this chapter—

(a) The term "State water pollution control agency" means the State health authority, except that, in the case of any State in which there is a single State agency, other than the State health authority, charged with responsibility for enforcing State laws relating to the abatement of water pollution, it means such other State agency.

(b) 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 of waters.

(c) The term "treatment works" means the various devices used in the treatment of sewage or industrial wastes of a liquid nature, including the necessary intercepting sewers, outfall sewers, pumping, power, and other equipment, and their appurtenances, and includes any extensions, improvements, remodeling, additions, and alterations thereof.

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

(e) The term "interstate waters" means all rivers, lakes, and other waters that flow across or form a part of State boundaries, including coastal waters.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes and an Indian tribe or an authorized Indian tribal organization. (June 30, 1948, ch. 758, § 23, formerly § 11, 62 Stat. 1161; July 9, 1956, ch. 518, § 1, 70 Stat. 506; June 25, 1959, Pub. L. 86–70, § 28(b), 73 Stat. 148; July 12, 1960, Pub. L. 86–624, § 23(b), 74 Stat. 418; July 20, 1961, Pub. L. 87–88, § 9, 75 Stat. 210; renumbered § 13, Oct. 2, 1965, Pub. L. 89–234, § 2(a), 79 Stat. 903, and amended Nov. 3, 1966, Pub. L. 89–753, title II, § 209, 80 Stat. 1251; renumbered § 23, Apr. 3, 1970, Pub. L. 91–224, title I, § 102, 84 Stat. 91.)

AMENDMENTS

1966—Subsec. (f). Pub. L. 89–753 inserted words "and an Indian tribe or an authorized Indian tribal organization."

1961—Subsec. (d). Pub. L. 87–88 included Guam.

Subsec. (e). Pub. L. 87–88 substituted "flow across or form a part of State boundaries, including coastal waters" for "flow across, or form a part of, boundaries between two or more States."

1960—Subsec. (d). Pub. L. 86–624 eliminated "Hawaii," preceding "Puerto Rico."

1959—Subsec. (d). Pub. L. 86–70 eliminated "Alaska," preceding "Puerto Rico."

1956—Act July 9, 1956, defined terms used in this chapter, which provisions were formerly contained in section 1172 of this title. Former provisions of this section which related to application to other laws are now covered by section 1174 of this title.

EFFECTIVE DATE OF 1960 AMENDMENT

Amendment of subsec. (d) of this section by Pub. L. 86–624 effective on Aug. 21, 1959, see section 47(f) of Pub. L. 86–624, set out as a note under section 645 of Title 20, Education.

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment of section by Pub. L. 86–70 effective on Jan. 3, 1959, see section 47(d) of Pub. L. 86–70, set out as a note under section 224 of Title 20, Education.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 section 48.

§ 1174. Application to other laws.

This chapter shall not be construed as (1) superseding or limiting the functions, under any other law, of the Surgeon General or of the Public Health Service, or of any other officer or agency of the United States, relating to water pollution, or (2) affecting or impairing the provisions of sections 407, 408, 409, and 411 to 413 of this title, or (3) affecting

5 U.S.C.A. § 553

§ 553. Rule making

Currentness

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general

statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

Notes of Decisions (1327)

5 U.S.C.A. § 553, 5 USCA § 553
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimitation Recognized by Krafsur v. Davenport, 6th Cir.(Tenn.), Dec. 04, 2013

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (3796)

5 U.S.C.A. § 706, 5 USCA § 706
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

5 U.S.C.A. § 601

§ 601. Definitions

Effective: March 29, 1996
Currentness

For purposes of this chapter--

(1) the term "agency" means an agency as defined in section 551(1) of this title;

(2) the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term "rule" does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

(3) the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(4) the term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(5) the term "small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register;

(6) the term "small entity" shall have the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" defined in paragraphs (3), (4) and (5) of this section; and

(7) the term "collection of information"--

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either--

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.

(8) Recordkeeping requirement.--The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1165; amended Pub.L. 104-121, Title II, § 241(a)(2), Mar. 29, 1996, 110 Stat. 864.)

Notes of Decisions (1)

5 U.S.C.A. § 601, 5 USCA § 601
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

5 U.S.C.A. § 602

§ 602. Regulatory agenda

Currentness

(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain--

(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking, [1] and

(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1166.)

Notes of Decisions (1)

Footnotes

1 So in original. The comma probably should be a semicolon.

5 U.S.C.A. § 602, 5 USCA § 602

Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)

5 U.S.C.A. § 603

§ 603. Initial regulatory flexibility analysis

Currentness

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain--

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of

the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as--

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

(d)(1) For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of--

(A) any projected increase in the cost of credit for small entities;

(B) any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

(C) advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).

(2) A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)--

(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and

(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1166; amended Pub.L. 104-121, Title II, § 241(a)(1), Mar. 29, 1996, 110 Stat. 864; Pub.L. 111-203, Title X, § 1100G(b), July 21, 2010, 124 Stat. 2112.)

Notes of Decisions (24)

5 U.S.C.A. § 603, 5 USCA § 603
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

5 U.S.C.A. § 604

§ 604. Final regulatory flexibility analysis

Effective: July 21, 2011
Currentness

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain--

(1) a statement of the need for, and objectives of, the rule;

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6) [1] a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and

(6) [1] for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1167; amended Pub.L. 104-121, Title II, § 241(b), Mar. 29, 1996, 110 Stat. 864; Pub.L. 111-203, Title X, § 1100G(c), July 21, 2010, 124 Stat. 2113; Pub.L. 111-240, Title I, § 1601, Sept. 27, 2010, 124 Stat. 2551.)

Notes of Decisions (37)

Footnotes

1 So in original. Two pars. (6) were enacted.

5 U.S.C.A. § 604, 5 USCA § 604

Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)

5 U.S.C.A. § 605

§ 605. Avoidance of duplicative or unnecessary analyses

Currentness

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1167; amended Pub.L. 104-121, Title II, § 243(a), Mar. 29, 1996, 110 Stat. 866.)

Notes of Decisions (18)

5 U.S.C.A. § 605, 5 USCA § 605
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)

5 U.S.C.A. § 606

§ 606. Effect on other law

Currentness

The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1168.)

5 U.S.C.A. § 606, 5 USCA § 606
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)

5 U.S.C.A. § 607

§ 607. Preparation of analyses

Currentness

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1168.)

5 U.S.C.A. § 607, 5 USCA § 607
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)

5 U.S.C.A. § 608

§ 608. Procedure for waiver or delay of completion

Currentness

(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1168.)

5 U.S.C.A. § 608, 5 USCA § 608
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

5 U.S.C.A. § 609

§ 609. Procedures for gathering comments

Currentness

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as--

(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

(3) the direct notification of interested small entities;

(4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter--

(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;

(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;

(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);

(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.

(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

(d) For purposes of this section, the term "covered agency" means--

(1) the Environmental Protection Agency;

(2) the Consumer Financial Protection Bureau of the Federal Reserve System; and

(3) the Occupational Safety and Health Administration of the Department of Labor.

(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

(2) Special circumstances requiring prompt issuance of the rule.

(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1168; amended Pub.L. 104-121, Title II, § 244(a), Mar. 29, 1996, 110 Stat. 867; Pub.L. 111-203, Title X, § 1100G(a), July 21, 2010, 124 Stat. 2112.)

Notes of Decisions (1)

5 U.S.C.A. § 609, 5 USCA § 609
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)

5 U.S.C.A. § 610

§ 610. Periodic review of rules

Currentness

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors--

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule from the public;

(3) the complexity of the rule;

(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding

twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1169.)

5 U.S.C.A. § 610, 5 USCA § 610
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)

5 U.S.C.A. § 611

§ 611. Judicial review

Currentness

(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3)(A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than--

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to--

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1169; amended Pub.L. 104-121, Title II, § 242, Mar. 29, 1996, 110 Stat. 865.)

Notes of Decisions (17)

5 U.S.C.A. § 611, 5 USCA § 611
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)

5 U.S.C.A. § 612

§ 612. Reports and intervention rights

Currentness

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1170; amended Pub.L. 104-121, Title II, § 243(b), Mar. 29, 1996, 110 Stat. 866.)

5 U.S.C.A. § 612, 5 USCA § 612
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimitation Recognized by Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 11th Cir.(Fla.), Sep. 15, 2010

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1533

§ 1533. Determination of endangered species and threatened species

Effective: November 24, 2003
Currentness

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970--

(A) in any case in which the Secretary of Commerce determines that such species should--

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species,

he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should--

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable--

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 670a of this title, if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

(ii) Nothing in this paragraph affects the requirement to consult under section 1536(a)(2) of this title with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 1538 of this title, including the prohibition preventing extinction and taking of endangered species and threatened species.

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a) (1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been--

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a) (3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of Title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that--

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B) (i) or (iii) shall be subject to judicial review.

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7 [1] to prevent a significant risk to the well being of any such species.

(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of Title 5, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of Title 5 (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall--

(A) not less than 90 days before the effective date of the regulation--

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register--

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either--

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B) (i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B) (ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either--

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation

that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that--

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of Title 5 shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if--

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

(c) Lists

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b) of this section.

(2) The Secretary shall--

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should--

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section.

(d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such State.

(e) Similarity of appearance cases

The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this section if he finds that--

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this chapter.

(f) Recovery plans

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable--

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan--

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

(g) Monitoring

(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this chapter are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c) of this section.

(2) The Secretary shall make prompt use of the authority under paragraph 7 [1] of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

(h) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments

The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to--

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section; and

(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

(i) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition

If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) of this section files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments,

or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3) of this section, the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

CREDIT(S)

(Pub.L. 93-205, § 4, Dec. 28, 1973, 87 Stat. 886; Pub.L. 94-359, § 1, July 12, 1976, 90 Stat. 911; Pub.L. 95-632, §§ 11, 13, Nov. 10, 1978, 92 Stat. 3764, 3766; Pub.L. 96-159, § 3, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 2(a), Oct. 13, 1982, 96 Stat. 1411; Pub.L. 100-478, Title I, §§ 1002 to 1004, Oct. 7, 1988, 102 Stat. 2306; Pub.L. 108-136, Div. A, Title III, § 318, Nov. 24, 2003, 117 Stat. 1433.)

Notes of Decisions (371)

Footnotes

1 So in original. Probably should be “paragraph (7)”.

16 U.S.C.A. § 1533, 16 USCA § 1533

Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

16 U.S.C.A. § 1536

§ 1536. Interagency cooperation

Currentness

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a) (2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)--

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth--

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a) (3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a) (2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a) (3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a) (2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that--

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that--

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a) (2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a) (2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a) (2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a) (2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g) (2) (B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of Title 5.

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C.A. § 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to--

(1) a description of the consultation process carried out pursuant to subsection (a) (2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a) (2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a) (2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a) (2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary--

(A) determine that the Federal agency concerned and the exemption applicant have--

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a) (2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A) (i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of Title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3) (A) (i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b) (1) and (2) thereof) of Title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing--

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b) (3) of section 556) of Title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g) (5) of this section. The Committee shall grant an exemption from the requirements of subsection (a) (2) of this section for an agency action if, by a vote of not less than five of its members voting in person--

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g) (4) of this section and on such other testimony or evidence as it may receive, that--

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action--

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless--

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a) (2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by

the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a) (2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of Title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section--

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. §§ 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

CREDIT(S)

(Pub.L. 93-205, § 7, Dec. 28, 1973, 87 Stat. 892; Pub.L. 95-632, § 3, Nov. 10, 1978, 92 Stat. 3752; Pub.L. 96-159, § 4, Dec. 28, 1979, 93 Stat. 1226; Pub.L. 97-304, §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426; Pub.L. 99-659, Title IV, § 411(b), (c), Nov. 14, 1986, 100 Stat. 3742; Pub.L. 100-707, Title I, § 109(g), Nov. 23, 1988, 102 Stat. 4709.)

Notes of Decisions (670)

16 U.S.C.A. § 1536, 16 USCA § 1536
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimitation Recognized by Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 11th Cir.(Fla.), Sep. 15, 2010

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1538

§ 1538. Prohibited acts

Currentness

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to--

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to--

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(b) Species held in captivity or controlled environment

(1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2)(A) The provisions of subsection (a) (1) of this section shall not apply to--

(i) any raptor legally held in captivity or in a controlled environment on November 10, 1978; or

(ii) any progeny of any raptor described in clause (i);

until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(c) Violation of Convention

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if--

(A) such fish or wildlife is not an endangered species listed pursuant to section 1533 of this title but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity,

be presumed to be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter.

(d) Imports and exports

(1) In general

It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business--

(A) as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (i) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (ii) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants; or

(B) as an importer or exporter of any amount of raw or worked African elephant ivory.

(2) Requirements

Any person required to obtain permission under paragraph (1) of this subsection shall--

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, plants, or African elephant ivory made by him and the subsequent disposition made by him with respect to such fish, wildlife, plants, or ivory;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his place of business, an opportunity to examine his inventory of imported fish, wildlife, plants, or African elephant ivory and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

(C) file such reports as the Secretary may require.

(3) Regulations

The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(4) Restriction on consideration of value or amount of African elephant ivory imported or exported

In granting permission under this subsection for importation or exportation of African elephant ivory, the Secretary shall not vary the requirements for obtaining such permission on the basis of the value or amount of ivory imported or exported under such permission.

(e) Reports

It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to section 1533 of this title as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this chapter or to meet the obligations of the Convention.

(f) Designation of ports

(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port or ports designated by the Secretary of the Interior. For the purpose of facilitating enforcement of this chapter and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of section 668cc-4(d) of this title, shall, if such designation is in effect on December 27, 1973, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) Violations

It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

CREDIT(S)

(Pub.L. 93-205, § 9, Dec. 28, 1973, 87 Stat. 893; Pub.L. 95-632, § 4, Nov. 10, 1978, 92 Stat. 3760; Pub.L. 97-304, § 9(b), Oct. 13, 1982, 96 Stat. 1426; Pub.L. 100-478, Title I, § 1006, Title II, § 2301, Oct. 7, 1988, 102 Stat. 2308, 2321; Pub.L. 100-653, Title IX, § 905, Nov. 14, 1988, 102 Stat. 3835.)

Notes of Decisions (173)

16 U.S.C.A. § 1538, 16 USCA § 1538
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 93. Public Officers and Employees (Refs & Annos)

18 U.S.C.A. § 1913

§ 1913. Lobbying with appropriated moneys

Effective: November 2, 2002
Currentness

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy or appropriations which they deem necessary for the efficient conduct of the public business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities. Violations of this section shall constitute violations of section 1352(a) of title 31.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 792; Pub.L. 103-322, Title XXXIII, § 330016(1)(G), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 107-273, Div. A, Title II, § 205(b), Nov. 2, 2002, 116 Stat. 1778.)

Notes of Decisions (11)

18 U.S.C.A. § 1913, 18 USCA § 1913
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 31. Money and Finance (Refs & Annos)
Subtitle I. General (Refs & Annos)
Chapter 7. Government Accountability Office (Refs & Annos)
Subchapter II. General Duties and Powers

31 U.S.C.A. § 712

§ 712. Investigating the use of public money

Currentness

The Comptroller General shall--

(1) investigate all matters related to the receipt, disbursement, and use of public money;

(2) estimate the cost to the United States Government of complying with each restriction on expenditures of a specific appropriation in a general appropriation law and report each estimate to Congress with recommendations the Comptroller General considers desirable;

(3) analyze expenditures of each executive agency the Comptroller General believes will help Congress decide whether public money has been used and expended economically and efficiently;

(4) make an investigation and report ordered by either House of Congress or a committee of Congress having jurisdiction over revenue, appropriations, or expenditures; and

(5) give a committee of Congress having jurisdiction over revenue, appropriations, or expenditures the help and information the committee requests.

CREDIT(S)

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 889.)

Notes of Decisions (6)

31 U.S.C.A. § 712, 31 USCA § 712
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-260 and 114-271.

End of Document

CODE OF FEDERAL REGULATIONS

Title 33
Navigation and Navigable Waters

Part 200 to End

Revised as of July 1, 2015

Containing a codification of documents
of general applicability and future effect

As of July 1, 2015

Published by the Office of the Federal Register
National Archives and Records Administration
as a Special Edition of the Federal Register

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

(8) Waters of the United States do not include 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.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(d) 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.

(e) The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

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

[51 FR 41250, Nov. 13, 1986, as amended at 58 FR 45036, Aug. 25, 1993]

EFFECTIVE DATE NOTE: At 80 FR 37104, June 29, 2015, § 328.3 was amended by revising paragraphs (a) through (c), removing paragraphs (d) and (e), and redesignating paragraph (f) as paragraph (d), effective Aug. 28, 2015. For the convenience of the user, the revised text is set forth 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.

* * * * *

§ 328.4 Limits of jurisdiction.

(a) *Territorial Seas.* The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR 329.12)

(b) *Tidal waters of the United States.* The landward limits of jurisdiction in tidal waters:

(1) Extends to the high tide line, or

(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) *Non-tidal waters of the United States.* The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

§ 328.5 Changes in limits of waters of the United States.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the boundaries of the waters of the United States. For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer.

PART 329—DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

Sec.

AUTHORITY: 33 U.S.C. 401 *et seq.*

SOURCE: 51 FR 41251, Nov. 13, 1986, unless otherwise noted.

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR parts 323 and 328.

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers districts and divisions having civil works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters of the United States" or "navigability" are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;

(b) Physical capabilities for use by commerce as in paragraph (a) of this section; and

(c) Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

(a) *Nature of commerce: type, means, and extent of use.* The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 of this part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

(b) *Nature of commerce: interstate and intrastate.* Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

33

Navigation and Navigable Waters

PART 200 TO END

Revised as of July 1, 1978

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JULY 1, 1978

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records Service
General Services Administration

as a Special Edition of
the Federal Register

AUTHORITY: 33 U.S.C. 1344.

SOURCE: 42 FR 37144, July 19, 1977, unless otherwise noted.

§ 323.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR 320.4 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344) (hereinafter referred to as Section 404). See 33 CFR 320.2(g). Certain discharges of dredged or fill material into waters of the United States are also regulated under other authorities of the Department of the Army. These include dams and dikes in navigable waters of the United States pursuant to Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401; see 33 CFR 321) and structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403; see 33 CFR 322). A Department of the Army permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for Department of the Army permits under this Part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 323.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means:[1]

(1) The territorial seas with respect to the discharge of fill material. (The transportation of dredged material by vessel for the purpose of dumping in the oceans, including the territorial seas, at an ocean dump site approved under 40 CFR 228 is regulated by Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413). See 33 CFR 324. Discharges of dredged or fill material into the territorial seas are regulated by Section 404.):

(2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;

(3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition).

(4) Interstate waters and their tributaries, including adjacent wetlands; and

(5) All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.[2]

[1] The terminology used by the FWPCA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

[2] In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." The

Footnotes continued on next page

30-091 O - 79 - 40

The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the high tide line and the landward limit of jurisdiction and all other waters, in the absence of adjacent wetlands, shall be the ordinary high water mark.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark (mean higher high water mark on the Pacific coast) and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR 329 for a more complete definition of this term.)

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(e) The term "natural lake" means a standing body of open water that occurs in a natural depression fed by one or more streams and from which a stream may flow, that occurs due to the widening or natural blockage of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream.

(f) The term "impoundment" means a standing body of open water created by artifically blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins cooling, or rice growing.

(g) The term "ordinary high water mark" means the 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.

(h) The term "high tide line" means a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide. The mark may be determined 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 de-

---

Footnotes continued from last page
waters listed in paragraphs (a)(1)–(4) fall within this mandate as discharges into those waterbodies may seriously affect water quality, navigation, and other Federal interests; however, it is also recognized that the Federal government would have the right to regulate the waters of the United States identified in paragraph (a)(5) under this broad Congressional mandate to fulfill the objective of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)). Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the Act. Discharges of dredged or fill material into waters of the United States identified in paragraphs (a)(1)–(4) will generally require individual or general permits unless those discharges occur beyond the headwaters of a river or stream or in natural lakes less than 10 acres in surface area. Discharges into these latter waters and into most of the waters identified in paragraph (a)(5) will be permitted by this regulation, subject to the provisions listed in paragraph 323.4–2(b) unless the District Engineer develops information, on a case-by-case basis, that the concerns for the aquatic environment as expressed in the EPA Guidelines (40 CFR 230) require regulation through an individual or general permit. (See 323.4–4).

lineate the general height reached by a rising tide. The term includes 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.

(i) The term "headwaters" means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second. [3] The District Engineer may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means.

(j) The term "primary tributaries" means the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters, and does not include any additional tributaries extending off of the main stems of these tributaries.

(k) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(l) The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified disposal site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Federal Water Pollution Control Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(m) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Federal Water Pollution Control Act Amendments of 1972.

(n) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(o) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this regulation and 33 CFR 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(p) The term "general permit" means a Department of the Army authorization that is issued for a category or categories of discharges of

[3] For streams that are dry during long periods of the year, District Engineers, after notifying the Regional Administrator of EPA, may establish the headwater point as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time. The District Engineer shall notify the Regional Administrator of his determination of these headwater points.

dredged or fill material that are substantially similar in nature and that cause only minimal individual and cumulative adverse environmental impact. A general permit is issued following an evaluation of the proposed category of discharges in accordance with the procedures of this regulation (§ 323.3(c)), 33 CFR Part 325, and a determination that the proposed discharges will be in the public interest pursuant to 33 CFR Part 320.

(q) The term "nationwide permit" means a Department of the Army authorization that has been issued by this regulation in § 323.4 to permit certain discharges of dredged or fill material into waters of the United States throughout the Nation.

§ 323.3 Discharges requiring permits.

(a) *General.* Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in §§ 323.4-1, 323.4-2 and 323.4-3 are permitted by this regulation. If a discharge of dredged or fill material is not permitted by this regulation, an individual or general Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States in accordance with the following phased schedule:

(1) Before July 25, 1975, discharges into navigable waters of the United States.

(2) After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands.

(3) After September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area. (See also § 323.4-2 for discharges that are permitted by this regulation.)

(4) After July 1, 1977, discharges into all waters of the United States. (See also § 323.4-2 for discharges that are permitted by this regulation.)

(b) *Individual permits.* Unless permitted by this regulation (§§ 323.4-1, 323.4-2 and 323.4-3) or authorized by general permits (§ 323.3(c)), the discharge of dredged or fill material into waters of the United States will require an individual Department of the Army permit issued in accordance with the policies in § 320.4 and procedures in 33 CFR Part 325.

(c) *General permits.* The District Engineer may, after compliance with the other procedues of 33 CFR Part 325, issue general permits for certain clearly described categories of structures or work, including discharges of dredged or fill material; requiring Department of the Army permits. After a general permit has been issued, individual activities falling within those categories will not require individual permit processing by the procedures of 33 CFR Part 325 unless the District Engineer determines, on a case-by-case basis, that the public interest requires individual review.

(1) District Engineers will include only those activities that are substantially similar in nature, that cause only minimal adverse environmental impact when performed separately, and that will have only a minimal adverse cumulative effect on the environment as categories which are candidates for general permits.

(2) The District Engineer shall include appropriate conditions as specified in Appendix C of 33 CFR Part 325 in each general permit and shall prescribe the following additional conditions:

(i) The maximum quantity of material that may be discharged and the maximum area that may be modified by a single or incidental operation (if applicable);

(ii) A description of the category or categories of activities included in the general permit; and

(iii) The type of water(s) into which the activity may occur.

(3) The District Engineer may require reporting procedures.

(4) A general permit may be revoked if it is determined that the effects of the activities authorized by it will have an adverse impact on the public interest provided the procedures of 33 CFR 325.7 are followed. Following revocation, applications for future activities in areas covered by the general permit shall be processed as applications for individual permits.

code of federal regulations

Navigation and Navigable Waters

33

PART 200 TO END

Revised as of July 1, 1983

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JULY 1, 1983

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records Service
General Services Administration

as a Special Edition of
the Federal Register

GENERAL SERVICES ADMINISTRATION

quirements of these regulations. Evaluation by a district engineer of a permit application may give recognition to the consideration by the Board of the general economic effects of the zone on local and foreign commerce, general location of wharves and facilities, and other factors pertinent to construction, operation, and maintenance of the zone.

PART 323–PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

Sec.
323.1 General.
323.2 Definitions.
323.3 Discharges requiring permits.
323.4 Discharges not requiring permits.
323.5 Program transfer to States.
323.6 Special policies and procedures.

AUTHORITY: 33 U.S.C. 1344.

SOURCE: 47 FR 31810, July 22, 1982, unless otherwise noted.

§ 323.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) (hereinafter referred to as Section 404). See 38 CFR 320.2(g). Certain discharges of dredged or fill material into waters of the United States are also regulated under other authorities of the Department of the Army. These include dams and dikes in navigable waters of the United States pursuant to Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401; see 33 CFR Part 321) and certain structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403; see 33 CFR Part 322). A Department of the Army permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for Department of the Army permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 323.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means: [1]

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

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travels for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (a)(1)–(4) of this section;

(6) The territorial sea;

---

[1] The terminology used by the CWA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

code of federal regulations

Navigation and Navigable Waters

33

PART 200 TO END

Revised as of July 1, 1985

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JULY 1, 1985

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records
Administration

as a Special Edition of
the Federal Register

permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for Department of the Army permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 323.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means: [1]

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

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travels for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (a)(1) through (a)(4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (a)(6) of this section. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR Part 329 for a more complete definition of this term.)

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(e) The term "lake" means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irri-

[1] The terminology used by the CWA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

gation, settling basins, cooling, or rice growing.

(f) The term "ordinary high water mark" means that the 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 charactertics of the surrounding areas.

(g) The term "high tide line" is the line used in Sec. 404 determinations and means a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide. The mark may be determined 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 term includes 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.

(h) The term "headwaters" means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second.[2] The District engineer may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means.

(i) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(j) The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(k) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Clean Water Act.

(l) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The terms does not include plowing, cultivating, seeding

[2] For streams that are dry during long periods of the year, district engineers may establish the headwater point as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.

and harvesting for the production of food, fiber, and forest products.

(m) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this regulation and 33 CFR Part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(n) The term "general permit" means a Department of the Army authorization that is issued on a nationwide ("nationwide permits") or regional ("regional permits") basis for a category or categories of activities when:

(1) those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) the general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330).

§ 323.3 Discharges requiring permits.

(a) *General.* Except as provided in § 323.4 below, Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in 33 CFR Part 330 are permitted by that regulation ("nationwide permits"). Other discharges may be authorized by district or division engineers on a regional basis ("regional permits"). If a discharge of dredged or fill material is not exempted by § 323.4 of this part or permitted by 33 CFR Part 330, an individual or regional Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States.

(b) *Activities of Federal agencies.* Discharges of dredged or fill material into waters of the United States done by or on behalf of any Federal agency, other than the Corps of Engineers (see 33 CFR 209.145), are subject to the authorization procedures of these regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulations. Division and district engineers will therefore advise Federal agencies and instrumentalities accordingly and cooperate to the fullest extent in expediting the processing of their applications.

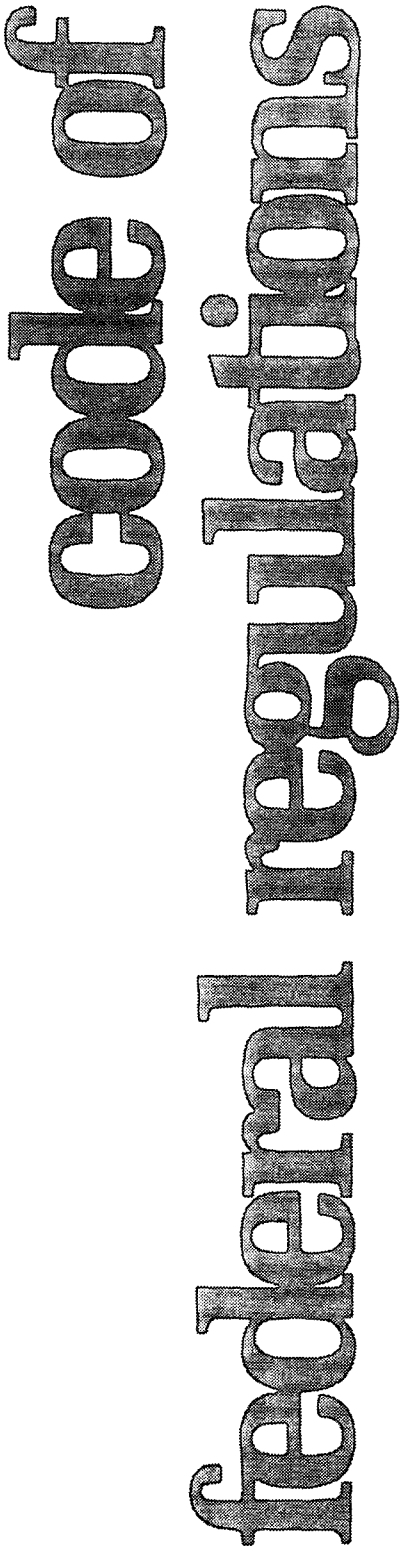
§ 323.4 Discharges not requiring permits.

(a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under Section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii)(A) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.



Navigation and Navigable Waters

33

PART 200 TO END

Revised as of July 1, 1987

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JULY 1, 1987

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records
Administration

as a Special Edition of
the Federal Register

the matters discussed at the public hearing in arriving at his initial decision or recommendation and shall address, in his decision or recommendation, all substantial and valid issues presented at the hearing. Where a person other than the initial action authority serves as presiding officer, such person shall forward the transcript of the public hearing and all evidence received in connection therewith to the initial action authority together with a report summarizing the issues covered at the hearing. The report of the presiding officer and the transcript of the public hearing and evidence submitted thereat shall in such cases be fully considered by the initial action authority in making his decision or recommendation to higher authority as to such permit action or Federal project.

§ 327.10 Authority of the presiding officer.

Presiding officers shall have the following authority:

(a) To regulate the course of the hearing including the order of all sessions and the scheduling thereof, after any initial session, and the recessing, reconvening, and adjournment thereof; and

(b) To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authority under which the Chief of Engineers functions, and with the policies and directives of the Chief of Engineers and the Secretary of the Army.

§ 327.11 Public notice.

(a) Public notice shall be given of any public hearing to be held pursuant to this regulation. Such notice should normally provide for a period of not less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing. Notice shall also be given to all Federal agencies affected by the proposed action, and to state and local agencies and other parties having an interest in the subject matter of the hearing. Notice shall be sent to all persons requesting a hearing and shall be posted in appropriate government buildings and provided to newspapers of general circulation for publication. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

(b) The notice shall contain time, place, and nature of hearing; the legal authority and jurisdiction under which the hearing is held; and location of and availability of the draft environmental impact statement or environmental assessment.

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

Sec.

AUTHORITY: 33 U.S.C. 1344.

SOURCE: 51 FR 41250, Nov. 13, 1986, unless otherwise noted.

§ 328.1 Purpose.

This section defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States." The terminology used by section 404 of the Clean Water Act includes "navigable waters" which is defined at section 502(7) of the Act as "waters of the United States including the territorial seas." To provide clarity and to avoid confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used throughout 33 CFR Parts 320 through 330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR Parts 322 and 329).

§ 328.2 General scope.

Waters of the United States include those waters listed in § 328.3(a). The lateral limits of jurisdiction in those

waters may be divided into three categories. The categories include the territorial seas, tidal waters, and nontidal waters (see 33 CFR 328.4 (a), (b), and (c), respectively).

§ 328.3 Definitions.

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

(a) The term "waters of the United States" means

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

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(d) 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.

(e) The term "ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedValidity Called into Doubt by In re E.P.A., 6th Cir., Oct. 09, 2015

KeyCite Yellow Flag - Negative TreatmentProposed Regulation

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 122. EPA Administered Permit Programs: The National Pollutant Discharge Elimination System (Refs & Annos)
Subpart A. Definitions and General Program Requirements

40 C.F.R. § 122.2

§ 122.2 Definitions.

Effective: August 28, 2015
Currentness

<In re E.P.A., 803 F.3d 804, 2015 WL 5893814 (C.A.6,2015) held: "The Clean Water Rule is hereby STAYED, nationwide, pending further order of the court.">

The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Animal feeding operation is defined at § 122.23.

Applicable standards and limitations means all State, interstate, and federal standards and limitations to which a "discharge," a "sewage sludge use or disposal practice," or a related activity is subject under the CWA, including "effluent limitations," water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," pretreatment standards, and "standards for sewage sludge use or disposal" under sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA.

Application means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in "approved States," including any approved modifications or revisions.

Approved program or approved State means a State or interstate program which has been approved or authorized by EPA under part 123.

Aquaculture project is defined at § 122.25.

(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.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. 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.] Waters of the United States do not include 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 jurisdiction remains with EPA.

Whole effluent toxicity means the aggregate toxic effect of an effluent measured directly by a toxicity test.

Note: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning “This exclusion applies ___” in the definition of “Waters of the United States.” This revision continues that suspension. [1]

(Authority: Clean Water Act (33 U.S.C. 1251 et seq.), Safe Drinking Water Act (42 U.S.C. 300f et seq.), Clean Air Act (42 U.S.C. 7401 et seq.), Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.))

Credits

[48 FR 39619, Sept. 1, 1983; 50 FR 6940, 6941, Feb. 19, 1985; 54 FR 254, Jan. 4, 1989; 54 FR 18781, May 2, 1989; 54 FR 23895, June 2, 1989; 58 FR 45037, Aug. 25, 1993; 58 FR 67980, Dec. 22, 1993; 64 FR 42462, Aug. 4, 1999; 64 FR 43426, Aug. 10, 1999; 65 FR 30905, May 15, 2000; 80 FR 37114, June 29, 2015]

SOURCE: 45 FR 33418, May 19, 1980, as amended at 48 FR 14153, Apr. 1, 1983, unless otherwise noted.

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

Notes of Decisions (97)

Current through January 5, 2017; 82 FR 1591, with the exception of Title 10.

Footnotes

1 Editorial Note: The words “This revision” refer to the document published at 48 FR 14153, Apr. 1, 1983.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.4

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

Currentness

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

40 C.F.R. § 1508.9

§ 1508.9 Environmental assessment.

Currentness

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (821)

Current through January 5, 2017; 82 FR 1591, with the exception of Title 10.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

40 C.F.R. § 1508.27

§ 1508.27 Significantly.

Currentness

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that 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. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

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

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(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.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Credits

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (458)

Current through January 5, 2017; 82 FR 1591, with the exception of Title 10.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Held Invalid Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior, D.D.C., Nov. 01, 2004

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart A. General

50 C.F.R. § 402.02

§ 402.02 Definitions.

Effective: March 14, 2016
Currentness

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

Director refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Framework programmatic action means, for purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Mixed programmatic action means, for purposes of an incidental take statement, a Federal action that approves action(s) that will not be subject to further section 7 consultation, and also approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Proposed critical habitat means habitat proposed in the Federal Register to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

Credits

[73 FR 76286, Dec. 16, 2008; 74 FR 20422, May 4, 2009; 80 FR 26844, May 11, 2015; 81 FR 7225, Feb. 11, 2016]

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1531 et seq.

Notes of Decisions (219)

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart B. Consultation Procedures

50 C.F.R. § 402.14

§ 402.14 Formal consultation.

Effective: June 10, 2015
Currentness

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) Exceptions.

(1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) Initiation of formal consultation. A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) Responsibility to provide best scientific and commercial data available. The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) Duration and extension of formal consultation. Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) Additional data. When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's

request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) Service responsibilities. Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1)–(3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45–day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45–day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10–day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) Biological opinions. The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) Incidental take.

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species (A surrogate (e.g., similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 216.105 and 222.301(h) for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

(j) Conservation recommendations. The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) Incremental steps. When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) Termination of consultation.

(1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

Credits

[54 FR 40350, Sept. 29, 1989; 73 FR 76287, Dec. 16, 2008; 74 FR 20423, May 4, 2009; 80 FR 26844, May 11, 2015]

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1531 et seq.

Notes of Decisions (192)

Current through January 5, 2017; 82 FR 1591, with the exception of Title 10.

End of Document

Title 33—Navigation and Navigable Waters

CHAPTER II—CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY

Regulatory Programs of the Corps of Engineers

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Final rules.

SUMMARY: We are revising and reorganizing all regulations governing the permit programs of the Corps of Engineers. The new format is designed to make the policies and procedures more understandable to a person desiring to perform work in the waters of the United States. The Section 404 program (discharging dredged or fill material into the water) is being revised to clarify many terms and to provide for the issuance of nationwide permits. The new regulations should enable a person to get a quicker decision on his application. In the case of nationwide permits, no application at all is required.

EFFECTIVE DATE: July 19, 1977.

FOR FURTHER INFORMATION CONTACT:

Mr. Curtis Clark or Mr. Bernie Goode, Regulatory Functions Branch, phone: 202–693–5070 or Mr. William Hedeman, Chief Counsels Office, phone: 202–693–6169.

SUPPLEMENTARY INFORMATION: Because of the rapidly changing nature of the Corps' regulatory programs, we have prefaced this supplementary information with a historical background discussion.

HISTORICAL BACKGROUND

The Department of the Army, acting through the Corps of Engineers, is responsible for administering various Federal laws that regulate certain types of activities in specific waters in the United States and the oceans. The authorities for these regulatory programs are based primarily on various sections of the River and Harbor Act of 1899 (33 U.S.C. 401 et seq.), Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344) and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413). Each of these laws will be discussed in further detail below.

THE RIVER AND HARBOR ACT OF 1899

Until recently, the regulatory programs of the Corps of Engineers were administered only pursuant to various sections in the River and Harbor Act of 1899. These include: Section 9 (33 U.S.C. 401); Section 10 (33 U.S.C. 403); Section 11 (33 U.S.C. 404); and Section 13 (33 U.S.C. 407).

Section 9 requires a permit from the Corps of Engineers to construct any dam or dike in a navigable water of the United States. The consent of Congress is also required if the navigable water is interstate, and the consent of the appropriate state legislature is required if the water is intrastate. Bridges and causeways constructed in navigable waters of the United States also require permits under Section 9, but the authority to issue these permits was transferred to the U.S. Coast Guard in 1966 when the Department of Transportation was created.

Section 10 identifies other types of structures or work in or affecting navigable waters of the United States that are prohibited unless permitted by the Corps of Engineers. However, unlike Section 9, the consent of Congress or a State legislature is not required. Section 10 requires permits from the Corps for structures in navigable waters such as piers, breakwaters, bulkheads, revetments, power transmission lines, and aids to navigation. It also requires permits for various types of work performed in navigable waters, including dredging and stream channelization, excavation and filling. In addition, any work that is performed outside the limits of a navigable water which affects its navigable capacity may also require a Section 10 permit.

The 1899 Act was enacted to protect navigation and the navigable capacity of the nation's waters. Section 11 focuses on this basic concern by allowing the Secretary of the Army to establish harbor lines landward of which piers, wharves, bulkheads, and other structures or work could be built or performed without a Corps permit. However, as will be noted below, these harborlines now serve only as guides to defining the offshore limits of these activities from the standpoint of their impact on navigation. They can no longer be relied upon as a substitute for the requirement to obtain a permit under the 1899 Act.

Violation of the provisions and requirements of Section 9, 10, or 11 of the 1899 Act can result in criminal prosecution. Section 12 specifies criminal fines that range between $500 and $2,500 per day of violation and/or imprisonment, either or both of which may be imposed upon conviction. In addition, Section 12 also provides for injunctive relief that may be sought by the United States to respond to violations of these Sections, including the restoration of the area to its original condition. See *U.S.* v. *Moretti*, 473 F. 2d 418 (5th Cir. 1975).

Until 1968, the Corps administered the 1899 Act regulatory program only to protect navigation and the navigable capacity of the nation's waters. The permit requirements of the Act were limited in their application to waters that were presently used as highways for the transportation of interstate or foreign commerce.

On December 18, 1968, the Department of the Army revised its policy with respect to the review of permit applications under Sections 9 and 10 of the 1899 Act. It published in the FEDERAL REGISTER a list of additional factors besides navigation that would be considered in the review of these applications. These included: fish and wildlife; conservation; pollution; aesthetics; ecology; and the general public interest. (33 CFR 209.120.)

The 1968 change in policy identified this new type of review as a "public interest review." It was adopted in response to a growing national concern for environmental values as they related to our nation's water resources and in response to related Federal legislation, such as the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), that required the consideration of some of these concerns in Federal decision-making. Enactment of the National Environmental Policy Act on January 1, 1970 (42 U.S.C. 4331 et seq.) gave further support to this change in policy.

The "public interest review" received its first judicial test in the case of *Zabel* v. *Tabb*, 430 F. 2d 199 (15th Cir. 1970), cert. den. 401 U.S. 910 (1972) in which the Court upheld the denial by the Corps of a landfill permit for fish and wildlife reasons (and not reasons related to navigation). In reaching this decision, the Court reaffirmed the Department of the Army's position that it was "acting under a Congressional mandate to collaborate and consider all of these factors" when it reached that decision.

In further response to the adoption of this public interest review, the Department of the Army revised its harborline regulation (33 CFR 209.150) on May 27, 1970. This revision made it clear that permits were required for any work commenced landward of an established harborline after May 27, 1970, and that these permit applications would receive a full public interest review. Of course, navigation concerns in this public interest review will be guided, in large part, by the presence of established harborlines.

During 1972, the Corps of Engineers reviewed all judicial decisions in which the term "navigable waters of the United States" had been interpreted in order to identify all waters to which Sections 9 and 10 of the 1899 Act could be applied. This analysis was made in response to the Federal government's growing concern over the protection of the nation's water resources and the need to protect those resources through the full mandate of available Federal laws.

On September 9, 1972, the Corps of Engineers published an administrative definition of the term "navigable waters of the United States" in the FEDERAL REGISTER (subsequently codified as 33 CFR 209.260). This definition was intended for use in the Corps' administration of Sections 9 and 10 of the 1899 Act, and included the following: (1) all waters presently used to transport interstate or foreign commerce (see *Daniel Ball* v. *United States*, 77 U.S. 557 (1871)); (2) all waters used in the past to transport interstate of foreign commerce (see *Economy Light and Power Company* v. *United States*, 256 U.S. 113 (1921)); all waters susceptible to use in their ordinary condition or by reasonable improvement to transport interstate or foreign commerce (see *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940)); and all waters subject to the ebb and flow of the tide (see *United States* v. *Moretti*, *supra*). The landward limit of this jurisdiction for freshwater was established as the ordinary high water mark and the shore-

other waters, including lakes, isolated wetlands, and potholes, whose degradation, destruction, and disappearance continues to increase at alarming rates.

On March 27, 1975, the District Court for the District of Columbia ordered the revocation and rescission of that part of the Department of the Army's regulation "which limits the permit (Section 404) jurisdiction of the Corps by definition or otherwise to other than the waters of the United States." The Court further ordered publication of proposed regulations within 15 days (later amended to 40 days) which clearly recognized the full regulatory mandate of the FWPCA with respect to Section 404, and final regulations within 30 days of the date of the order (later amended to 80 days). *NRDC* v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

Responding to this court order, the Corps published four alternative proposed regulations in the FEDERAL REGISTER for comment on May 6, 1975. Over 4,500 comments were received in response to these proposed regulations. Many of these comments assisted the Corps in developing an administrative definition of "navigable waters" that was consistent with the intent and objectives of the FWPCA, and also in developing a program that was responsive to many of the concerns raised by the comments.

On July 25, 1975, the Corps of Engineers published an interim final regulation in the FEDERAL REGISTER. The interim final regulation essentially melded revisions to the Section 404 program into the previously published April 3, 1974 regulation. It included administrative definitions of "navigable waters", "dredged material", and "fill material", and procedural mechanisms to avoid unnecessary duplicative review in those states that have permit programs similar to Section 404.

The interim final regulation administratively defined the term "navigable waters" to include: coastal waters, wetlands, mudflats, swamps, and similar areas; freshwater lakes, rivers, and streams that are used, were used in the past, or are susceptible to use to transport interstate commerce, including all tributaries to these waters; interstate waters; certain specified intrastate waters, the pollution of which would affect interstate commerce; and freshwater wetlands, including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to the above described lakes, rivers, and streams, and that are periodically inundated and normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.

The regulation also specified that permits would not be required for discharges beyond the "headwaters" of a river or stream unless the interests of water quality required assertion of jurisdiction above the headwaters. "Headwaters" was defined as "the point on the stream above which the flow is normally less than 5 cubic feet per second * * *."

Any material that is excavated or dredged from a water of the United States and reintroduced into a water of the United States is considered to be the "discharge of dredged material" for purposes of Section 404.

"Fill material" was defined to include the following activities: the creation of fastlands, elevations of land beneath waters of the United States, or impoundments; the building of any structure or impoundment requiring rock, sand, dirt, or other pollutants for its construction; site-development fills; causeway or roadfills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, and breakwaters; beach nourishment; levees; and backfill for various structures and utility lines.

The regulation also identified certain types of activities that were excluded from the program because they do not involve the discharge of dredged or fill material into water. Plowing, seeding, cultivating, and harvesting for the production of food, fiber, and forest products were included in this list of excluded activities. Also excluded from the program was material placed for maintenance and emergency reconstruction of existing fills.

The July 25 regulation adopted a phase-in schedule to implement the permit requirements of Section 404 for discharges in the above defined waters, and also included authority for District Engineers to issue general permits for those discharges that cause only a minor individual and cumulative impact to the environment. Phase I began immediately upon publication of the regulation, and included all waters subject to the ebb and flow of the tide and/or waters that are, were, or are susceptible to use for commercial navigation purposes (waters already being regulated by the Corps) plus all adjacent wetlands to these waters (thus eliminating the artificial ordinary high water and mean high water mark distinctions). Phase II became effective on September 1, 1976 (originally scheduled for July 1, 1976, but postponed for 60 days by Presidential action), and included primary tributaries to the Phase I waters and lakes greater than five acres in surface area, plus wetlands adjacent to these waters. Phase III, requiring permits for discharges of dredged or fill material into all waters of the United States, became effective on July 1, 1977. Discharges that occur in a particular waterbody before a scheduled phase-in date are permitted by the regulation, subject to six specified conditions. Also permitted by the regulation are certain minor discharges, again subject to the same conditions.

Various policies and procedures were also included in this regulation to allow joint review and processing of applications for Section 404 permits in those states with programs similar to Section 404.

On September 5, 1975, EPA published interim final guidelines to be used in the evaluation of proposed discharges of dredged or fill material. These interim guidelines are published in 40 CFR Part 230.

A number of courts have had occasion to consider whether particular waters, including wetlands, are "waters of the United States" within the scope of the FWPCA. The first case to address whether wetlands beyond the mean high water mark of traditional navigable waters of the United States were subject to the FWPCA was *United States* vs. *Holland*, 373, F. Supp. 665 (M.D. Fla., 1974) in which the Court held:

> The court is of the opinion that the mean high waterline is no limit to Federal authority under the FWPCA. While the line remains a valid demarcation for other purposes, it has no rational connection to the aquatic ecosystems which the FWPCA is intended to protect. Congress has wisely determined that Federal authority over water pollution properly rests on the commerce clause and not on past interpretations of an act designed to protect navigation. And the Commerce clause gives Congress ample authority to reach activities above the mean high water line that pollute the waters of the United States.

Other Courts have pursued the same theme, and often use the Holland rationale to support their position. These include the following: *United States* v. *Ashland Oil and Transportation Co.*, 504 F2d 1317 (6th Cir. 1974), involving discharges of oil into a tertiary tributary to a navigable water of the United States; *United States* v. *P.F.Z. Properties, Inc.*, 393 F. Supp. 1370, 1381 (D.D.C. 1975) and *Leslie Salt* v. *Froehlke*, 403 F. Supp. 1292, 1296–1297 (N.D. Cal. 1974)—each involving discharges of dredged or fill material into navigable waters of the United States; *Conservation Council of North Carolina* v. *Costanzo*, 398 F. Supp. 653, 673 (E.D. N.C. 1975); *United States* v. *Smith*, 7 ERC 1936, 1938–1939 (E.D. Va., 1975); *United States* v. *Golden Acres, Inc.*, No. 76–0023–CIV–4, slip opinion p. 5–6 (E.D. N.C., Jan. 13, 1977); *United States* v. *Riverside Bayview Homes, Inc.*, Civil Action No. 77–76041 (E.D. Mich., Feb. 24, 1977)—all involving discharges into wetlands adjacent to navigable waters of the United States or a primary tributary thereof in which the wetland area is located above the mean high tide line or ordinary high water mark but is still periodically inundated and covered with aquatic vegetation; and *United States* v. *Byrd and Elder*, ERC 1275 (N.D. Ind., August 13, 1976) involving the discharge of fill material into a natural freshwater lake.

SECTION 103 OF THE MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT OF 1972

Five days after enactment of the FWPCA, Congress enacted the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413). This Act, commonly referred to as the "Ocean Dumping Act", has many provisions that resemble the approach taken by the FWPCA to regulate activities that can pollute or otherwise adversely affect the ocean waters.

Section 102 of the Act vests authority in the Administrator, EPA, to issue permits, after notice and opportunity for public hearing, for the transportation from the United States of material that is intended to be dumped in ocean waters. "Material" is defined in the Act to include most liquid, solid, or suspended solid substances. Before issuing a permit,

The legislative history of the term "navigable waters" specified that it "be given the broadest constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." (H.R. Report No. 92-1465 at 144; A Legislative History of the FWPCA at p. 327). Article 1, Section 8 of the Constitution gives the Federal Government the authority "to regulate commerce with foreign Nations and among the several states." We have interpreted the guidance contained in this legislative history to be consistent with the Federal Government's broad constitutional power to regulate activities that affect interstate commerce as interpreted by the Supreme Court on several occasions. *Perez* v. *United States*, 402 U.S. 146 (1970); *Katzenbach* v. *McClung*, 379 U.S. 294 (1974); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); and *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

Water pollution is one such activity, for as the Court stated in *U.S.* v. *Holland*, supra., "Congress has wisely determined that Federal authority over water pollution properly rests on the commerce clause. And the commerce clause gives Congress ample authority to reach activities * * * that pollute the waters of the United States." (See also the cases cited above on defining "waters of the United States" which affirmed the constitutionality of Congress' broad assertion of jurisdiction.)

We followed this basic premise in the development of our administrative definition of "navigable waters" for the July 25, 1975 regulation, and we have followed it again in our efforts to clarify that definition in this regulation.

Our definition of "navigable waters" in the 1975 regulation included the following:

(1) Coastal waters that are navigable waters of the United States subject to the ebb and flow of the tide, shoreward to their mean high water mark (mean higher high water mark on the Pacific coast);

(2) All coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters. "Coastal wetlands" includes marshes and shallows and means those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction;

(3) Rivers, lakes, streams, and artificial water bodies that are navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;

(4) All artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters, landward to their ordinary high water mark;

(5) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;

(6) Interstate waters landward to their ordinary high water mark and up to their headwaters;

(7) Intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized:

(a) By interstate travelers for water-related recreational purposes;

(b) For the removal of fish that are sold in interstate commerce;

(c) For industrial purposes by industries in interstate commerce; or

(d) In the production of agricultural commodities sold or transported in interstate commerce;

(8) Freshwater wetlands, including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation. "Freshwater wetlands" means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction; and

(9) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 230). For example, in the case of intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters identified in paragraphs (a)–(h), a decision on jurisdiction shall be made by the District Engineer.

Many suggested that we change the nomenclature of the term "navigable waters" and refer to our jurisdiction under Section 404 as "waters of the United States." This is the definition given to that term in Section 502(7) of the FWPCA. We have adopted this suggestion and feel that it will assist in distinguishing between the Section 404 program and the types of waters that are subject to the permit programs administered under Sections 9 and 10 of the 1899 Act.

We have consolidated the 1975 list of waters in our new definition to include four basic categories. We believe that this consolidation will assist in clarifying those waters that are subject to the Section 404 program.

CATEGORY 1

Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands.—This category corresponds to those waters identified in sections (1), (2), (3), and (8) of the old definition. Through consolidation, we believe that many of the ambiguities raised in the old definition will be clarified.

The Federal government's authority to regulate all activities in or affecting navigable waters of the United States has always been recognized. As we have noted above, waters that fall within this category are also regulated under the River and Harbor Act of 1899. They include natural and artifical waters that are subject to the ebb and flow of the tide and/or that are used, were used in the past, or are susceptible to use to transport interstate or foreign commerce.

CATEGORY 2

Tributaries to navigable waters of the United States, including adjacent wetlands.—This category corresponds to sections (4), (5), (8), and (9) of the old definition.

The Federal government's authority to regulate activities on the rivers and streams that feed into navigable waters of the United States also has been historically recognized. As we noted in our historical background discussion, Section 10 of the River and Harbor Act of 1899 can be used to regulate activities outside the jurisdictional limits of navigable waters of the United States if those activities affect the navigable capacity of those waters. Section 13 of the 1899 Act also prohibits the dumping of any refuse matter into any tributary of a navigable water of the United States, or onto the banks of such waters where the material is likely to be washed into the water.

More recently, courts have recognized that the FWPCA is applicable to tributaries of navigable waters. In *U.S.* v. *Ashland Oil, supra*, the Court stated:

Pollution control of navigable streams can only be exercised by controlling pollution of their tributaries.

We have adopted the suggestion of many commenters that we incorporate into our definition (and not in the Preamble as we did in 1975) the statement that nontidal drainage and irrigation ditches that feed into navigable waters will not be considered "waters of the United States" under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Sections 208 and 402 .

CATEGORY 3

Interstate waters and their tributaries, including adjacent wetlands.—This category corresponds to those waters listed in sections (6) and (8) of the old definition.

The affects of water pollution in one state can adversely affect the quality of the waters in another, particularly if the waters involved are interstate. Prior to the FWPCA Amendments of 1972, most federal statutes pertaining to water quality were limited to interstate waters. We have, therefore, included this third category consistent with the Federal government's traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries.

CATEGORY 4

All other waters of the United States not identified in Categories 1–3, such as isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.—This category corresponds to sections (7), (8), and (9) of the old definition.

Waters that fall within categories 1, 2, and 3 are obvious candidates for inclusion as waters to be protected under the Federal government's broad powers to regulate interstate commerce. Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a

tributary system to navigable waters of the United States. The condition or quality of water in these other bodies of water will have an effect on interstate commerce.

The 1975 definition identified certain of these waters. These included waters used:

(1) By interstate travelers for water-related recreational purposes;
(2) For the removal of fish that are sold in interstate commerce;
(3) For industrial purposes by industries in interstate commerce; and
(4) In the production of agricultural commodities sold or transported in interstate commerce.

We recognized, however, that this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category. The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over "other waters", such as intermittent rivers, streams, tributaries and perched wetlands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.

We received many comments and criticisms concerning the waters covered in sections (7) and (9) of the 1975 definition, particularly with respect to uncertainty over the types of waters covered by section 9, and as to whether section 404 permits are required to discharge dredged or fill material into these latter waters.

We have responded to these comments by noting in the definition of these waters that they are the type, the degradation or destruction of which could affect interstate commerce. We have also incorporated an explanatory footnote at the end of this category which further explains this connection to interstate commerce.

We are responding to the concern of uncertainty over the need to obtain a permit in these waters by issuing today a nationwide permit for discharges into most of these waters. We believe that if the common sense conditions, guidelines and management practices provided in these nationwide permits are followed, the concern for water quality, as it affects the production, movement and/or use for interstate commerce, ordinarily will be satisfied with respect to these discharges.

Wetlands. Prior to enactment of the FWPCA, the mean tide line (mean higher tide line on the West Coast) was used to delineate the shoreward extent of jurisdiction over the regulation of most activities in tidal waters under the 1899 Act as well as for mapping, delineation of property boundaries, and other related purposes. In freshwater lakes, rivers and streams that are navigable waters of the United States, the landward limit of jurisdiction has been traditionally established at the ordinary high water mark.

The regulation of activities that cause water pollution cannot rely on these artificial lines, however, but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.

For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.

The July 25, 1975 regulation identifies "coastal" and "freshwater" wetlands contiguous or adjacent to other waters of the United States as separate categories of waters for inclusion in our overall definition of the term "waters of the United States." Many comments and suggestions were received on these terms.

Both "coastal" and "freshwater" wetlands as used in the July 25, 1975 regulation require that the area in question be "periodically inundated" by either saline, brackish or freshwater and "normally characterized by the prevalence of" salt or brackish water vegetation or vegetation that requires saturated soil conditions for growth and reproduction. Some felt that the criteria for delineating a wetland should not require both "periodic inundation" and the "prevalence of" vegetation, as either condition should suffice from the standpoint of protecting the entire aquatic system. Others raised concern over the vagueness of terms such as "perodically inundated", "normally", and "prevalence", and the lack of any definition for the terms "contiguous" or "adjacent".

In response to these comments, and with the assistance of the Departments of Interior and Agriculture and the Environmental Protection Agency, we have adopted the following definition of "wetlands":

> Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

This definition is intended to eliminate several problems and achieve certain results. The reference to "periodic inundation" has been eliminated. Many interpreted that term as requiring inundation over a record period of years. Our intent under Section 404 is to regulate discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a record period of time. The new definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation. This inundation or saturation may be caused by either surface water, ground water, or a combination of both.

The use of the word "normally" in the old definition generated a great deal of confusion. The term was included in the definitions to respond to those situations in which an individual would attempt to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation, and to those areas that are not aquatic but experience an abnormal presence of aquatic vegetation. Several such instances of destruction of aquatic vegetation in order to eliminate Section 404 jurisdiction actually have occurred. However, even if this destruction occurs, the area still remains as part of the overall aquatic system intended to be protected by the Section 404 program. Conversely, the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program.

We have responded to the concern for the vagueness of the term "normally" by replacing it with the phrase "* * * and that under normal circumstances to support * * *" We do not intend, by this clarification, to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes.

Concerns were also expressed over the types and amount of vegetation that would be required to establish a "wetland" under this definition. We have again used the term "prevalence" to distinguish from those areas that have only occasional aquatic vegetation interspersed with upland or dry land vegetation.

At the same time, we have changed our description of the vegetation involved by focusing on vegetation "typically adapted for life in saturated soil conditions." The old definition of "freshwater wetlands" provided a technical "loophole" by describing the vegetation as that which requires saturated soil conditions for growth and reproduction, thereby excluding many forms of truly aquatic vegetation that are prevalent in an inundated or saturated area, but that do not require saturated soil from a biological standpoint for their growth and reproduction. We intend to publish shortly vegetation guides to indicate the types of vegetation intended to be included in this definition, and to rely on the assistance of biologists, scientists and other technical experts from other Federal and State agencies to assist in delineating those wetland areas intended to be incuuded in this definition.

Several comments questioned the need for separate definitions of salt and brackish water wetlands (e.g. coastal wetlands) and freshwater wetlands. Others questioned whether salt and brackish water wetlands in nontidal waters and freshwater wetlands contiguous or adjacent to coastal wetlands were intended to be included in the definition, since these wetlands are part of the aquatic system. Still others ques-

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 6, 115, 121, 122, 123, 124, 125, 402, and 403

[FRL 1201-2]

National Pollutant Discharge Elimination System; Revision of Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule extensively revises the existing regulations governing the National Pollutant Discharge Elimination System (NPDES) program for three purposes:

(1) To clarify and improve existing program regulations and procedures in light of past experience;

(2) To fill significant gaps in coverage under the existing regulations, particularly in response to court decisions and the emerging emphasis on the control of toxic and hazardous pollutants; and

(3) To make the regulatory changes which are necessary under the 1977 amendments to the Clean Water Act.

DATES: These regulations will be considered issued for purposes of judicial review at 1:00 p.m. eastern time on June 14, 1979. If such date is a Federal holiday, the issuance date will be considered to be 1:00 p.m. eastern time on the next day after the seventh day which is not a Federal holiday. Parts 121, 122, 123, 125 and 403 of this regulation shall be effective August 13, 1979. Part 124 is effective as provided in § 124.135. In order to assist EPA to correct typographical errors, incorrect cross-references, and similar technical errors, comments of a technical and nonsubstantive nature on this final regulation may be submitted not later than August 13, 1979. However, the effective dates will not be delayed by consideration of such comments.

FOR FURTHER INFORMATION CONTACT: Edward A. Kramer (EN-336), Office of Water Enforcement, Environmental Protection Agency, Washington, DC 20460 (202-755-0750).

SUPPLEMENTARY INFORMATION:

Background

The Federal Water Pollution Control Act Amendments of 1972 established the National Pollutant Discharge Elimination System (NPDES) permit program. Shortly after, in December 1972 and May 1973, EPA promulgated regulations outling the NPDES program in two Parts. 40 CFR Part 124 established substantive requirements for approved State NPDES programs, while Part 125 established the similar requirements of the EPA permit program. These two Parts, revised several times, are the existing NPDES regulations which remain in force until the effective date of these regulations published today.

In 1977, a new phase of the NPDES program began, prompted by several developments. First, five years of experience with dischargers, approved NPDES States, and the courts had been gained. Second, the "first round" of NPDES permits, issued for a term of five years, were beginning to expire. Third, a major statutory deadline (July 1, 1977) had passed, and the 1983 deadline for achievement of more stringent treatment requirements became the new program goal, along with an increased emphasis on the control of toxic and hazardous pollutants. In late 1977, Congress enacted the Clean Water Act of 1977, making several significant changes in the scope and direction of the NPDES program. These changes include: revisions of the 1983 treatment requirements for industrial dischargers; extensions of the 1977 treatment deadline for certain municipal and industrial dischargers; provisions for certain variances from technology-based treatment requirements; recognition of the Consent Decree in *NRDC* v. *Train*, 8 ERC 2120 (D.D.C. 1976); requirements for best management practices in certain industrial permits; provision for control of sewage sludge disposal in NPDES permits; provision for EPA to issue permits if it objects to a State NPDES permit; and authorization of State assumption of the permit programs under sections 318, 404, and 405.

In addition to the need for regulatory revisions to address these major developments, the former regulations had to be amended and reorganized because they had become unwieldy. On one hand, much needless duplication of the basic substantive and procedural requirements between the former State and Federal NPDES program regulations can be eliminated. Under the regulations published today, the basic substantive and procedural requirements applicable to all permits are set forth in Parts 122 and 124. Part 123, which establishes State Permit Program Requirements, cross-references provisions from those Parts which are applicable to State programs. EPA believes that this new structure will help to simplify the regulations for use by permittees, the States, and the public, and will avoid inconsistencies between State and Federal programs.

Parts of the former NPDES regulations were either too terse to provide meaningful guidance or left significant permit-related issues unaddressed. For example, in many situations the former regulations governing adjudicatory hearings provided inadequate assistance or direction to Presiding Officers or the parties. Based upon several years of experience accumulated by EPA in conducting these hearings, the regulations published today for Part 124 provide more detailed procedures better tailored to result in responsible, informed permit issuance decisions. Similarly, and for the same purpose, the regulations published today for Parts 122 and 125 provide guidance on substantive questions formerly unaddressed in regulations.

Accordingly, five new Parts of Title 40, incorporating all of existing Parts 115, 122, 123, 124, 125 and 402, as well as portions of § 6.900, are established as follows:

- **PART 121—STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT**
- **PART 122—NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**
- **PART 123—STATE PERMIT PROGRAM REQUIREMENTS**
- **PART 124—PROCEDURES FOR DECISIONMAKING REGARDING NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS**
- **PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

A "Guide to the NPDES Regulations" which describes the regulations has been prepared and is available by writing the Environmental Protection Agency, Public Information Center (PM-215), 401 M Street, S.W., Washington, D.C. 20460.

These regulations were proposed on August 21, 1978, (43 FR 37078). Originally, the comment period on the proposed regulations was to have ended on October 20, 1978. However, based on many requests from the public, the comment period was extended to November 20, 1978 (43 FR 47213, October 13, 1978). During the comment period, two public meetings were held: one in Washington, D.C. and one in San Francisco. Over 100 people attended each meeting and over 500 letters were

facilitate the use of computer systems designed to directly read and analyze the reported information. It will also increase the ability of all program offices within EPA to share such information. EPA will provide the States with preprinted standard forms (States may substitute their name, logo, etc. on these forms) and will also provide necessary computer software.

§ 122.3(t) (Proposed § 122.3(s)) Definition of "navigable waters".

The definition of "navigable waters" has been slightly revised to clarify its intent and scope, but the basic thrust and coverage remain the same as in the proposed rules.

Some commenters suggested that EPA exclude certain types of impoundments of navigable waters from the definition, such as holding ponds, cooling ponds, and closed cycle lagoons. Under some circumstances, it is appropriate to impound navigable streams in order to create a cooling pond or lake. EPA does not mean to prohibit this practice and applicable regulations specifically recognize this use and specify where it is allowable to comply with technology-based regulations. For example, in 40 CFR § 423.11 (m) and (n), the terms "cooling pond" and "cooling lake" are distinguished. A "cooling pond" may under some circumstances be navigable waters, but usually is not. A "cooling lake" is always a navigable water. Yet in either case affluent guidelines explicitly recognize some circumstances in which it is appropriate to use such impoundments for treatment. (Compare 40 CFR § 423.13(1)(3) with 40 CFR § 423.15(1)(2)). These are exceptional cases, however. In general, the Act's requirements must be met at the point of discharge into navigable waters.

Some commenters suggested that waste treatment systems be excluded from the definition of navigable waters. EPA disagrees with this comment where cooling ponds are involved. Such ponds are frequently extremely large in size and some harbor fish populations which invite recreational uses. If such ponds are opened for recreational use, recreational users of the previously non-navigable waters could be exposed to potentially harmful effects where, for example, fish are contaminated and consumed by such users. EPA believes this use should remain subject to control under the Act's regulatory provisions, and that such broad jurisdiction is consistent with the thrust of the Act and its legislative history.

Use by industries in interstate commerce. Some controversy has centered around the question of what waters are defined as "waters of the United States" because of use by industries in interstate commerce for industrial purposes. The Decision of the General Counsel No. 73 concluded that the definition in the previous regulations required actual use by an industrial user downstream from the discharger. Since there were no users downstream from the discharging industry, the stream in question was found not to be waters of the United States. The opinion explicitly stated, however, that it was based upon the regulations, not the Act, and left open the question whether EPA was free to adopt a broader definition tied to the susceptibility of the stream of use by industries in interstate commerce.

These regulations are intended to broaden the definition of waters of the United States in the manner suggested by Decision No. 73. Waters will be considered to be waters of the United States not only if they are actually used, but also if they may be susceptible to use, for industrial purposes by industries in interstate commerce. Thus the regulations now focus, not on the nature of the stream's users, but on the characteristics of the stream itself, and it will no longer be necessary to show actual industrial use for a stream to fall within the definition.

On the other hand, except for cooling ponds which meet the criteria for "waters of the United States" (such as, for example, those which are used for fishing or other recreational purposes by interstate travelers), EPA agrees with a frequently encountered comment that waste treatment lagoons or other waste treatment systems should not be considered waters of the United States. Accordingly, the definition has been revised to exclude such treatment systems.

Moreover, if any portion of a stream is used or susceptible to use by industries in commerce, the entire stream is waters of the United States. As an example, assume that three industries in interstate commerce (A, B and C), lie along a stream which flows into a small lake contained entirely on the property of Industry C, and from which there is no outflow. Industries A and B are upstream of Industry C. All three use the stream for industrial purposes and discharge effluent into the stream. The stream is waters of the United States because it is used by industries in interstate commerce. All three industries require NPDES permits, including Industry C, even though there is no user downstream from Industry C. The question of actual or potential use downstream from the discharger (Industry C) is not relevant to the determination, since the character of the stream as a whole is clearly such as to be susceptible to use by an industry in interstate commerce.

§§ 122.3 (u) and (v) (proposed § 122.3(t)) Definition of "new sources and new dischargers".

Some commenters objected to the definition of new source in the proposed regulations, particularly the 120-day limit in paragraph (t)(1)(ii) for the promulgation of proposed standards. These commenters pointed out that the 120-day limit for promulgation of standards was not part of the statutory definition of new sources in section 306 of the Act and so went beyond proper EPA authority. EPA believes that the definition of new source in section 306 of the Act must be read in the context of section 306 in its entirety. Section 306(b)(1)(B) contemplates the promulgation of new source performance standards within 120 days of proposal. See Decision of the General Counsel No. 71. Read together with the definition in section 306(a)(2), this section supports the language of both the proposed and final regulation. Further, there is also an overriding policy in support of the 120-day limitation; since construction of a source to meet new source performance standards can only proceed in a meaningful way if final standards are available, any inequities which may result from EPA failure to promulgate standards within 120 days of proposal are resolved by the language of section 306(d). A source which falls outside the new source definition but is a new discharger and commences construction after October 18, 1972, may gain the benefit of the new source protection period by satisfying the requirements of section 306(d). See preamble discussion of § 122.47(d).

A number of commenters objected to the use of the definition of "new discharger" in proposed § 122.3(t)(2) (now § 122.3(v)). They argued the definition would automatically require a new permit when a discharger ceased operation during the term of the permit. They also suggested the definition could be read to impose new source performance standards on a discharger which recommences operation after terminating a discharge. EPA has revised the definition of "new discharger" in response to these comments. The term now applies only to a genuinely new source of discharge but which is not a "new source" as defined in section 306 of the Act because applicable performance standards have not been issued. The final regulations

continue to require that new dischargers meet applicable standards and limitations upon commencement of discharge, and identify most of these sources as eligible under section 306(d) of the Act and § 122.47(d) for the ten year protection from more stringent standards of performance.

EPA does not intend to require a new permit automatically when a discharge ceases. Many permits cover facilities which in the normal course of their operations cease and recommence discharge. Their permits do not lapse when they cease discharging. However, the proposed rules were intended to require a source which shuts down (including those which do so in order to escape a statutory deadline or other requirement) to meet all applicable standards and limitations upon recommencement of discharge. This requirement is now contained in § 122.17(c)(3).

Definitions of Application, Discharge Monitoring Report, New Source/ Environmental Questionnaire and Permit. Proposed § 122.3 referenced Appendices A, B, C and D which were to contain copies of the application form, permit format, new source/ environmental questionnaire and discharge monitoring reports, respectively. These Appendices have been deleted from the final regulations pending completion of these forms. They will be published at a later date.

A new Appendix A has been added which is a redesignation and redivision of the industrial categories appendix contained in former regulations promulgated on May 23, 1978 and December 11, 1978 (see Table I of this preamble). The Appendix has been revised to conform to the modified settlement agreement approved by the District Court and issued on March 9, 1979, in *NRDC* v. *Costle* (which modifies the *NRDC* v. *Train* 8 ERC 2120 (D.D.C. 1976), settlement agreement of June 8, 1976). Additional time after the issuance date for effluent limitations guidelines under the consent decree has been added to allow for processing of permits. This Appendix will be updated from time to time if further modifications are made.

New Definitions. In response to comments requesting definitions for additional terms, EPA has included several new definitions in the final regulations.

A definition of "publicly owned treatment works" ("POTWs") (§ 122.3(bb)) has been added which is consistent with the definition of POTW found in other EPA regulations, e.g., 40 CFR § 403.3(m).

A definition of "Direct discharge" (§ 122.3(h)) has been added which states that this term means the discharge of pollutants.

The term "Director" (§ 122.3(i)) has been changed to include both the Regional Administrator and the State Director, as appropriate. Generally, the use of the term Director means that the regulation is applicable to both EPA and approved States. The terms "Regional Administrator" (§ 122.3(cc)), "Enforcement Division Director" (§ 122.3(n)) and "State Director" (§ 122.3(ü)) are now used only where the regulation addresses an action that is unique to one of those people. This change in the use of the term "Director" necessitated the addition of a new term, "State Director" which is the same definition as was found for "Director" in proposed § 122.3(h).

A definition of "process waste water" (§ 122.3(aa)) has been added which restates the definition found in 40 CFR § 401.11(q).

§ *122.4 Exclusions.*

Some commenters thought proposed § 122.4(a)(1) over-stepped EPA's statutory authority to control vessels when "operating in a capacity other than a vessel." Commenters felt that the language in section 502(12)(B) of the Act which defines "discharge of a pollutant" as "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,*" (emphasis added) precluded regulating mining vessels as point sources. The Act does not define "vessels or other floating craft", but it appears that those terms refer to transportation vessels. The legislative history of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) and the Marine Protection Research and Sanctuaries Act (MPRSA) of the same year, indicated that all ocean discharges within the jurisdiction of the United States were to be regulated by EPA under one Act or the other. As the Senate Public Works Committee noted on the FWPCA:

> Coupled with the provisions in the bill reported by the Committee on Public Works, the bill to be reported from the Commerce Committee [i.e., the MPRSA] should enable the United States to have complete and integrated regulation of the disposal of pollutants *into all waters and over all sources of pollutants subject to its jurisdiction (emphasis added).* See *A Legislative History of the Water Pollution Control Act Amendments of 1972, Senate Committee on Public Works,* 93d Cong., 1st sess. (1973) at 1492 (hereafter FWPCA Legis. Hist.).

Hence, if the commenters are right, the MPRSA or Ocean Dumping Act would require permits for temporarily fixed drilling vessels, ocean mining dredge ships or processing vessels.

We believe the greater weight of authority points to the fact that similar structures should be treated similarly, i.e., an oil platform at sea and an oil platform that is temporarily anchored to the bottom of the sea should have to meet the same requirements under the same Act. Similarly a deepsea mining processing ship should have the same requirements as an onshore processing plant discharging into the ocean. It appears the exception in section 502(12)(B) was intended solely to exclude redundant authority over ocean dumping under NPDES and the Ocean Dumping Act.

The Clean Water Act clearly is better designed to regulate routine industrial discharges. The industry-by-industry approach required for effluent limitation guidelines under the Act is more attuned to handling discharges from these two industries than the Ocean Dumping Act since the Ocean Dumping Act requires extensive studies aimed at finding alternatives to ocean discharges.

Regular sewage discharges from vessels are still regulated by the Coast Guard under section 312 of the Act. Paragraph 122.4(a)(1) is aimed at industrial processes that occur at sea.

Many commenters objected to the comment after § 122.4(a)(2) in the proposed regulations regarding the relationship of section 402 and 404 permits, which incorporated the "primary purpose" test presently stated in Corps of Engineers regulations for section 404 permits, 33 CFR § 323.2(m). These commenters objected to the vagueness of the comment and to the implication that both a section 402 and a section 404 permit could be required for the same activity. This comment has been deleted because the Agency is currently reviewing its position on the overlap between section 402 and 404 permits. Part of this Agency review involves a draft policy document concerning the applicability of the NPDES program to the disposal of solid waste in waters of the United States. Since Agency policy was not resolved at the time of publication of these final regulations, no resolution or further clarification is now appropriate.

Many commenters objected to the restriction contained in § 122.4(a)(3) of the proposed regulations that limited that exclusion to indirect dischargers as defined in § 122.3(o) of the proposed regulations. Although § 122.4(a)(3) has been retained without change, these

SUPPLEMENTARY INFORMATION: On March 27, 1980 the Postal Service published in the **Federal Register** (45 FR 20118) a proposal to amend the regulations of the Postal Service concerning the mailing of poisons, poisonous drugs and medicines, and controlled substances. This proposal would have, among other things, eliminated the requirement to send controlled substances by registered mail. There were two extensions of the comment period on the registered mail proposal (see 45 FR 26983 and 38419), and the periods expired without any comments from the public on this issue.

Accordingly, the Postal Service hereby adopts the following revisions of the Domestic Mail Manual, which is incorporated by reference in the **Federal Register**. See 39 CFR 111.1.

Part 124—Nonmailable Matter—Articles and Substances; Special Mailing Rules

In 124.5 delete .543 and .544.

124.5 Controlled Substances.

Narcotics (18 U.S.C. 1716)

* * * * *

.54 Mailing Requirements

* * * * *

.543 [Deleted]

.544 [Deleted]

A transmittal letter making these changes in the pages of the Domestic Mail Manual will be published and will be transmitted to subscribers automatically. These changes will be published in the **Federal Register** as provided in 39 CFR 111.3.

(39 U.S.C. 401(2); 18 U.S.C. 1716)

Fred Eggleston,

Assistant General Counsel, Legislative Division.

[FR Doc. 80-21809 Filed 7-18-80; 8:45 am]

BILLING CODE 7710-12-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[FRL 1545-2]

Consolidated Permit Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Suspension of portion of final rule.

SUMMARY: This action suspends a portion of the definition of the term, "waters of the United States" in the Consolidated Permit Regulations pending further rulemaking.

EFFECTIVE DATE: July 21, 1980.

FOR FURTHER INFORMATION CONTACT: Peter Holmes, Office of General Counsel (A-131), Washington, D.C. 20460 (202) 755-0753.

SUPPLEMENTARY INFORMATION: On May 19, 1980, EPA issued final consolidated permit regulations under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the Clean Water Act, and the Clean Air Act. Included in those regulations was a definition of the term "waters of the United States." 40 CFR § 122.3. This term governs the applicability of the "National Pollutant Discharge Elimination System" (NPDES) permit system under the Clean Water Act.

The definition amended the previous definition, formerly appearing at 40 CFR § 122.3(i) (1979) of the term "navigable waters." This prior definition had specified that:

* * * waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

The May 19 regulations provided:

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11 (m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [40 CFR § 122.3, definition of "waters of the United States," FR 33424, May 19, 1980]

The Agency's purpose in the new last sentence was to ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands.

Petitions for review were filed in several courts of appeals by industries and an environmental group seeking review of the May 19 consolidated regulations. Certain industry petitioners wrote to EPA expressing objections to the language of the definition of "waters of the United States." They objected that the language of the regulation would require them to obtain permits for discharges into existing waste treatment systems, such as power plant ash ponds, which had been in existence for many years. In many cases, they argued, EPA has issued permits for discharges from, not into, these systems. They requested EPA to revoke or suspend the last sentence of the definition.

EPA agrees that the regulation should be carefully re-examined and that it may be overly broad. Accordingly, the Agency is today suspending its effectiveness. EPA intends promptly to develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of that rulemaking, EPA will amend the rule, or terminate the suspension.

Authority: This suspension is issued under authority of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

Dated: July 16, 1980.

Douglas M. Costle,

Administrator.

§ 122.3 [Amended]

1. In 40 CFR § 122.3, in the definition of "Waters of the United States," the last sentence, beginning "This exclusion applies * * *," is suspended until further notice.

[FR Doc. 80-21878 Filed 7-17-80; 11:32 am]

BILLING CODE 6560-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 460

Professional Standards Review; Redesignation of PSRO Areas in California

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final regulation.

SUMMARY: This regulation redesignates Professional Standards Review Organization (PSRO) areas in California in order to combine PSRO Areas XIX and XXIII. This redesignation will facilitate initiation of PSRO activity in the currently uncovered area of Los Angeles, California, formerly designated as Area XIX. In addition, the redesignation results in a higher degree of congruence with the Health Service Area (HSA) designations and in more effective coordination with Medicare intermediaries and carriers and Medicaid fiscal agents.

DATES: Effective July 21, 1980.

FOR FURTHER INFORMATION CONTACT: Marjorie Geller, (301) 594-5033.

SUPPLEMENTARY INFORMATION: On December 17, 1979, we published a notice of proposed rulemaking in the **Federal Register** (44 FR 73128). The purpose of the proposal was to redesignate California PSRO areas so that the cities and postal zones of Los Angeles County previously designated as PSRO Area XIX were transferred to PSRO Area XXIII which consists of a group of cities in Los Angeles County.

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 328, 329 and 330

Final Rule for Regulatory Programs of the Corps of Engineers

AGENCY: Corps of Engineers, Army Department, DOD.

ACTION: Final rule.

SUMMARY: We are hereby issuing final regulations for the regulatory program of the Corps of Engineers. These regulations consolidate earlier final, interim final, and certain proposed regulations along with numerous changes resulting from the consideration of the public comments received. The major changes include modifications that provide for more efficient and effective management of the decision-making processes, clarifications and modifications of the enforcement procedures, modifications to the nationwide permit program, revision of the permit form, and implementation of special procedures for artificial reefs as required by the National Fishing Enhancement Act of 1984.

EFFECTIVE DATE: January 12, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Collinson or Mr. Bernie Goode, HQDA (DAEN–CWO–N), Washington, DC 20314–1000, (202) 272–0199.

SUPPLEMENTARY INFORMATION:

Consolidation of Corps Permit Regulations

These final regulations consolidate and complete the six following rulemaking events affecting the Corps regulatory program:

1. *Interim Final Regulations.* These regulations contained Parts 320–330 and were published (47 FR 31794) on July 22, 1982, to incorporate policy and procedural changes resulting from legislative, judicial, and administrative actions that had occurred since the previous final regulations had been published in 1977. Because it had been almost two years since we had proposed changes to the 1977 regulations, we published the 1982 regulations as "interim final" and asked for public comments. We received nearly 200 comments.

2. *Proposed Regulatory Reform Regulations.* On May 12, 1983, we published (48 FR 21466) proposed revisions to the interim final regulations to implement the May 7, 1982, directives of the Presidential Task Force on Regulatory Relief. The Task Force directed the Army to reduce uncertainty and delay, give the states more authority and responsibility, reduce conflicting and overlapping policies, expand the use of general permits, and redefine and clarify the scope of the permit program. Since these regulations proposed changes to our existing nationwide permits and the addition of two new nationwide permits, a public hearing was held in Washington, DC, on October 12, 1983, to obtain comments on these proposed changes. As a result of the public comments received, nearly 500 in response to the proposed regulations and 22 at the public hearing, we have determined that some of the proposed revisions should be adopted and some should not. We have adopted some of the provisions that were designed to clarify policies for evaluating permit applications, to revise certain permit processing procedures, to add additional conditions to existing nationwide permits, and to modify certain nationwide permit procedures. We have not adopted some of the other proposed changes, including the two proposed new nationwide permits.

3. *Settlement Agreement Final Regulations.* On October 5, 1984, we published (49 FR 39478) final regulations to implement a settlement agreement reached in a suit filed by 16 environmental organizations in December of 1982 against the Department of the Army and the Environmental Protection Agency (*NWF v. Marsh*) concerning several provisions of the July 22, 1982, interim final regulations. The court approved the settlement agreement on February 10, 1984, and on March 29, 1984, we published (49 FR 12660) the implementing proposed regulations. We received over 150 comments on these proposed regulations covering a full range of views. Those comments which were applicable to the provisions of the March 29, 1984, proposals were considered and addressed in the final regulations published on October 5, 1984. The remaining comments have been considered in the development of the final regulations we are issuing today.

In the October 5, 1984, final rule there were several new provisions relating to the 404(b)(1) guidelines. In 33 CFR 320.4(a)(1) we clarified the fact that no 404 permit can be issued unless it complies with the 404(b)(1) guidelines.

If a proposed action complies with the guidelines, a permit will be issued unless the district engineer determines that it will be contrary to the public interest. In 33 CFR 323.6(a) we stated that district engineers will deny permits for discharges which fail to comply with the 404(b)(1) guidelines, unless the economic impact on navigation and anchorage necessitates permit issuance pursuant to section 404(b)(2) of the Clean Water Act. Although no 404 permit can be issued unless compliance with the 404(b)(1) guidelines is demonstrated (i.e., compliance is a prerequisite to issuance), the 404(b)(1) evaluation is conducted simultaneously with the public interest review set forth in 33 CFR 320.4(a).

4. *Proposed Permit Form Regulations.* On May 23, 1985, we published (50 FR 21311) proposed revisions to 33 CFR Part 325 (Appendix A), which contains the standard permit form used for the issuance of Corps permits and the related provisions concerning special conditions. This proposal provided for the complete revision of the permit form and its related provisions to make them easier for permittees to understand. General permit conditions were written in plain English and greatly reduced in number; unnecessary material was deleted; and material which is informational in nature was reformatted under a "FURTHER INFORMATION" heading. We received 18 comments on this proposal.

5. *Proposed Regulations to Implement the National Fishing Enhancement Act of 1984 (NFEA).* On July 26, 1985, we published (50 FR 30479) proposed regulations to implement a portion of the Corps regulatory responsibilities pursuant to the NFEA. Specialized procedures relative to the processing of Corps permits for artificial reefs were proposed for inclusion in Parts 322 and 325. Eight organizations commented on these proposed regulations. The NFEA also authorizes the Secretary of the Army to assess a civil penalty on any person who, after notice and an opportunity for a hearing, is found to have violated any provision of a permit issued for an artificial reef. Procedures for implementing such civil penalties will be proposed at a later date. In addition, we are hereby notifying potential applicants for artificial reef permits that the procedures contained in Part 323 relating to the discharge of dredged or fill materials and those in Part 324 relating to the transportation of dredged material for the purpose of dumping in ocean waters will be used in the processing of artificial reef permits when applicable.

6. *Proposed Regulations (Portion of Part 323 and All of Part 326.* On March 20, 1986, we published (51 FR 9691) a proposed change to 33 CFR 323.2(d), previously 323.2(j), to reflect the Army's policy regarding *de minimis* or incidental soil movements occurring

recognizing and reporting unpermitted discharges. This paragraph deals only with cases where EPA is considering an enforcement action. The reporting of violations is covered under § 326.3(a). Another commenter recommended that this paragraph be reworded to ensure that Corps actions under Part 326 are not in conflict with EPA enforcement actions. Another commenter, a state agency, suggested that this provision be expanded to require similar consultations with state agencies that have initiated enforcement actions. The reason we have provided for consultations with EPA in this paragraph is due to the fact that both the Corps and EPA have overlapping authorities pursuant to the Clean Water Act. This is not the case with state agencies. Nevertheless, we believe district engineers will wish to consult with state agencies in appropriate circumstances. In any event, as we stated in our discussion relating to the wording of § 326.3(e)(iv), we believe the Corps should have the right to take a position that may conflict with another agency's viewpoint. However, we have revised this provision to emphasize that district engineers should coordinate with EPA when they are aware of enforcement actions being considered by EPA under its independent enforcement authorities.

Section 326.4(a–b): As a result of further internal coordination, we have determined that § 326.4(a) should make it clear that district engineers have the discretionary authority to determine when the inspection of permitted activities is appropriate. We have modified § 326.4(a) accordingly. In addition, we have added a new § 326.4(b) to further discuss inspection limitations.

Section 326.4(d)—Proposed as 326.4(c): One commenter, a state agency, objected to the provisions in this paragraph for attempting to obtain voluntary compliance before issuing a formal compliance order. The rationale given was that the absence of a formal order would make coordination between the Corps and the state difficult. Another state agency recommended consultations with state agencies and with EPA. The proposed, non-compliance procedures do not prohibit early coordination with other regulatory agencies, when appropriate, and presumably, if the permittee quickly brings his work into compliance, such coordination should not be necessary.

One commenter objected to allowing a district engineer to issue a compliance order and to not making the use of Corps suspension/revocation procedures or legal actions mandatory. Another commenter recommended that suspension/ revocation procedures or legal actions be made mandatory if a violator fails to comply with a compliance order. The issuance of a compliance order is provided for in section 404(s) of the Clean Water Act, and in most cases, we believe that the methods available for obtaining voluntary compliance should be used before discretionary consideration is given to using the Corps suspension/ revocation procedures or initiating legal action.

Another commenter objected to the term "significantly serious to require an enforcement action" on the basis that all violations are worthy of some enforcement action. Minor deviations from the terms and conditions of a Corps permit may not always warrant an enforcement action. For example, would a dock authorized to be constructed with a length of 50 feet but inadvertently constructed with a length of 51 feet constitute a violation warranting an enforcement action? We agree there may be extenuating circumstances, such as the additional length of the dock being just enough to impact the water access of a neighbor. However, this is a judgment that is best made by the district engineer involved.

One Commenter objected to the term "mutually agreeable solution" on the basis that such a solution could invalidate the prior results of coordination with resource agencies. Since this term refers to bringing the permitted activity into compliance or the resolution of the violation with a permit modification using the modification procedures in 33 CFR 325.7(b), such resolutions would not invalidate prior coordination. In view of the above discussion, we have retained the proposed wording of this paragraph.

Section 326.5(a): One commenter requested that the words "willful" and "repeated" be deleted from this paragraph, the rationale being, apparently, that most violators are not repeat or willful offenders and that the Corps should take the one opportunity it has to bring legal action against these one-time violators. We do not agree with this approach as being either reasonable or practical. Another commenter recommended adding violations that result in substantial impacts to the list of violations that should be considered appropriate for legal action. We agree with this recommendation and have modified the wording of this provision accordingly.

Section 326.5(c): One commenter recommended rewording of this paragraph to require that copies be provided to EPA of Corps referrals to local U.S. Attorneys. We believe it would be more appropriate to address matters relating to the detailed aspects of interagency coordination in interagency agreements. Therefore, we have retained the proposed wording of this paragraph.

Section 326.5(d)(2): As a result of further internal coordination, we have determined that litigation cases involving isolated water no longer need to be referred to the Washington level on a routine basis. Therefore, we have deleted this provision.

Section 326.5(e): One commenter recommended that the word "may" be replaced with the words "encouraged to" in the provision relating to sending litigation reports to the Office of the Chief of Engineers when the district engineer determines that an enforcement case warrants special attention and the local U.S. Attorney has declined to take legal action. We agree with this recommendation and have made the change.

Another commenter suggested that wording be aided to this paragraph to address circumstances in which permits are not required. The fact that a legal option may not be available does not mean that a permit is not required. If the district engineer chooses to close the case record, the activity in question will still be unauthorized and therefore illegal. Such unauthorized activities will be taken into account if the responsible parties become involved in future violations. One commenter suggested that Corps attorneys initiate legal actions as an alternative to actions by local U.S. Attorneys. However, the Corps does not have the authority under existing Federal laws to initiate legal actions on its own.

Another commenter recommended that this paragraph be modified to provide for joint Federal/state prosecution of violators. Since this involves discretionary decisions on the part of the Department of Justice, it would not be appropriate to include a provision of this nature in the Corps enforcement regulations.

Part 328—Definition of Waters of the United States

This part is being added in order to clarify the scope of the Section 404 permit program. This part was added in direct response to many concerns expressed by both the public and the Presidential Task Force on Regulatory Relief. We have not made changes to existing definitions; however, we have provided clarification by simply setting

them apart in a separate and distinct Part 328 of the regulation.

The format for Part 328 has been changed slightly from the proposed regulation in order to improve clarity and reduce duplication. The content of the proposed § 328.2 "General Definitions" has been partially combined with § 328.3 "Definitions." The remainder has been reestablished as § 328.5, "Changes in Limits of Waters of the United States." Section 328.2 has been established as "General Scope." The proposed §§ 328.4 and 328.5 have been combined into § 328.4 and renamed "Limits of Jurisdiction."

A number of commenters appeared to have misinterpreted the intent of this part. Many thought we were trying to reduce the scope of jurisdiction while others believed we were trying to expand the scope of jurisdiction. Neither is the case. The purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted.

Section 328.3: Definitions. This section incorporates the definitions previously found in § 323.3 (a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

(a) Non-tidal drainage and irrigation ditches excavated on dry land.

(b) Artificially irrigated areas which would revert to upland if the irrigation ceased.

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.

(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).

The term "navigable waters of the United States" has not been added to this section since it is defined in Part 329.

A number of comments were received concerning the proposed change to the definition of the terms "adjacent" and the proposed definitions for the terms "inundation", "saturated", "prevalence", and "typically adapted." A number of commenters believed that these terms may better define the scope of jurisdiction of the section 404 program, but such definitions should more rightfully be within the province of the Environmental Protection Agency in order to remain consistent with the opinion of Benjamin Civiletti, Attorney General (September 5, 1979). These definitions would require the prior approval of the Environmental Protection Agency, which has not been forthcoming. Therefore, these new proposed definitions will not be adopted at this time.

To respond to requests for clarification, we have added a definition for "tidal waters." The definition is consistent with the way the Corps has traditionally interpreted the term.

Section 328.4: Limits of Jurisdiction. Section 328.4(c)(1) defines the lateral limit of jurisdiction in non-tidal waters as the ordinary high water mark provided the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible.

Section 328.5: Changes in Limits of Waters of the United States. This section was changed to reflect both natural and man-made changes to the limits of waters of the United States. This change was made for clarification and resulted from consultation with the Environmental Protection Agency.

Section 328.6: Supplemental Clarification. Most commenters favored the Corps plans to give special consideration to unique areas such as Arctic Tundra that do not easily fit the generic" wetlands definition. Several commenters indicated that the Corps should clarify its intended use of this section, and one questioned the need to "describe" unique areas in the **Federal Register.** A number of commenters indicated that criteria should be specified for determining wetland types to be included as unique areas. Some commenters stated that close coordination between the Corps and the Environmental Protection Agency will be necessary when selecting unique areas and developing procedures for making wetland determinations in such areas, since the Environmental Protection Agency has the final authority to determine the scope of "Waters of the United States."

While we believe that supplemental clarificaion of unique areas will be a positive step in clarifying the scope of jurisdiction under the section 404 permit program, we have determined that such supplemental clarification can be done under existing regulations of the Environmental Protection Agency and the Corps and therefore have deleted this section.

Part 329—Definition of Navigable Waters of the United States

We are currently planning to propose a complete revision of Part 329 in the near future, to simplify and clarify the procedures involved, while retaining the essential aspects of the relevant policy. In the interim, we are making the two minor changes discussed below.

Section 329.11: This section has been modified to clarify that the lateral extent of jurisdiction in rivers and lakes extends to the edge of all such waterbodies as it does in bays and estuaries (§ 329.12(b)).

Section 329.12(a): This section has been corrected to reflect that the territorial seas, for the purpose of Rivers and Harbors Act of 1899 jurisdiction, extend 3 geographic miles everywhere and are measured from the baseline.

Part 330—Nationwide Permits

We are reissuing the 26 nationwide permits at § 330.5(a) as modified and conditioned. The nationwide permits will be in effect for 5 years beginning with the effective date of this regulation, unless sooner revised or revoked.

Section 330.1: This section was restructured and updated in order to improve its readability and technical accuracy. The definition concerning the division engineer's discretionary authority was deleted from this section since similar language appears in § 330.2. "Definitions." The discussion concerning the applicability of nationwide permits as they relate to

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 232 and 233

[FRL-3214-1]

Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: We are hereby issuing final rules containing 404 program definitions and 404(f)(1) exemptions and the procedures and criteria used in approving, reviewing and withdrawing approval of State 404 programs. Part 232 contains definitions and exemptions related to both the Federal and State-run 404 program and Part 233 deals with State programs only. The revisions in these rules will provide the States more flexibility in program design and administration while still meeting the requirements and objectives of the Clean Water Act (the Act).

EFFECTIVE DATES: This final rule is effective on July 6, 1988. In accordance with 40 CFR 23.2, this regulation shall be considered issued for purposes of judicial review at 1:00 p.m., Eastern time on June 20, 1988.

FOR FURTHER INFORMATION CONTACT: Lori Williams, Office of Wetlands Protection (A-104F), U.S. Environmental Protection Agency, Washington, DC 20460, (202) 382-5043.

SUPPLEMENTARY INFORMATION: This final rule contains the 404 program definitions and 404(f)(1) permit exemptions in addition to the procedures and criteria used in approving, reviewing and withdrawing approval of 404 State programs. Part 232 basically recodifies the existing 404 program definitions and 404(f)(1) permit exemptions in a new, separate part of eliminate any confusion about their applicability. Part 232 applies to both the Federal and State programs. Part 233 revises the procedures and criteria used in approving, reviewing and withdrawing approval of 404 State programs. These final rules provide the States more flexibility in program design and administration while still meeting the requirements and objectives of the Act.

This rule was proposed on October 2, 1984 at 49 FR 39012. The notice invited public comments for a 60-day period ending December 3, 1984. On December 10, 1984 (49 FR 48064), the comment period was extended to January 2, 1985. Thirty-eight comments were received—15 State agencies, 10 environmental groups, 6 industry groups, 4 Federal agencies, and 3 others.

The comments covered the full range of views, ranging from those which indicated that more streamlining is required to those which indicated that the proposed regulations increased flexibility at the expense of environmental protection.

In addition to the more significant revisions described in the preamble, we have made minor editorial and content changes from the proposal. We have also renumbered the sections in Part 233 to close the large gaps in numbering in the proposal.

It is the agency's intent that 40 CFR Part 124 no longer applies to 404 State programs. We will be publishing technical, conforming regulations in the near future.

The following summarizes the major comments and EPA's response to them.

Response to Comments and Explanation of Changes

Part 232—404 Program Definitions, Exempt Activities Not Requiring 404 Permits

Section 232.2(b): In response to comment, we have revised the proposed definition of "application" for clarity.

Section 232.2 (e) and (f): The definition of "discharge of dredged material" and "discharge of fill material" were modified for consistency with the Corps regulations (33 CFR 323.2 (d) and (f)).

Section 232.2(j): We received comment that our definition of "general permit" is different from the Corps' definition (33 CFR 323.2(n)). The proposed definition was taken from the Act (404(e)(1)) and, therefore, has been retained in the final regulation.

Section 232.2(i): Under Section 404 of the Act, the Corps (and States approved by EPA) issue permits for discharges of dredged and fill material into waters of the U.S. Under Section 402, EPA (and States approved by EPA) issue permits for discharges of all other pollutants into waters of the U.S. In January 1986 the Corps and EPA entered into a Memorandum of Agreement (MOA) to resolve a longstanding difference over the appropriate Clean Water Act program to regulate certain discharges of solid wastes into waters of the U.S. The Corps issued its definition of "fill material" in 1977, which provided that only those solid wastes discharged with the primary purpose of replacing an aquatic area or of changing the bottom elevation of a waterbody are regulated under the Corps' 404 program. These discharges include discharges of pollutants intended to fill a regulated wetland to create fast land for development. The Corps' definition excludes pollutants discharged with the primary purpose to dispose of wastes which, under the Corps' definition, would be regulated under Section 402. Under EPA's definition of "fill material," all such solid waste discharges would be regulated under Section 404, regardless of the primary purpose of the discharger. The difference complicated the regulatory program for some solid wastes discharged into waters of the U.S.

The MOA provides an interim arrangement between the agencies for controlling these discharges. In the longer term EPA and Army agree that consideration given to the control of discharges of solid waste both in waters of the U.S. and upland should take into account the results of studies being implemented under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act (RCRA). The main focus of the interim arrangement is to ensure an effective enforcement program under Section 309 of the Act of controlling discharges of solid and semi-solid wastes into waters of the U.S. for the purpose of dispoal of waste. When warranted, EPA will normally initiate section 309 action to control such unauthorized discharges. If it becomes necessary to determine whether Section 402 or 404 applies to an ongoing or proposed discharge, the determination will be based upon criteria in the agreement, which provide, *inter alia,* for certain homogeneous wastes to be regulated under the Section 402 Program and certain heterogeneous wastes to be regulated under the Section 404 Program, subject to certain criteria. This agreement does not affect the regulatory requirements for materials discharged into waters of the U.S. for the primary purpose of replacing an aquatic area or of changing the bottom elevation of a water body. Discharges listed in the Corps definition of "discharge of fill material" (33 CFR 323.2(1)) remain subject to Section 404 even if they occur in association with discharges of waste meeting the criteria in the agreement for Section 402 discharges.

Unless extended by mutual agreement, the MOA will expire at such time as EPA has accomplished specified steps in its implementation of RCRA. In the meantime, these regulations simply repromulgate EPA's existing definition of fill material.

Section 232.2 (q) and (r): Several comments were directed toward the

definitions of "waters of the United States" and wetlands." The commentors suggested that these definitions exceed the original intent of Congress.

The legislative history of the Act, from both 1972 and 1977, emphasizes Congress' intent that the jurisdiction of the Act over waters of the United States reflect the maximum extent permissible under the Commerce Clause of the Constitution. The specific definition of wetlands used in these regulations was originally promulgated in 1977 (prior to the 1977 Amendments to the Act) and has been approved in numerous courts, most recently by the Supreme Court in *U.S.* v. *Riverside Bayview Homes Inc.* (106 S.Ct. 455 (Dec. 4, 1985)). The overall definition of waters of the United States has also been approved by the courts, both in its current articulation and in earlier versions. Therefore, we see no need to change these definitions to narrow their coverage.

Several questions have arisen about this application of this definition to isolated waters which are or could be used by migratory birds and endangered species. As the Agency explained in an opinion by the General Counsel dated September 12, 1985, if evidence reasonably indicates that isolated waters are or would be used by migratory birds or endangered species, they are covered by EPA's regulation. Of course, the clearest evidence would be evidence showing actual use in at least a portion of the waterbody. In adition, if a particular waterbody shares the characteristics of other waterbodies whose use by and value to migratory birds as well established, and those characteristics make it likely that the waterbody in question would also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used). Endangered species are, almost by definition, rare. Therefore, in the case of endangered species, if there is no evidence of actual use of the waterbody (or similar waters in the area) by the species in question, one could actually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. However, in each case a specific determination of jurisdiction would have to be made, and would turn on the particular facts.

For clarity and consistency, we are adding the following language from the preamble to the Corps' regulations published on November 13, 1986 (51 FR 41217). This language clarifies some cases that typically are or are not considered "waters of the United States."

"Waters of the United States" typically include the following waters:

- Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- Which are or would be used as habitat by other migratory birds which cross State lines; or
- Which are or would be used as habitat for endangered species; or
- Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "waters of the United States." However, EPA reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. Pursuant to agreements with EPA, the permitting authority also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

Non-tidal drainage and irrigation ditches excavated on dry land.

- Artificially irrigated areas which would revert to upland if the irrigation ceased.
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.

Section 232.3: The 1977 Clean Water Act provided for specific exemptions (404(f)(1)) from permitting requirements. EPA's 1980 Consolidated Permit Regulations promulgated regulations spelling out the scope of the exempted activities. The October 2, 1984, publication proposed several substantive revisions to the 404(f)(1) exemptions, as well as organizational changes. This rulemaking finalizes the organizational changes, but finalizes only one of the proposed substantive revisions. That revision substitutes "one year from discovery" for the previous "one year from formation" in § 232.2(d)(3)(i)(D), which exempts as minor drainage certain discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages. This rule also includes the revised irrigation ditch provision which was the subject of a separate rulemaking (40 CFR 233.35(a)(3), December 20, 1984). Additionally, we have made the note following § 232.3(b) more explicit to clarify that a conversion of wetlands to non-wetlands is (and has been) considered a "change in use." Apart from these changes, it appears, based on the comments received, that the regulated sector is familiar with the existing language and that no additional clarification or improvement is now needed.

One commenter suggested that the Best Management Practices (BMPs) for the exemption from permitting for construction or maintenance of farm roads, forest roads or temporary roads for moving mining equipment are complex and difficult to administer and should be left to negotiation between the State and EPA for inclusion in the Memorandum of Agreement (§ 233.13). These BMPs are the same BMPs that are required for exemption from Federal permitting requirements. These BMPs were promulgated in 1980 and have not been the subject of significant comment or complaint since then. A discharger under an approved State program should meet the same requirements as under the Federal program.

Part 233—State Section 404 Program Assumption Regulations

We received several comments expressing concern that the proposed regulations would weaken Federal responsibilities, such as those in the Fish and Wildlife Coordination Act, Endangered Species Act, and National Environmental Policy Act. When a State assumes the 404 permitting responsibility, these statutes usually no longer apply, since these statutes only apply to Federal actions. When a State assumes the program, the permit decision is a State action, not a Federal action. However, a Federal oversight role is clearly established by section 404(j) of the Act. Therefore, the altered Federal role after program approval is a function of the statutory scheme, not these regulations.

Section 233.1: Several comments were received on partial State programs, ranging from the view that partial programs should not be allowed to the

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 123, and 124

[FRL-3834-7]

RIN 2040-AA79

National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Today's final rule begins to implement section 402(p) of the Clean Water Act (CWA) (added by section 405 of the Water Quality Act of 1987 (WQA)), which requires the Environmental Protection Agency (EPA) to establish regulations setting forth National Pollutant Discharge Elimination System (NPDES) permit application requirements for: storm water discharges associated with industrial activity; discharges from a municipal separate storm sewer system serving a population of 250,000 or more; and discharges from municipal separate storm sewer systems serving a population of 100,000 or more, but less than 250,000.

Today's rule also clarifies the requirements of section 401 of the WQA, which amended CWA section 402(1)(2) to provide that NPDES permits shall not be required for discharges of storm water 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 (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 product, finished product, byproduct, or waste product located on the site of such operations. This rule sets forth NPDES permit application requirements addressing storm water discharges associated with industrial activity and storm water discharges from large and medium municipal separate storm sewer systems.

DATES: This final rule becomes effective December 17, 1990. In accordance with 40 CFR 23.2, this rule shall be considered final for purposes of judicial review on November 30, 1990, at 1 p.m. eastern daylight time. The public record is located at EPA Headquarters, EPA Public Information Reference Unit, room 2402, 401 M Street SW., Washington DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For further information on the rule contact: Thomas J. Seaton, Kevin Weiss, or Michael Mitchell Office of Water Enforcement and Permits (EN-336), United States Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 475-9518.

SUPPLEMENTARY INFORMATION:

SUPPLEMENTARY INFORMATION:

I. Background and Water Quality Concerns

The 1972 amendments to the Federal Water Pollution Control Act (referred to as the Clean Water Act or CWA), prohibit the discharge of any pollutant to navigable waters from a point source unless the discharge is authorized by an NPDES permit. Efforts to improve water quality under the NPDES program traditionally and primarily focused on reducing pollutants in discharges of industrial process wastewater and municipal sewage. This program emphasis developed for a number of reasons. At the onset of the program in 1972, many sources of industrial process wastewater and municipal sewage were not adequately controlled and represented pressing environmental problems. In addition, sewage outfalls and industrial process discharges were easily identified as responsible for poor, often drastically degraded, water quality conditions. However, as pollution control measures were initially

activity" which must be covered by an individual or general permit pursuant to today's rule.

EPA would also note that individual facilities have the burden of determining whether a permit application should be submitted to address a point source discharge. Those unsure of the classification of storm water flow from a facility, should file permit applications addressing the flow, or prior to submitting the application consult permitting authorities for clarification.

One commenter stated that "point source" for this rulemaking should be defined, for the purposes of achieving better water quality, as those areas where "discharges leave the municipal [separate storm sewer] system." EPA notes in response that "point source" as currently defined will address such discharges, while keeping the definition of discharge and point source within the framework of the NPDES program, and without adding potentially confusing and ambiguous additional definitions to the regulation. If this comment is asserting that the term point source should not include discharges from sources through the municipal system, EPA disagrees. As discussed in detail below, discharges through municipal separate storm sewer systems which are not connected to an operable treatment works are discharges subject to NPDES permit requirements at (40 CFR 122.3(c)), and may properly be deemed point sources.

One industry argued that the definition of "point source" should be modified for storm water discharges so as to exclude discharges from land that is not artificially graded and which has a propensity to form channels where precipitation runs off. EPA intends to embrace the broadest possible definition of point source consistent with the legislative intent of the CWA and court interpretations to include any identifiable conveyance from which pollutants might enter the waters of the United States. In most court cases interpreting the term "point source", the term has been interpreted broadly. For example, the holding in *Sierra Club* v. *Abston Construction Co., Inc.*, 620 F.2d 41 (5th Cir. 1980) indicates that changing the surface of land or establishing grading patterns on land will result in a point source where the runoff from the site is ultimately discharged to waters of the United States:

> Simple erosion over the material surface, resulting in the discharge of water and other materials into navigable waters, does not constitute a point source discharge, absent some effort to *change the surface*, to *direct* the water flow or otherwise impede its progress * * * Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the (discharger) at least initially collected or channeled the water and other materials. A point source of pollution may also be present where (dischargers) design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the (dischargers) have done nothing beyond the mere collection of rock and other materials * * * Nothing in the Act relieves (dischargers) from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water. Conveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a * * * drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act." 620 F.2d at 45 (emphasis added).

Under this approach, point source discharges of storm water result from structures which increase the imperviousness of the ground which acts to collect runoff, with runoff being conveyed along the resulting drainage or grading patterns.

The entire thrust of today's regulation is to control pollutants that enter receiving water from storm water conveyances. It is these conveyances that will carry the largest volume of water and higher levels of pollutants. The storm water permit application process and permit conditions will address circumstances and discharges peculiar to individual facilities.

One industry commented that the definition of waters of the State under some State NPDES programs included municipal storm sewer systems. The commenter was concerned that certain industrial facilities discharging through municipal storm sewers in these states would be required to obtain an NPDES permit, despite EPA's proposal not to require permits from such facilities generally. In response, EPA notes that section 510 of the CWA, approved States are able to have stricter requirements in their NPDES program. In approved NPDES States, the definition of waters of the State controls with regard to what constitutes a discharge to a water body. However, EPA believes that this will have little impact, since, as discussed below, all industrial dischargers, including those discharging through municipal separate storm sewer systems, will be subject to general or individual NPDES permits, regardless of any additional State requirements.

One municipality commented that neither the term "point source" nor "discharge" should be used in conjunction with industrial releases into urban storm water systems because that gives the impression that such systems are navigable waters. EPA disagrees that any confusion should result from the use of these terms in this context. In this rulemaking, EPA always addresses such discharges as "discharges through municipal separate storm sewer systems" as opposed to "discharges to waters of the United States." Nonetheless, such industrial discharges through municipal storm sewer systems are subject to the requirements of today's rule, as discussed elsewhere.

One commenter desired clarification with regard to what constituted an outfall, and if an outfall could be a pipe that connected two storm water conveyances. This rulemaking defines outfall as a point of discharge into the waters of the United States, and not a conveyance which connects to Sections of municipal separate storm sewer. In response to another comment, this rulemaking only addresses discharges to waters of United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body. *See, e.g., Exxon Coro.* v. *Train*, 554 F.2d 1310, 1312 n.1 (5th Cir. 1977); *McClellan Ecological Seepage Situation* v. *Weinberger*, 707 F.Supp. 1182, 1195–96 (E.D. Cal. 1988)).

In the WQA and other places, the term "storm water" is presented as a single word. Numerous comments were received by EPA as to the appropriate spelling. Many of these comments recommended that two words for storm water is appropriate. EPA has decided to use an approach consistent with the Government Printing Office's approved form where storm water appears as two words.

C. Responsibility for Storm Water Discharges Associated With Industrial Activity Through Municipal Separate Storm Sewers

The December 7, 1988, notice of proposed rulemaking requested comments on the appropriate permitting scheme for storm water discharges associated with industrial activity through municipal separate storm sewers. EPA proposed a permitting scheme that would define the requirement to obtain coverage under an NPDES permit for a storm water discharge associated with industrial activity through a municipal separate storm sewer in terms of the classification of the municipal separate storm sewer. EPA proposed holding municipal operators of large or medium

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[WH-FRL-4038-8]

Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This rule amends the water quality standards regulation by adding: (1) The procedures by which an Indian Tribe may qualify for treatment as a State for purposes of the Clean Water Act section 303 water quality standards and section 401 certification programs, and (2) a mechanism to resolve unreasonable consequences that may arise from Indian Tribes and States adopting differing water quality standards on common bodies of water.

EFFECTIVE DATE: The rule shall be effective January 13, 1992.

ADDRESSES: The public may inspect the administrative record for this rulemaking and all comments received on the proposed regulation at the Environmental Protection Agency, Standards and Applied Science Division, Office of Science and Technology, room 919 East Tower, 401 M Street, SW., Washington, DC, between the hours of 8 a.m. and 4:30 p.m. on business days. A reasonable fee will be charged for copying. Inquiries can be made by calling 202-260-1315.

FOR FURTHER INFORMATION CONTACT: David K. Sabock, Environmental Protection Agency, Standards and Applied Science Division, (WH-585), 401 M Street, SW., Washington, DC, 20460, (202) 260-1318.

SUPPLEMENTARY INFORMATION: Information in this preamble is organized as follows:

A. Background

Section 303(c) of the Clean Water Act (33 U.S.C. 1313(c)) requires the States to develop, review, and revise water quality standards for all surface waters of the United States. The Environmental Protection Agency's (EPA's) implementing regulations (40 CFR part 131) require that, at a minimum, such standards include designated water uses, in-stream criteria to protect such uses, and an antidegradation policy. EPA's role in the water quality standards program is to review and approve or disapprove the State-adopted water quality standards and, where necessary, to promulgate Federal water quality standards.

Section 401 of the CWA provides that States may grant or deny "certification" for Federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the State's determination regarding whether the proposed activity will comply with the requirements of certain sections of the CWA enumerated in section 401(a)(1). These sections include those requiring water quality standards and effluent limitations. If a State denies certification, the Federal permitting or licensing agency is prohibited from issuing a permit or license. Certifications are subject to objection from downstream States where the downstream State determines that the proposed activity would violate its water quality requirements. Certifications are normally issued by the State in which the discharge originates, but may be issued in certain circumstances by an interstate agency or the Administrator.

The February 4, 1987 Amendments to the Act added a new section 518, which requires EPA to promulgate regulations specifying how the Agency will treat qualified Indian Tribes as States for the purposes of, among others, the section 303 (water quality standards) and section 401 (certification) programs described above. Section 518 also requires EPA, in promulgating these regulations, to establish a mechanism to resolve unreasonable consequences that may result from an Indian Tribe and a State adopting differing water quality standards on common bodies of water.

On September 22, 1989, the Environmental Protection Agency (EPA) proposed amendments to the water quality standards regulations in response to CWA section 518 requirements (see 54 FR 39098). The proposal included amendments that would: (1) Add procedures by which an Indian Tribe could qualify for treatment as a State for purposes of the section 303 water quality standards and section 401 certification programs of the Clean Water Act, and (2) establish a mechanism to resolve unreasonable consequences that may result from an Indian Tribe and a State adopting differing water quality standards on common bodies of water. Pursuant to CWA section 518, the proposal had been prepared in consultation with States and Indian Tribes. The proposal was developed with the assistance of an informal work group composed of representatives from Indian Tribes, States, and EPA. In addition, a national consultation meeting involving States and Tribes was held in Denver, Colorado in June of 1988 for the purpose of obtaining additional comments. Finally, EPA distributed a number of drafts of the proposal to all States and Tribes (following a mailing list of Federally recognized Tribes obtained by the Office of Water) for review and comment prior to issuing the proposed rule.

Public hearings on the September 22, 1989 proposal were held in Phoenix, Arizona on November 14, 1989, Rapid City, South Dakota on November 16, 1989, and Washington, DC on December 5, 1989. A total of 25 people registered at the three hearings. The public comment period closed on December 22, 1989. EPA received a total of 34 written comments on the proposed rule.

EPA notes that more comments were received on the various drafts of the proposed rule than on the proposed rule which was ultimately published. EPA believes that many of the difficult issues were resolved during the consultation period prior to proposal, and that this explains why relatively few comments were received on the proposal and why relatively few changes to the proposal were required in preparing today's final rule. Another reason is that EPA had previously published similar procedures under CWA section 518 for the section 106 water quality management and planning program (54 FR 14354; April 11, 1989).

Additional background information was included in the preamble to the proposed rulemaking.

B. Changes to the Proposed Rule

Two changes were made to the rule as a result of the public comments.

EPA received several comments on the provision of the dispute resolution mechanism which specifies how arbitrators should be selected (see § 131.7(f)(2)). These various comments suggested that such persons should be acceptable to all parties, knowledgeable about water quality standards, knowledgeable about Indian law and Tribal governments, and impartial.

The rule was amended to provide that the Regional Administrator select as arbitrators and panel members individuals who: (1) Are agreeable to all

public participation in water quality standards development. Commenters questioned whether public participation in the adoption of standards by Indian Tribes would be limited to just Indians, just residents of the reservation, or whether the hearing process would be open to interested parties in the areas surrounding the reservation. In general, these commenters requested additional clarification of public participation requirements.

Response: Public participation is not limited in any way to only residents of the area or just Indians. EPA expects that Tribes and States will make every reasonable effort to ensure that possible interested parties are made aware of the hearings on standards. This may require a direct written notice to State or Indian agencies or other Federal agencies. One of the responsibilities of EPA in reviewing State or Indian adopted standards is to assure that a full range of public participation occurred. EPA expects that State representatives will participate in public hearings on the reservation concerning water quality standards and that Tribal representatives will do the same in State hearings.

Standards adopted by either States or Indian Tribes that appear to be based on improper or unduly limited public participation may be disapproved by EPA solely on that basis since the Clean Water Act requires that standards may only be revised or adopted with public participation (see section 303(c)(1) of the Clean Water Act and §§ 131.6(e) and 131.20 (a) and (b) of the Water Quality Standards Regulation in 40 CFR part 131).

Comments on Enforcement of Standards

Comment: Several comments were received on enforcement of Tribal water quality standards. These commenters generally asserted that additional clarification should be provided by EPA. Several commenters noted that EPA should enforce Tribal standards. One commenter assumed that, based on the limited scope of CWA section 518, Tribal standards would be enforced by either EPA or the State.

Response: Enforcement of standards is not directly a component of the standards program regulation. Enforcement is the responsibility of the permitting agency or, in some cases, the agency which adopted the standards, which may be the Tribe, if it qualifies for treatment as a State for administering the NPDES permit program, or EPA or the State if the Tribe does not (see 40 CFR 123.1(h)). Where Tribes lack the requisite criminal enforcement authority, EPA may exercise certain criminal enforcement powers on behalf of Indian Tribes that seek to operate NPDES or State Sludge Management Programs.

4. Other Comments

Comments on Trust Responsibility

Comment: EPA received several comments regarding its assertion that the "Federal trust responsibility" owed to Indian Tribes, as it applies to EPA actions under the CWA, is defined by the terms of the CWA. EPA went on to explain that "the Agency's responsibility is clearly to attempt to resolve * * * disputes [between States and Tribes over standards] consistent with the provision of the [CWA]." 54 FR 39101.

Certain commenters asserted that EPA should explicitly clarify whether the CWA defines any trust obligations to tribes and, if so, where and how that obligation will be expressed. In particular, EPA should explicitly define how the trust responsibility will affect its role in the dispute resolution process. Other commenters not only asked for clarification, but asserted that EPA must state that the Federal-Tribal trust relationship "exists independently of and informs EPA decision making" concerning the CWA and State-Tribal disputes. Still another commenter asked EPA to clarify that the proposed regulations are not to be read as modifying or abrogating EPA's trust responsibility.

Response: EPA believes that the preamble to the proposed rule stated the applicable principles clearly and that no further clarification is needed. EPA recognizes the responsibility owed by the Federal government as trustee for the affairs of Indian Tribes. However, the Agency does not believe the trust responsibility precludes EPA from playing an impartial role in the dispute resolution process.

Furthermore, EPA believes that the concerns of both Tribal and State commenters regarding the trust responsibility's impact on the dispute resolution process and EPA's other activities under today's regulation are likely unfounded. If so appointed by the Regional Administrator, EPA employees will be acting solely as mediators or non-binding arbitrators in the process. Thus, they will not have the power to impose a binding decision on either the Tribe or the State absent prior consent from both sides. Furthermore, if both the Tribe and the State have adopted valid water quality standards approved by EPA, the dispute resolution process would not be able to supersede those standards. Thus, the "trust responsibility" would not affect the outcome of the dispute resolution process and any EPA statements regarding its overall scope would be strictly hypothetical. By the same token, EPA recognizes its duty to work with Tribes who wish to develop and adopt standards and to eliminate all potential barriers to Tribes accomplishing this goal.

Comments on Definitions Proposed for Section 131.3

Comment: EPA should change the proposed definition of a Tribe in section 131.3 to mean any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental powers and functions over a Federal Indian Reservation.

Response: No change was made. The rule reflects the statutory definition.

Comment: What role do standards play in subsurface flows emanating from one jurisdiction that flow into and impact the surface waters of another jurisdiction?

Response: Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters, EPA and most courts addressing the issues have recognized two limited instances where, for the purpose of protecting surface waters and their uses, EPA may exercise authorities that may affect underground waters. First, the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, the affected groundwaters are not considered "waters of the United States" but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters. Second, it is EPA's long-established position that water quality standards are required for certain underground segments of surface waters. See *Kentucky* v. *Train*, 9 ERC 1280 (E.D. Kentucky 1972). In such streams, the subterranean component must be sufficiently stream-like so as to possibly allow the passage of fish and other aquatic organisms from a surface segment of the stream into the underground segment.

Comments on Water Quantity Rights

Comment: Several comments were received regarding water quantity issues. These comments generally asserted that the statement in the preamble to the proposal [54 FR 39101] which indicates that all section 518

DEPARTMENT OF DEFENSE

Department of the Army

Corps of Engineers

33 CFR Parts 323 and 328

ENVIRONMENTAL PROTECTION AGENCY

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

Clean Water Act Regulatory Programs

AGENCIES: U.S. Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are issuing today final regulations that implement the following actions with regard to the Clean Water Act (CWA) Section 404 regulatory program: (1) Modification of the definition of "discharge of dredged material;" (2) clarification of when the placement of pilings is a discharge of fill material; and (3) codification of the current policy that prior converted croplands are not waters of the United States. EPA is also issuing conforming changes to the definition of "waters of the United States" and "navigable waters" in other CWA program regulations. The first two changes implement the settlement agreement in *North Carolina Wildlife Federation* v. *Tulloch*, Civil No. C90–713–CIV–5–BO (E.D.N.C. 1992).

EFFECTIVE DATE: This rule becomes effective on [Insert 30 days from the publication in the **Federal Register**].

FOR FURTHER INFORMATION CONTACT: Mr. Michael Davis, Office of the Assistant Secretary of the Army for Civil Works at (703) 695–1376 or Mr. Sam Collinson (Corps) at (202) 272–0199 or Mr. Gregory Peck (EPA) or Ms. Hazel Groman (EPA) at (202) 260–7799.

SUPPLEMENTARY INFORMATION:

I. Background

On February 28, 1992, the Federal government agreed to settle a lawsuit brought by the North Carolina Wildlife Federation and the National Wildlife Federation (*North Carolina Wildlife Federation, et al.* v. *Tulloch*, Civil No. C90–713–CIV–5–BO (E.D.N.C. 1992)) involving CWA Section 404 as it pertains to certain activities in waters of the United States. In accordance with the settlement agreement, the Corps and EPA proposed changes to their regulations on June 16, 1992 to clarify that mechanized landclearing, ditching, channelization, and other excavation activities involve discharges of dredged material when performed in waters of the United States, and that these activities would be regulated under Section 404 of the CWA when they have or would have the effect of destroying or degrading waters of the United States, including wetlands. 57 FR 26894. In addition, the Corps and EPA agreed to propose to incorporate into the Section 404 regulations the substantive provisions of Corps Regulatory Guidance Letter (RGL) 90–8 to clarify the circumstances under which the placement of pilings have the effect of "fill material" and is subject to regulation under Section 404. The agencies stated that the proposal would not affect, in any manner, the existing statutory exemptions for normal farming, ranching, and silviculture activities in Section 404(f)(1).

In addition to the changes proposed in accordance with the settlement agreement, the Corps and EPA proposed to incorporate into the Section 404 regulations the substantive provisions of Corps RGL 90–7 to clarify that prior converted croplands are not waters of the United States for purposes of the CWA. EPA also proposed conforming changes to the definitions of "waters of the United States" and "navigable waters" for all other CWA program regulations contained in 40 CFR parts 110, 112, 116, 117, 122, and 401 to provide consistent definitions in all CWA program regulations.

Overall, these changes were proposed in order to promote national consistency, more clearly notify the public of regulatory requirements, ensure that the Section 404 regulatory program is more equitable to the regulated public, enhance the protection of waters of the United States, and clarify which areas in agricultural crop production would not be regulated as waters of the United States.

The proposed changes were published in the **Federal Register** on June 16, 1992, for public comment. The comment period closed on August 17, 1992. We received over 6,300 comments. The significant issues raised by public comments and the changes that have been made from the proposed rule are discussed below.

II. General Comments on the Proposed Rule

Several commentors raised general issues with regard to the proposed rule. These comments are addressed first below. Comments relating to the specific components of the rule are addressed in the following sections of this preamble.

Several commentors expressed concern that the agencies had agreed to propose these revisions as part of a settlement agreement with plaintiffs in the *Tulloch* lawsuit. These commentors felt that this procedural posture for the rulemaking impaired the agencies' ability to conduct the rulemaking impartially and based upon a good faith consideration of all public comments, as required by the Administrative Procedure Act. The commitments the agencies entered in the settlement of the *Tulloch* case have not, in any way, bound the agencies to reach a predetermined outcome in this rulemaking. The agencies agreed in the settlement agreement to propose certain revisions to their regulations in exchange for the plaintiffs' agreement to stay that litigation. The settlement agreement in no way binds the agencies to an outcome in the final rule, but provides that the plaintiffs in the lawsuit will dismiss their action if the final rule is "substantially similar" in language and effect as the proposal. The agencies do not view the settlement agreement as narrowing our discretion in any manner to adopt a final rule that best reflects relevant legal and policy considerations under Section 404. Because this rulemaking is of great national significance to the Section 404 program, EPA and the Corps have pursued this rulemaking based upon careful consideration of all the policy issues raised in the proposal and addressed by public comments. The agencies would not adopt policies in this final rule that we do not believe are appropriate merely to avoid reinitiation of litigation in the *Tulloch* lawsuit. As reflected by the discussion in this preamble, the agencies have fully considered all the public comments received on the proposal, and we have therefore fully complied with the procedural requirements of the Administrative Procedure Act.

Several commentors recommended that no decision on the final rule be made until a wetland definition was agreed upon by Congress. Two commentors stated that the wetlands definition was too broad and that it was not applicable across the country. Similarly, two commentors stated that because the rulemaking regarding the wetlands delineation manual was not yet complete, it was inappropriate to propose changes that would expand activities in wetlands covered under the program, thereby increasing uncertainty about the Federal government's regulation of wetlands. Several commentors were concerned about how

the use of prior converted croplands for non-agricultural uses. One commentor objected to the fact that there is no mechanism providing for "recapture" into Section 404 jurisdiction of those prior converted croplands that revert back to wetlands. One commentor objected to the requirement that a prior converted cropland is considered abandoned unless it is used for the production of an agricultural commodity at a regular interval, stating that it should include use for any agricultural production, including hay and pastureland.

The Corps and EPA will use the SCS provisions on "abandonment," thereby ensuring that PC cropland that is abandoned within the meaning of those provisions and which exhibit wetlands characteristics will be considered wetlands subject to Section 404 regulation. While we agree that SCS's abandonment provisions may be complex, SCS has been applying these provisions for several years in implementing the Swampbuster program, and farmers have become familiar with the standards used to determine whether a property has been "abandoned." If EPA and the Corps were to use different abandonment provisions in implementing today's rule, we believe the resulting inconsistency between the two regulatory programs would serve only to create confusion as to which standards are applicable to the same parcel of property. In response to commentors who opposed the use of PC croplands for non-agricultural uses, the agencies note that today's rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA jurisdiction is made regardless of the types or impacts of the activities that may occur in those areas. The agencies also note that today's rule will provide a mechanism for "recapturing" into Section 404 jurisdiction those PC croplands that revert back to wetlands where the PC cropland has been abandoned. Finally, in response to the request that a PC cropland not be considered abandoned if the area is used for any agricultural production, regardless of whether the crop is an agricultural commodity, we note that SCS's abandonment provisions do recognize that an area may be used for other agricultural activities and not be considered abandoned. In particular, PC cropland which now meets wetland criteria is considered to be abandoned *unless*: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.

H. Grandfather Clause

One commentor said that RGL 90–7 results in the retroactive grandfathering of illegal drainage activities between 1977 and 1985. It has been and continues to be the position of the Corps and EPA that unauthorized discharge activity cannot eliminate Section 404 jurisdiction. Therefore, wetlands that were converted to prior converted cropland between 1972 and 1985 as a result of unauthorized discharges of dredged or fill material do not constitute "prior converted cropland" within the meaning of today's rule and remain "waters of the United States" subject to Section 404 regulation.

VI. Environmental Documentation

Some commentors wanted the Corps to prepare an Environmental Impact Statement (EIS), arguing that this rulemaking constitutes a major federal action significantly affecting the quality of the human environment. Some commenters felt that since these rules protected wetlands, an EIS would be needed to determine such environmental effects as mosquito infestation, odors, and gases. Others wanted an EIS prepared because they felt that these rules would result in a loss of wetlands. One commentor requested that the Corps prepare an EIS for farming, forestry and ranching disturbances and other questionable wetland impacts before proceeding with further rulemaking.

Section 511(c) of the CWA 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 with the meaning of NEPA. In this joint rulemaking by EPA and the Corps, these two agencies are making substantively identical revisions to their regulations in order to better carry out the purposes of Section 404 of the CWA. EPA is exempt from NEPA under Section 511(c), and we believe that, under the circumstances of this joint rulemaking, the Corps is exempt as well.

Nonetheless, the Corps has prepared an environmental assessment and determined that there will not be a significant impact on the quality of the human environment. This assessment is contained in the record for this rulemaking. Consequently, an EIS has not been prepared by the Corps. Furthermore, appropriate environmental documentation, including an EIS when required, is prepared by the Corps for all permit decisions.

VII. Executive Order 12291 and the Regulatory Flexibility Act

Numerous commentors indicated that a regulatory impact analysis under Executive Order 12291 should be done because the rule would allegedly cause an increase in the Corps' workload and in costs to permit applicants and because the rule will allegedly result in additional encumbrances or burdens on the public in the form of tax increases, project delays, project scrutiny and increased project costs. One commentor felt that agency resources would be diverted from larger, more significant projects by this rule. EPA and the Corps do not believe that this regulation meets the definition of a major rule under Executive Order 12291, and we therefore have not prepared a regulatory impact analysis for the rule.

Some commentors also argued that the agencies were required to perform a Regulatory Flexibility Analysis for this regulation under the Regulatory Flexibility Act, 5 U.S.C. 601–612. EPA and the Department of the Army certify, pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980, that this regulation will not have a significant impact on a substantial number of entities. Therefore we have not prepared a regulatory flexibility analysis for this rule.

EPA and the Corps do not believe that this regulation will have a significant impact on a substantial number of small entities first because most of the components of this rule merely codify current agency policies and these aspects of the rule will therefore not result in any increased regulatory burden on the public, including small businesses. Since 1990, the Corps has followed the policy under RGL 90–5 of regulating mechanized landclearing activities under Section 404. Similarly, RGL 90–8 established, in December 1990, the Corps policy of regulating the placement of pilings when the activity would have the effect of discharge of fill material. The amendment of the definition of waters of the United States in today's rule also codifies the agencies' current policy of not regulating prior converted cropland under Section 404, as reflected by Corps RGL 90–7. RGL 90–7, moreover, eased the regulatory burden of the Section 404 program by excluding prior converted cropland from coverage under this provision.

EPA and the Corps believe, moreover, that coverage of discharges associated with ditching, channelization and other

92D CONGRESS
1ST SESSION

H. R. 11896

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 19, 1971

Mr. BLATNIK (for himself, Mr. JONES of Alabama, Mr. KLUCZYNSKI, Mr. WRIGHT, Mr. GRAY, Mr. CLARK, Mr. EDMONDSON, Mr. JOHNSON of California, Mr. DORN, Mr. HENDERSON, Mr. ROBERTS, Mr. KEE, Mr. HOWARD, Mr. ANDERSON of California, Mr. CAFFERY, Mr. ROE, Mr. COLLINS of Illinois, Mr. RONCALIO, Mr. BEGICH, Mr. MCCORMACK, Mr. RANGEL, Mr. JAMES V. STANTON, Mrs. ABZUG, Mr. HARSHA, and Mr. GROVER) introduced the following bill; which was referred to the Committee on Public Works

A BILL

To amend the Federal Water Pollution Control Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Water Pollution Control Act Amendments of 1971".

SEC. 2. The Federal Water Pollution Control Act is amended to read as follows:

I—O

this subsection if such applicant is not in total compliance with all applicable water quality requirements under this Act, or otherwise does not have a satisfactory record with respect to environmental quality.

"(2) The Administrator shall award a certificate or plaque of suitable design to each industrial organization or political subdivision which qualifies for such recognition under regulations established under this subsection.

"(3) The President of the United States, the Governor of the appropriate State, the Speaker of the House of Representatives, and the President pro tempore of the Senate shall be notified of the award by the Administrator and the awarding of such recognition shall be published in the Federal Register.

"(f) Upon the request of a State water pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this Act.

"GENERAL DEFINITIONS

"SEC. 502. Except as otherwise specifically provided, when used in this Act:

"(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 water 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 of waters 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, and the Trust Territory of the Pacific Islands; or with respect to any river basin within the jurisdiction of an agency or instrumentality of the United States constituted pursuant to an Act of Congress and designated by the Governors or by statutes of the participating States in such basin, such basin agency, if the Administrator determines that such agency has sufficient authority to implement this Act for such river basin.

"(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 208 of this Act.

"(5) The term 'person' means an individual, corporation, partnership, association, State, municipality, commis-

sion, or political subdivision of a State, or any interstate body.

"(6) The term 'pollutant' means, but is not limited to, 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, agricultural, and other waste introduced into water. This term does not mean (A) 'sewage from vessels' within the meaning of section 312 of this Act; 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.

"(7) The term 'pollution' means the man-made or man-induced alteration of the natural chemical, physical, biological, and radiological integrity of water.

"(8) The term 'navigable waters' means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes.

"(9) 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

S. REP. 92-414, S. Rep. No. 414, 92ND Cong., 2ND Sess. 1972, 1972 U.S.C.C.A.N. 3668, 1971 WL 11307 (Leg.Hist.)

***3668** P.L. 92-500, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

Senate Report (Public Works Committee) No. 92-414,
Oct. 28, 1971 (To accompany S. 2770)
House Report (Public Works Committee) No. 92-911,
Mar. 11, 1972 (To accompany H.R. 11896)
Senate Conference Report No. 92-1236,
September 28, 1972 (To accompany S. 2770)
House Conference Report No. 92-1465,
September 28, 1972 (To accompany S. 2770)
Cong. Record Vol. 117 (1971)
Cong. Record Vol. 118 (1972)
DATES OF CONSIDERATION AND PASSAGE
Senate November 2, 1971; October 4, 1972
House March 29, October 4, 1972

The Senate bill was passed in lieu of the House bill. The Senate Report and the Senate Conference Report are set out.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

SENATE REPORT NO. 92-414

Oct. 28, 1971

THE Committee on Public Works, to which was referred the bill (S. 2770) Federal Water Pollution Control Act Amendments of 1971, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass. An original bill (S. 2770) is reported in lieu of S. 523, S. 1012, S. 1013, S. 1014, S. 1017 and S. 1238 which were considered by the committee.

***3669** GENERAL STATEMENT

HISTORY

For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States.

The 1948 legislation, for example, assigned powers for enforcement in water pollution control to Governors of the States. The Federal agencies were authorized only to support research in water pollution, projects in new technology, and limited loans to assist the financing of treatment plants.

Given these basic provisions, State and Federal efforts in water pollution control went forward with little legislative change for nearly 10 years. It was a period of transition. To most Americans, the problems of water pollution control appeared to be localized and moderate.

In 1956, the Congress approved the first major legislative changes in the water pollution control program. Federal grants were authorized to assist States in preparing plans for pollution control and to help localities in building treatment plants. The authority for research and technical assistance was increased and broadened. Measures for controlling pollution of interstate waters were tightened.

Section 507 of the bill is patterned after the National Labor Management Act and a similar provision in Public Law 91-173 relating to the health and safety of the Nation's coal miners. Under this section employees and union officials could help assure that employers do not contribute to the degradation of our environment.

Any worker who is called upon to testify or who gives information with respect to an alleged violation of a pollution control law by his employer or who files or institutes any proceeding to enforce a pollution control law against an employer may be subject to discrimination.

The section would prohibit any firing or discrimination and would provide an administrative procedure under which the employee or his representative could seek redress for any violation of this prohibition. The Secretary of Labor would investigate such charges and issue findings and a decision which would be subject to judicial review. If the Secretary should find a violation, he would issue orders to abate it, including, where appropriate, the rehiring of the employee to his former position with back pay. Also, the person committing the ***3749** violation could be assessed the costs incurred by the employee to obtain redress.

This provision would safeguard the rights of employees, but it should not encourage employees to frivolously allege violations since the employee would have to pay the costs of the proceedings unless the violation is proved.

In order to avoid abuse of the protection afforded under this Section the Committee has added a provision which would deny its applicability to any Employee who, without direction from his employer, deliberately violates or wilfully contributed to a violation of any standard, requirement or regulation under the Act.

SECTION 508-FEDERAL PROCUREMENT

No Federal agency may enter into any contract involving any facility that has been convicted under Section 309. The prohibition continues until EPA certifies that the violation that led to the conviction no longer exists.

The President may exempt any contract if the exemption is in the paramount interest of the United States. The President is required to submit an annual report on implementing this section.

The Committee, as in the Clean Air Amendments of 1970, has reported a bill that would provide that the Federal Government will not patronize or subsidize polluters throught its procurement practices and policies.

Section 508 would make any person or corporation who fails to comply with a court order issued under this Act or who is convicted of a knowing violation of any requirement under the Act becomes ineligible for a Federal contract for any work to be done at the polluting facility. This ineligibility would continue until the Administrator certifies that the facility is in compliance with the court order or the provisions of the Act.

This section would be limited, whenever feasible and reasonable, to contracts affecting only the facility not in compliance, rather than an entire corporate entity or operating division.

There might be cases where a plant could not participate in Federal contract due to a violation but another plant owned by the same company might bid and transfer other work to the first plant. This type of action would circumvent the intent of this provision. In this case, the company's second facility should also be barred from bidding until the first plant returns to compliance.

There would also be instances where a second plant within a corporation was seeking a contract unrelated to the violation at the first plant. In such a case, the unrelated facility should be permitted to bid and receive Federal contracts.

The bill also mandates that the President publish new Federal contract guidelines that will enable the Federal Government to exercise its procurement power to assure compliance with the Federal Water Pollution Control Act and to suspend or revoke a contract once the contracting party is found in non-compliance with the requirements of the Act.

The effectiveness of this section would depend on fast, accurate dissemination of information. All Federal agencies would have to be ***3750** rapidly apprised of any abatement order or conviction which would bar a facility from eligibility for Federal contracts. The Administrator would also have to act expeditiously to certify that a facility had achieved compliance, and notify all Federal agencies of that fact. Delays in reporting such information, leading to inaccurate public disclosures, would quickly render this section unworkable.

SECTION 509. ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

EPA may issue subpoenas. Trade secrets are protected from public reporting. Fees are granted to witnesses. Any suit against a Federal standard must be filed in the U.S. Court of Appeals in Washington, D.C. Suits for review of a Section 402 permit must be filed in the Court of Appeals for the appropriate circuit. Such suits must be filed within thirty days of promulgation or approval.

Section 509 of the bill includes provisions relating to subpoenas, specifies the courts in which certain appeals may be prosecuted, and the circumstances under which additional evidence may be ordered by the courts to be taken by the Administrator.

As noted in the discussion of section 305, the Administrator is required to furnish information to the Congress and the public on control technology and the status of progress toward eliminating the discharge of pollutants. It should be noted that the authority to subpoena records and other information as contained in section 509 is available to support the acquisition by the Administrator of information necessary to fully apprise Congress of the official status of the control technology and success of the program so that Congress will be in a position to assess accurately water pollution control needs and make any appropriate adjustments in policy on legislation.

One of the uncertainties in the existing Federal Water Pollution Control Act is the availability or opportunity for judicial review of administratively developed and promulgated requirements, standards and regulations. Moreover, the effect on the general program of a review itself is not clear.

Any person has standing in court to challenge administratively developed standards, rules and regulations under the Act. The courts are increasingly adapting this test to what administrative actions are reviewable. In several recent cases (Environmental Defense Fund, Inc. v. Hardin (C.A. No. 23,813, May 28, 1970); Barlow v. Collins (397 U.S. 159, 167 [1] (1970)); Abbott Laboratories v. Gardiner (387 U.S. 136, 140-41 [2] (1967))) the Courts have held that even in matters committed by statute to administrative discretion, preclusion of judicial review ‘is not lightly to be inferred . . . it requires a showing of clear evidence of legislative intent.‘ (E.D.F. v. Hardin, supra, p.7). The Courts have granted this review to those being regulated and to those who seek ‘to protect the public interest in the proper administration of a regulatory system enacted for their benefit.‘ (E.D.F. v. Hardin supra, p. 6). Since precluding review does not appear to be warranted or desirable, the bill would specifically provide for such review within controlled time periods. Of course, the person regulated would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applies to him alone.

***3751** Because many of these administrative actions are national in scope and require even and consistent national application, including the approval of State programs under Section 402. This section specifies that any review of such actions shall be in the United States Court of Appeals for the District of Columbia. For review of permits issued under section 402 and other actions which run only to one region, the section places jurisdiction in the U.S. Court of Appeals for the Circuit in which the affected State or region, or portion thereof, is located.

92d Congress, 2d Session House Report No. 92-911

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH ADDITIONAL AND SUPPLEMENTAL VIEWS

H.R. 11896

TO AMEND THE FEDERAL WATER POLLUTION CONTROL ACT

MARCH 11, 1972.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

U.S. GOVERNMENT PRINTING OFFICE
74-610 WASHINGTON : 1972

(8) Navigable Waters
(9) Territorial Seas
(10) Contiguous Zone
(11) Ocean
(12) Effluent Limitation
(13) Discharge of a Pollutant and Discharge of Pollutants
(14) Toxic Pollutant
(15) Point Source
(16) Biological Monitoring
(17) Thermal Discharge
(18) Discharge

One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

The term "pollutant" as defined in the bill includes "radioactive materials." These materials are those not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that Act. "Radioactive materials" encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission. Examples of radioactive material not covered by the Atomic Energy Act, and, therefore, included within the term "pollutant," are radium and accelerator produced isotopes.

It is the intent of the Committee that the exclusion from the term "pollutant" relating to the injection of water, gas, or other materials into wells applies only to the properly executed injection of materials into wells to stimulate the primary, secondary, or subsequent production of crude oil or natural gas, and to the properly executed disposal in wells of brines derived in association with the production of crude oil or natural gas, with appropriate precautions taken to assure that such injection or disposal does not lead to, or make substantially more likely, the degradation of usable water resources. For such exclusion to be effective, the State is required (1) to approve the well used either to facilitate production or for disposal purposes, and (2) to make a determination, based on sufficient investigation and evidence, that such degradation has not taken place and has not been or will not be made substantially more likely as a result of such injection or disposal.

It should be noted that the term "thermal discharge" is defined as the introduction of water into the navigable waters or the waters of the contiguous zone at a temperature different from the ambient temperature of the receiving waters. It is intended that the term "thermal discharge" and the term "discharge of a pollutant" (and "discharge of pollutants") are mutually exclusive.

Section 503—Water Pollution Control Advisory Board

This section continues, with conforming language changes, the provisions of section 9 of the existing law. The per diem allowance for Board members while attending conferences or meetings of the Board is raised from $50 per diem to $100 per diem.

S. CONF. REP. 92-1236, S. Conf. Rep. No. 1236, 92ND Cong., 2ND
Sess. 1972, 1972 U.S.C.C.A.N. 3776, 1972 WL 12735 (Leg.Hist.)

***3776** P.L. 92-500, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

Senate Report (Public Works Committee) No. 92-414,
Oct. 28, 1971 (To accompany S. 2770)
House Report (Public Works Committee) No. 92-911,
Mar. 11, 1972 (To accompany H.R. 11896)
Senate Conference Report No. 92-1236,
September 28, 1972 (To accompany S. 2770)
House Conference Report No. 92-1465,
September 28, 1972 (To accompany S. 2770)
Cong. Record Vol. 117 (1971)
Cong. Record Vol. 118 (1972)
DATES OF CONSIDERATION AND PASSAGE
Senate November 2, 1971; October 4, 1972
House March 29, October 4, 1972

The Senate bill was passed in lieu of the House bill. The Senate Report and the Senate Conference Report are set out.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

SENATE CONFERENCE REPORT NO. 92-1236

September 28, 1972

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2270) to amend the Federal Water Pollution Control Act, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment struck out all of the Senate bill after the enacting clause and inserted a substitute text.

With respect to the amendment of the House, the Senate recedes from its disagreement to the amendment of the House, with an amendment which is a substitute for both the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below except for minor technical and clarifying changes made necessary by reason of the conference agreement.

***3777** SHORT TITLE

Senate bill

Provides that The act may be cited as the ‘Federal Water Pollution Control Act Amendments of 1971‘.

House amendment

Provides that the Act may be cited as the ‘Federal Water Pollution Control Act amendments of 1972‘.

Conference substitute

The conference substitute is the same as the House amendment.

Both the Senate bill and the House amendment provide for complete revisions of the Federal Water Pollution Control Act. This revision would consist of five titles and hereafter the references in this statement are to be sections and titles of the proposed revisions of the Federal Water Pollution Control Act.

TITLE I-RESEARCH AND RELATED PROGRAMS

DECLARATION OF GOALS AND POLICY

Senate bill

Section 101 establishes a policy to eliminate the discharge of pollutants by 1985, restore the natural chemical, physical, and biological integrity of United States waters, and reach an interim goal of water quality for swimming and fish propagation by 1981.

Section 101 also prohibits the discharge of toxic pollutants in 'toxic amounts', provides for Federal financial assistance for construction of waste treatment facilities, develops regional waste treatment management programs, initiates a major research and demonstration effort to find technological methods necessary to eliminate waste discharges, and requires the Administrator of the Environment Protection Agency to develop minimum guidelines for public participation in enforcement of the proposed Act.

House amendment

Section 101 sets an objective of restoring and maintaining the chemical, physical, and biological integrity of United States waters.

To achieve the proposed objective, the amendment establishes two national goals. The goals are to eliminate the discharge of pollutants into navigable waters by 1985, and to have water quality that provides for protection of fish, shellfish, and wildlife, and for recreation in and on water by 1981.

Other national policies stated in the section include Federal assistance for construction of waste treatment facilities, creation of area waste treatment management planning processes in each State, and major research and demonstration efforts to develop technology necessary to achieve the zero-discharge goal.

Section 101(c) calls on the President to encourage foreign countries to set goals which are at least comparable to those of the United States.

Section 101(f) sets a national policy encouraging 'drastic minimization' of paperwork and duplication of efforts, and best utilization of available manpower and funds.

***3778** Section 101(g) would require agencies involved in carrying out the bill to consider all potential impacts of their activities on water, land, and air.

Conference substitute

Section 108 restates section 15 of existing law, except for minor changes.

House amendment

Sections 108(a), (b), and (c) continue the provisions of section 15 of existing law, with minor changes.

Section 108(c) authorized $20 million for projects in the Great Lakes.

Sections 108(d) and (e) require the Corps of Engineers to design and develop a $5 million demonstration waste water management program for Lake Erie.

Conference substitute

Section 108 is the same as the Senate bill and the House amendment except as follows:

(1) Te concept of ‘abatement‘ has been changed to ‘reduction‘ of pollution.

(2) The concept of ‘pollution elimination or control‘ has been changed to ‘pollution prevention, reduction, and elimination‘.

TRAINING GRANTS AND CONTRACTS

Senate bill

Section 109 is the same as existing law with one change. The change authorizes the Administrator to make grants for construction of waste treatment works to provide for necessary education and training facilities for treatment operation and maintenance personnel. Such facilities would be additions to treatment works.

House amendment

Section 109 continues section 16 of existing law.

Conference substitute

Section 109 is the same as the Senate provision with the authorization of grants for the construction of necessary education and training facilities for treatment operation, and maintenance personnel reduced in cost from $1 million to $250 thousand per facility.

ALLOCATION OF TRAINING GRANTS OR CONTRACTS; SCHOLARSHIPS

Senate bill

Sections 110 and 111, training program allocations and scholarships, restate the present law with minor changes.

House amendment

Section 110, application for training grant or contract; allocation of grants or contracts, continues the provisions of section 17 of existing law. Section 111, award of scholarships, contains the provisions of section 18 of existing law.

Conference substitute

Sections 110 and 111 are the same as the Senate bill and the House amendment.

***3785** DEFINITIONS and AUTHORIZATIONS

Senate bill

Section 112 defines the terms used in sections 109 through 112. These definitions are essentially the same as those in section 19 of existing law. The section authorizes $25 million for fiscal 1972 only.

House amendment

Section 112 defines terms used in sections 109 through 112. They are basically the same as those included in section 19 of existing law.

Section 112(c) authorizes $25 million per fiscal year for fiscal 1973 and 1974 to carry out sections 109 through 112.

Conference substitute

This section is the same as the House amendment.

ALASKA VILLAGE DEMONSTRATION PROJECTS

Senate bill

Section 113, Alaska village demonstration projects, restates the present law with an additional $1 million for water rights.

House amendment

Section 113, Alaska village demonstration projects, continues section 20 of existing law and authorizes $2 million.

Conference substitute

This section is the same as the Senate bill and the House amendment, except that the report to Congress is required not later than July 1, 1973, instead of January 1, 1974, as in the House amendment.

POLLUTION CONTROL IN LAKE TAHOE

Senate bill

Section 114 authorizes a demonstration project for control of non-point sources of pollution in the Lake Tahoe Basin.

Section 114(b) authorizes the Administrator to review, in consultation with the Tahoe Regional Planning Agency, any Federal or federally assisted public works project, any expenditures of Federal funds, any Federal licenses or permits, any Federal insurance, and any Federal guarantees of loans in all cases where the Administration judges that such Federal activities may result directly or indirectly in discharges into the navigable waters of the basin.

Section 114(c) requires the Administrator to report to Congress, within 180 days after the date of enactment of the Act and annually thereafter, on the environment impact of development in the basin, adequacy of plans developed by the Tahoe planning agency to maintain and enhance the water quality, and an analysis of demonstration projects authorized by section 114.

Section 114(d) authorizes $6 million to be available until expended.

House amendment

No comparable provision.

Conference substitute

Section 114 of the conference substitute provides that the Administrator, in consultation with the Tahoe Regional Planning Agency, ***3786** the Secretary of Agriculture, and others, shall conduct a study on the adequacy of and the need for extending Federal oversight and control needed in order to preserve the ecology of Lake Tahoe. This study is to include an examination of the interrelationships and responsibilities of various government agencies at all levels with a view to establishing the need for redefining the legal and other arrangements between these levels of government. Such study shall consider the effect of various actions in terms of their environmental impact on the Tahoe Basin, treated as an ecosystem. The report is to be completed within a year, and the authorization is for up to $500,000.

ECONOMIC GROWTH CENTERS

Senate bill

No comparable provision.

House amendment

Section 114 authorizes the Administrator to make supplemental grants to economic growth centers when a center receives a grant for construction of waste treatment facilities. The Administrator would use his discretion in determining the percentage of the supplemental grant, and $5 million is authorized for the supplemental program.

Conference substitute

No comparable provision.

IN-PLACE TOXIC POLLUTANTS

Senate bill

No provision.

House amendment

No provision.

Conference substitute

Section 115 of the conference substitute requires the Administrator to identify the location of in-place pollutants with emphasis on toxic pollutants in harbors and navigable waterways and authorizes the Administrator, acting through the Secretary of the Army, to make contracts for the removal and appropriate disposal of such materials which are in critical port and harbor areas. There is an authorization of $15,000,000 to carry out this section.

TITLE II-GRANTS FOR CONSTRUCTION OF TREATMENT WORKS

PURPOSE

Senate bill

Section 201 provides that the objective of this title is to assist in development of waste treatment management plans and practices to eliminate the discharge of pollutants. To meet the goal, the best practicable technology is required, including the recycling of water, confined disposal of pollutants, and advanced waste treatment technology. Waste management is required on a regional basis.

Beginning is fiscal 1975, the Administrator is authorized to reject any construction grant application that results in any discharge ***3787** of pollutants unless the applicant demonstrates that alternative techniques have been considered and that the proposal will result in the best practicable treatment.

House amendment

Section 201 provides that the purpose of the title is to require and assist the development and implementation of waste treatment management plans and practices. This would require the application of the best practicable waste treatment technology, including reclaiming and recycling water, confined disposal of pollutants, and advance waste treatment technology and aerated treatment irrigation technology.

The section requires that waste treatment management be on an areawide basis to the extent practicable and does not allow the Administrator to approve any grant after July 1, 1973, unless the applicant demonstrates that each sewer collection system discharging into a treatment facility is not subject to excessive infiltration.

Conference substitute

The conference substitute is basically the same as the Senate bill as revised by the House amendment with the exception that subsection (a) is revised to provide that the purpose of the title is to require, and to assist the development and implementation of, waste treatment management plans and practices which will achieve the goals of this Act; and, in subsection (b), waste treatment management plans and practices are required to provide for consideration of advance waste treatment techniques rather than advanced waste treatment technology and aerated treatment spray-irrigation technology.

FEDERAL SHARE

Senate bill

Section 202 provides a minimum Federal grant of 60 percent of the cost for sewage treatment facilities. The maximum would be 70 percent if a State contributed 10 percent of the cost.

House amendment

Section 202(a) increases the Federal share of waste treatment facilities to a maximum of 75 percent. Municipalities are eligible for the 75 percent if the State agrees to provide an additional 15 percent of the costs. The increased percentage is effective for any grant made from funds authorized after June 30, 1971. If a State does not participate in cost sharing, the Federal share is 60 percent. Grants for projects approved between January 1 and July 1 of 1971, for treatment works actual erection of which is not commenced before July 1, 1971, shall, if requested, be increased to 75 per centum. This increased amount shall be paid only if (1) there is an adequate sewage collection system, and (2) there is a certification that the quality of available ground water is insufficient to meet future requirements unless adequately treated effluents are used to replenish the ground water supplies.

Conference substitute

Section 202 is the same as the House amendment, except that a Federal grant for treatment works shall be 75 per centum of the cost of construction in every case. The provision relating to certification has been modified to require that the certification set forth that available ***3788** ground water is insufficient, inadequate, or unsuitable for public use, including ecological preservation and recreational use of surface water unless adequately treated effluents are returned to the ground water consistent with acceptable technological standards.

PLANS, SPECIFICATIONS, ESTIMATES, AND PAYMENTS

Senate bill

Section 203 provides that close coordination be maintained between the Administrator and the States. The section requires the Administrator to review preliminary plans for any construction project and authorizes the Administrator to advance up to 5 percent of the project's cost to assist a community in completing its detailed plans and specifications. Approval of final plans constitutes a contractual obligation of the Federal Government.

House amendment

Section 203 authorizes contract authority. The Administrator has power to commit the Federal Government to payment of its portion of treatment facilities when he approves an applicant's plans, specifications, and estimates.

Conference substitute

Section 203 is the same as the House amendment.

The conferees want to emphasize the complete change in the mechanics of the administration of the grant program that is authorized under the conference substitute. Under existing law and procedure, the Environmental Protection Agency makes the first payment upon certification that 25 percent of the actual construction is completed. The remaining Federal

payments are also made in reference to the percentage of completion of the entire waste treatment facility. This results in applicants absorbing enormous interest expense and other costs while awaiting the irregular flow of Federal funds.

Under the conference substitute, which is a program modeled after the authority and procedures under the Federal-Aid Highway Act, each stage in the construction of waste treatment facility is a separate project. Consequently, the applicant for a grant furnishes plans, specifications, and estimates (PS&E) for each state (which is a project) in the overall waste treatment facility which is included in the term 'construction' as defined in section 212. Upon approval of the PS&E for any project, the United States is obligated to pay 75 percent of the costs of that project. Thus, for instance, the applicant may file a PS&E for a project to determine the feasibility of a treatment works, another PS&E for a project for engineering, architectural, legal, fiscal, or economic investigations, another PS&E for actual building, etc.

In such a program, the States and communities are assured of an orderly flow of Federal payments and this should result in substantial savings and efficiency.

It cannot be emphasized too strongly that the procedure adopted in the conference substitute represents a complete and thorough change of the present practice of making payments of the Federal share of treatment works. The conferees urge the Administrator, the States, and local governments to draw from the experience of the highway ***3789** program to improve the efficiency of the waste treatment grant program.

When funding the construction of waste treatment plants, the Administrator, upon the request of a State, should encourage the use of a phased approach to the construction of treatment works, and the funding thereof, on a State's priority list. Such a phased program, which the committee notes has been developed and approved in the State of Delaware, has enabled the State to accelerate the construction of sewage treatment facilities, and thus accelerate the attainment of clean water.

LIMITATIONS AND CONDITIONS

Senate bill

Section 204 sets forth a number of grant conditions to assure that treatment facilities are constructed, operated and maintained to produce the best practicable application of treatment technology.

The section requires each grant applicant to adopt, by July 1, 1973, user charges to assure that recipients of waste treatment services will pay their share of the cost of operating and maintaining the facility. An applicant must receive from each industrial user a commitment that the user will repay to the United States that portion of the Federal grant applicable to the user's wastes.

Section 204 also requires applicants to demonstrate that proposed facilities conform to all applicable river basin plans, and other applicable waste treatment management plans. The proposal must be certified by the State as entitled to priority. The proposed treatment works also must qualify for a permit under section 402.

Applicants are required to describe the relationship of the reserve capacity proposed, the current demand, and an estimate of any cost for expected expansion of facilities in the alternative to including reserve capacity.

The Administrator is directed to promulgate guidelines for establishment and imposition of user charge systems as a guide to applicants for waste treatment works grants. The guidelines are required to reflect varying legal and financial factors which exist in different jurisdictions. For industrial user charges, the Administrator is required to establish guidelines that would consider, at a minimum, such factors as strength, volume, and delivery flow characteristics of the waste.

House amendment

Section 204 provides that grants for treatment works cannot be approved unless the facilities are included in an areawide waste treatment management plan, the applicant has assured proper operation and maintenance of the facilities, and the applicant has or will adopt a system of user charges. The user charge requirement applies after June 30, 1973.

The Administrator is required to issue guidelines relating to payment of waste treatment costs by industrial and nonindustrial recipients of waste treatment services. The guidelines must establish classes of users, including categories of industrial users, criteria for determining the adequacy of imposed charges, and model systems and rates of user charges typical of various treatment works.

Revenues derived from payments would be retained by the grantee for operation, maintenance, expansion, and construction of treatment works.

***3790** Conference substitute

The conference substitute is basically the same as the Senate bill as revised by the House amendment with the following changes:

(1) The requirement that users pay for the cost of future expansion of waste treatment services has been stricken.

(2) The requirement that revenues derived from payment of cost by industrial users be retained by the grantee for use for operation, maintenance, expansion, and construction of publicly-owned treatment works has been stricken and in place of it there has been substituted a requirement that the grantee shall retain an amount of the revenues derived from payment of cost by industrial users, to the extent costs are attributable to the Federal share of the project costs, equal to (A) the amount of the non-Federal cost of the project, paid by the grantee plus (B) the amount, necessary for future expansion and reconstruction of the project, except that such amount shall not exceed 50 per centum of such revenues from such project. All revenues not retained by the grantee are to be deposited in the Treasury as miscellaneous receipts. That portion of the revenues retained by the grantee attributable to clause (B) together with any interest thereon must be used solely for future expansion and reconstruction.

ALLOTMENT

Senate bill

Section 205 provides that allocations for sewage treatment construction grants be made on the basis of population. Reallocation of any sums not obligated shall be made on a priority basis to States qualifying for 70 percent Federal assistance. Also, in fiscal 1972 and 1973 up to $200 million is authorized for allotment to projects using advanced waste treatment on a regional scale. The $200 million is not available if the amount left for reallocation from the previous fiscal year exceeded $200 million.

House amendment

Section 205 authorizes the Administrator to allot construction funds on the basis of States' needs. Funds not obligated by a State shall be reallocated on the basis of need.

Conference substitute

This is the same as the House amendment, except that the initial phrase 'All sums appropriated' has been revised to read 'Sums authorized to be appropriated ' and the initial ratio is to be based on Table III of House Public Works Committee Print No. 90-50.

***3791** Table III reads as follows:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

The conferees determined that utilization of a 'needs' formula would eliminate any need for special allocation for an advanced waste treatment project or other special cases. Projects such as the Blue Plains Regional Treatment Works in the District of Columbia will receive adequate and timely funds under this provision so long as adequate funds are released for obligation.

REIMBURSEMENT AND ADVANCED CONSTRUCTION

Senate bill

Section 206 provides that all projects initiated after June 30, 1966, shall be eligible for retroactive grant raising the Federal share on such projects to at least 50 percent. The money would be required to be spent on a project's debt or to finance the local share of a new project.

The section authorizes $2 billion to meet the post 1966 reimbursement, and $400 million to reimburse 1956-66 projects to a 30 percent Federal grant level.

House amendment

Section 206 authorizes reimbursement to States that proceeded with construction of sewage treatment facilities without Federal aid. Such reimbursement would be on the basis of the highest Federal share that the project would have been eligible and qualified for at the time of ***3792** construction. A total of $2.75 billion is authorized for reimbursements. Of the total, $2 billion is authorized for facilities constructed between 1966-71, and $750 million for facilities constructed between 1955-66. This section provides t hat where a State advances construction without Federal funds it may be thereafter paid when sufficient funds are allotted to it if the project otherwise qualifies under the law.

Conference substitute

Section 206(a) of the conference substitute provides that any publicly owned treatment works on which construction was started after June 30, 1966, but before July 1, 1972, which was approved by the appropriate State agencies and which the Administrator finds meets the requirements of section 8 of this Act in effect at the time of initiation of construction shall be reimbursed a total amount equal to the difference between the amount of Federal financial assistance, if any, received under section 8 and 50 per centum of the cost of the project or 55 per centum if The administrator determines the treatment works were constructed in conformity with a comprehensive metropolitan treatment plan as described in section 8(f) of the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of these amendments. No treatment works shall receive Federal grants from all sources including this provision in excess of 80 per centum of the cost of the project.

Subsection (b) is the same as that subsection in the Senate bill which requires that the project meet the requirements of section 8 prior to the date of enactment of these amendments rather than the requirements of that section as they were contained in the law immediately prior to such date of enactment.

Subsections (c) and (d) of section 206 of the conference substitute require that an application for assistance under this section be filed with the Administrator within one year of the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, and authorizes the revision from time to time thereafter of that application. Further, the Administrator is required to allocate to each qualified project under subsection (a) each fiscal year for which funds are appropriated under this section an amount which bears the same ratio to the unpaid balance of the reimbursement due such project as the total of such funds for such year bears to the total unpaid balance of reimbursement due all such approved projects on the date of enactment of the appropriation. The Administrator is required to allocate to each qualified project under subsection (b) each fiscal year for which funds are appropriated under this section an amount which bears the same ratio to the unpaid balance of the reimbursement due such project as the total of such funds for such year bears to the total unpaid balance of reimbursement due all such approved projects on the date of enactment of such appropriation.

The remainder of this section is the same as the House amendment.

AUTHORIZATION

Senate bill

Section 207 authorizes $14 billion for construction grants, not to exceed $2 billion of which would be authorized for fiscal 1972, $3 billion for fiscal 1973, $4 billion for fiscal 1974, and $5 billion for fiscal ***3793** 1975. Up to 5 percent of the fiscal 1972-74 funds are authorized for expenditures on waste treatment management.

House amendment

Section 207 authorizes for construction grants and to carry out title II, except sections 208 and 209, $5 billion for fiscal 1973, $6 billion for fiscal 1974, and $7 billion for fiscal 1975.

Conference substitute

Section 207 of the conference substitute authorizes not to exceed $5,000,000,000 for fiscal 1973, not to exceed $6,000,000,000 for fiscal 1974, and not to exceed $7,000,000,000 for fiscal 1975. Funds for waste treatment management are authorized in section 208.

DISBURSEMENT

Senate bill

Section 208 authorizes the Administrator to make payments through the Department of the Treasury.

House amendment

No comparable provision.

Conference substitute

No comparable provision.

AREAWIDE WASTE TREATMENT MANAGEMENT

Senate bill

Under section 209, the Administrator is required to establish guidelines under which each State Governor would designate waste management regions and an agency to develop a waste management plan for each of the regions. If a Governor fails to designate agencies, the chief local officials in the area may assume the responsibility.

Within two years of designation, all such agencies are required to develop waste treatment management plans to regulate all sources of pollution within a region. A six-month extension could be granted to individual regions.

The plan is required to contain waste treatment construction priorities and information on waste treatment needs for a 20-year period, and to create a regulatory program to control industrial discharges and disposal of pollutants onto the land or into subsurface excavation. Also, to the extent possible, the plan is required to include control over pollution related to agriculture, mine water, construction, and salt water intrusion.

The Administrator is required to assist in financing development of the plans, and the Corps of Engineers is authorized, upon request of a Governor, to provide technical assistance.

After a Governor has designated regional agencies, he is responsible for carrying out of the plan, building waste treatment facilities, and assessing user charges. After July 1, 1974, all grants would go to a designated agency for projects that conform with the waste management plan. After an agency is designated, 100 percent planning grants are available for the first two years and 75 percent grants are available thereafter.

***3794** House amendment

Section 208 authorizes areawide waste treatment management plans. Under the planning process, the Administrator is required to promulgate regulations designating urban industrial and other areas with serious water quality control problems.

The Governor of each State would designate areas requiring areawide planning and appoint a planning agency for each State. Plans should be developed by existing regional organizations whenever possible. After the planning organizations have been designated, they would have two years to initiate a planning process.

The plans must include the anticipated construction required to meet municipal and industrial waste treatment needs for 20 years, establishment of construction priorities, establishment of regulatory programs, and designation of agencies required to manage the program. When a plan is submitted to the Administrator for approval, the Governor may include the name of one or more agencies capable of carrying out pollution control within the planning areas.

After a plan is approved by the Administrator, the Governor must annually certify revisions in conformance with basin plans, and provide an evaluation of the plan's effectiveness.

The section authorizes $100 million for fiscal 1973 and $150 million for fiscal 1974 to be used by planning agencies. For fiscal 1973-75, the Administrator would make 100 percent grants to the agencies, with a ceiling of 75 percent for fiscal years thereafter.

In addition to grants, the section authorizes the Administrator to provide the agencies consulting services and technical assistance.

The section also authorizes the Corps of Engineers at the request of a State to assist planning agencies in developing and operating a continuing management process. For each of fiscal 1973 and 1974, $50 million would be authorized for the Corps' assistance.

Conference substitute

Section 208 of the conference substitute is the same as the Senate bill and the House amendment with the following changes:

(1) In designating the boundaries of areas having substantial water quality control problems, the Governor is required to consult with appropriate elected and other officials of local governments having jurisdiction in such areas and the Governor is required to designate a single representative organization, including elected officials from local governments or their designees, capable of developing an effective areawide waste treatment management plan for the area.

(2) If the Governor does not designate an area within the time required or does not make a determination not to make such a designation within the time required by paragraph (2) of subsection (a) of this section or, in the case of an interstate area, if the Governors of the States involved do not designate a planning organization within the time required by paragraph (3), then the chief elected officials of local governments within the area may, by agreement, designate the boundaries of the area and an organization composed of elected officials from the general public, local governments within the area, and other appropriate individuals capable of developing an areawide waste treatment management plan for such area.

(3) A State is required to act as a planning agency for all portions of the State which are not specifically designated under paragraph (2), (3), or (4) of the subsection.

***3795** (4) The requirement that a designated organization have in operation a continuing areawide waste treatment management planning process within two years of the date of designation of the organization is reduced to one year, and the initial plan prepared in accordance with the process is to be certified by the Governor and submitted to the Administrator not later than two years after the planning process is in operation.

(5) Any plan prepared under the process is required to identify, if appropriate, ‘silviculturally‘ related nonpoint sources of pollution as well as agriculturally related nonpoint sources and includes forest lands.

(6) Any plan prepared under the process is also required to include a process to control the disposition of all residual waste generated within the area which could affect water quality and a process to control the disposal of pollutants on land or in subsurface excavations within the area to protect ground and surface water quality.

(7) Whenever the Governor of a State determines and notifies the Administrator that consistency with a statewide regulatory program under section 203 so requires, then the requirements of clauses (F) through (K) of paragraph (2) of subsection (b) of this section are required to be developed and submitted by the Governor to the Administrator for application to all regions within such State.

(8) The Governor of each State, in consultation with the planning agency designated under subsection (a) of this section, at the time a plan is submitted to the Administrator, shall designate one or more waste treatment management agencies (which may be an existing or newly created local regional or State agency or political subdivision) for each area designated under subsection (a) of this section and submit such designations to the Administrator. The Administrator is required to accept such designation unless within 120 days of the designation he finds that the designated management agency (or agencies) does not have adequate authority to carry out the same requirements as are provided in clauses (A) through (I) of paragraph (2) of subsection (c) of section 208 of the House amendment.

(9) In lieu of the authorization of $100,000,000 for fiscal year 1973 submit to the Administrator each proposal for which a grant is applied for, and the Administrator is required to act upon such proposal as soon as practicable after submission. His approval of that proposal is a contractual obligation of the United States for payment of its contribution to the proposal. Not to exceed $50,000,000 is authorized for fiscal 1973, not to exceed $100,000,000 for fiscal 1974, and not to exceed $150,000,000 for fiscal 1975.

BASIN PLANNING

Senate bill

No comparable provision.

House amendment

Section 209 requires the President, acting through the Water Resources Council, to prepare a 'Level B' plan, for all basins, under the Water Resources Planning Act. All plans must be completed by January 1, 1980. A total of $200 million would be authorized for development of the basin plans.

***3796** Conference substitute

This provision is the same as the House amendment except for minor clerical changes.

The conferees adopted the House amendment directing the President, through the Water Resources Council, to require the preparation of comprehensive regional or river basin plans (Level B) for all areas of the Nation by 1980, and authorizing appropriations not to exceed $200 million for this purpose. It is the conferees' intent not to displace or duplicate existing river basin planning authorizations and agencies. While preparation of the plans required by this provision will be managed by the Council, the bulk of the funds authorized will be transferred to and utilized in the actual conduct of these studies by the Environmental Protection Agency, the Corps of Engineers, and other agencies having primary statutory responsibility for the preparation of plans for a given basin.

ANNUAL SURVEY

Senate bill

No comparable provision.

House amendment

Section 210 requires the Administrator to make an annual survey of operation and maintenance of publicly owned treatment works and to include the results of the survey in required annual reports to Congress.

Conference substitute

This section is the same as the House amendment.

SEWAGE COLLECTION SYSTEMS

Senate bill

No comparable provision.

House amendment

Section 211 allows grants for sewage collection systems only when the system is for an existing community and is necessary to the integrity of a total waste treatment works system.

Conference substitute

This section provides that no grant shall be made for a sewer collection system unless the grant (1) is for replacement or major rehabilitation of an existing system and is necessary to the total integrity and performance of the waste treatment works servicing the community, or (2) is for a new collection system in the existing community with sufficient existing or planned capacity to adequately treat the collected sewage and is consistent with section 201.

The authority provided in this section covers only communities in existence on the date of the enactment of this bill. It is the committee's intent that sewage collection systems for new communities, new subdivisions or newly developed urban areas, be addressed in the planning of such areas and be included as a part of the development costs of the new construction in these areas. They are not to be covered under the construction grant program.

***3797** DEFINITIONS

Senate bill

Section 210 defines the terms ‘construction‘, ‘treatment works‘, ‘replacement ‘, ‘industrial user‘, and ‘grant‘ for the purposes of title II.

House amendment

Section 212 defines the same terms as are defined in the Senate bill for the purposes of title II except for the deletion of the definition of the term ‘grant‘.

Conference substitute

The conference substitute is basically the same as the Senate bill as revised by the House amendment, except for the deletion of the definition of the term ‘industrial user‘ which has been placed in the general definitions section in title V.

TITLE III-STANDARDS AND ENFORCEMENT

EFFLUENT LIMITATIONS

Senate bill

The discharge of any pollutant is illegal, except as permitted under section 301, 302, 306, 307, or 402.

By January 1, 1976, all point sources of pollution, except publicly owned treatment works, must have in use the best practicable treatment technology or meet any section 307 pretreatment standard, if the effluent is sent through a publicly owned treatment works.

All publicly owned facilities must utilize secondary treatment by the same date, or within four years of the date that construction was started on any grant project begun prior to June 30, 1974.

By 1981, point sources, other than publicly owned treatment works, must eliminate the discharge of pollutants. An exception to this requirement shall be granted if the owner presents information to the Administrator showing that compliance cannot be attained at a reasonable cost. If that occurs, the discharge limitation for that source shall be the best available technology. The section 307 pretreatment standard covers any industrial discharge into publicly owned treatment works.

Any publicly onwed treatment works that is approved after June 30, 1974, must comply with section 201.

This section requires that all effluent limitations must be reviewed at least every five years.

A prohibition is declared on the discharge of any radiological, chemical, or biological welfare material, or any high-level radioactive waste.

House amendment

Section 301 requires that effluent limitations be in effect by 1976. All point sources of pollution discharge, other than publicly owned treatment works, are required to achieve effluent limitations requiring use of 'the best practicable control technology'.

Publicly owned treatment works in existence on January 1, 1976, or those approved for construction grants before June 30, 1974, are ***3798** required to meet effluent limitations based on secondary treatment as defined by the Administrator.

By January 1, 1981, point sources other than publicly owned works are required to eliminate discharge of pollutants unless it is demonstrated that compliance is not attainable at a reasonable cost. If that can be shown, point sources other than publicly owned works would be required to apply the best available demonstrated technology.

Conference substitute

Section 301(a) is the same as the Senate bill and the House amendment.

Paragraph (1) of subsection (b) of section 301 is the same as the provisions in the Senate bill and the House amendment, except that the date of January 1, 1976, which requires effluent limitations based upon best practicable control technology for point sources other than publicly owned treatment works is extended to July 1, 1977, and for publicly owned treatment

works effluent limitations based on secondary treatment is also extended from January 1, 1976, to July 1, 1977. In addition, the requirement that by January 1, 1976, any more stringent limitations including those necessary to meet water quality standards, treatment standards, or schedules of compliance established pursuant to any other State or Federal law or regulation or required to implement an applicable water quality standards is extended from January 1, 1976, to July 1, 1977, and is confined to those standards or schedules of compliance established pursuant to any State law or regulation (under authority preserved by section 510) or any other Federal law or regulation.

Paragraph (2)(A) of subsection (b) of section 301 is amended to provide that no later than July 1, 1983, effluent limitations for categories and classes of point sources other than publicly owned treatment works which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2), which effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including that developed under section 315) that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2), or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307, and paragraph (2)(B) provides that not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g)(2)(A) of this Act.

Subsection (c) of section 301 of the conference substitute provides that the Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, on a showing by the owner or operator of such point source satisfactory to the Administrator ***3799** that the modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator, and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Subsections (d), (e), and (f) of the conference substitute are the same as subsections (c), (d), and (e) of this provision of the House amendment.

The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable. The burden will be on him to show that modified requirements will represent the maximum use of technology within his economic capability and will result in reasonable further progress toward the elimination of the discharge of pollutants. If he makes this showing, the Administrator may modify the requirements applicable to him.

WATER QUALITY RELATED EFFLUENT LIMITATIONS

Senate bill

Section 302 requires more stringent standards than those required by section 301 if such effluent limits would interfere with attaining the 1981 interim goal. The interim goal requires a water quality assuring protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water. Before a more restrictive standard can be set, the balance between the economic and social costs of a new limitation and the social and economic benefits are required to be determined at an administrative hearing.

House amendment

Section 302 would permit the setting of more stringent standards than those required by section 301, essentially using the same tests as the Senate bill. Before a more restrictive standard can be set, however, the House bill requires written comment and public hearings to determine economic, social, and environmental costs as compared to their benefits. If a person shows there is no reasonable relationship between these costs and benefits, then the limitation shall be adjusted as it applies to that person.

Conference substitute

Section 302 of the conference substitute is the same as section 302 of the Senate bill with the exception that all authority granted to a State in this section has been eliminated.

AQUACULTURE

Senate bill

Section 303 authorizes the Administrator to allow discharges of pollutants under controlled conditions for approved aquaculture projects.

***3800** House amendment

Section 318 authorized the Administrator, after hearings, to permit discharge of specific pollutants under controlled conditions associated with an approved aquaculture project. The Administrator is required to establish procedures and guidelines necessary to carry out this provision by January 1, 1974.

Conference substitute

Section 318 of the conference substitute is the same as that provision in the Senate bill and the House amendment.

WATER QUALITY STANDARDS AND IMPLEMENTATION PLANS

Senate bill

No comparable provision.

House amendment

Section 303 of the House amendment continues the use of water quality standards contained in the existing law. Existing standards are adopted for purposes of this revision both as to interstate and intrastate waters in the case where such standards have not been adopted and they are required to be adopted within 180 days from the date of enactment. Provision is made for the revision of existing standards and the adoption of new ones in the future. In addition, the State is required to rank by priority and establish daily loads with seasonal variations and, further, within 120 days to submit for approval by the Administrator a proposed continuing planning process consistent with the Act. Plans prepared under such process are required to include effluent limits, schedules of compliance, areawide waste treatment management plans, daily load limits, and adequate implementation controls over the disposition of residual waste and an inventory and ranking of needs for construction.

Conference substitute

This is the same as the provision in the House amendment, with the following exceptions:

(1) Subsection (d)(1) requires each State to identify the waters within its boundaries for which effluent limitations required by section 301 are not stringent enough to implement a water quality standard applicable to the waters. The State is to establish a priority ranking for such waters, taking into account the severity of the pollution and uses to be made of the water.

(2) Each State is to identify waters within its boundaries for which controls on thermal discharges under section 301 are not stringent enough to protect a balanced indigenous population of shellfish, fish, and wildlife.

(3) Each State is to establish for waters identified under paragraph (1)(A) in accordance with the priority ranking the total maximum daily load for those pollutants which the Administrator identifies as suitable for such calculation. This is to be established at a level necessary to implement water quality standards with seasonal variations and a margin of safety.

(4) Each State is to estimate for the waters identified in paragraph (1)(B) the total maximum daily thermal load required to assure protection ***3801** and propagation of a balanced indigenous population of shellfish, fish, and wildlife. These estimates are to take into account normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and dissipative capacity. In addition, they shall include a calculation of maximum heat input, including a margin of safety.

(5) The State is to submit to the Administrator from time to time the waters so identified and loads so established. The Administrator is to approve or disapprove the identification and load within 30 days after submission. If they are approved, the State must incorporate them into its plan under subsection (e). If he disapproves them, he is required to identify the waters and establish the loads, and the State is to incorporate that into its current plan.

(6) For the purpose of developing information, each State is to identify all waters which it has not otherwise identified under this subsection and estimate for them the total maximum daily load with seasonal variations and margins for safety of pollutants and for thermal discharges at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(7) Each State is required to have a continuing planning process consistent with this Act and to submit such plan within 100 days after the date of enactment of this Act to the Administrator for his approval. The Administrator must approve or disapprove such process within 30 days after submission, and he must, from time to time, review the State's approved planning process to insure that it is at all times consistent with the Act.

(8) The Administrator is not to approve any State permit program under title IV for any State not having such an approved planning process.

(9) The planning process must include a process which will result in plans for all navigable waters within the State which include, among other things, total maximum daily loads for pollutants and thermal discharges.

INFORMATION AND GUIDELINES

Senate bill

Section 304 directs the Administrator to publish criteria on water quality within one year after enactment of the law. The criteria must reflect the latest scientific information on factors needed for restoration of the natural chemical, physical, and biological integrity of all navigable waters; propagation of fish, shellfish, and wildlife; and allow swimming, together with the effects that individual pollutants have on fish, plant life, and beaches as well as the movement of particular pollutants through the life chain.

Within one year after enactment, the Administrator is required to publish effluent limitation guidelines that identify the degree of effluent reduction that is attainable through the use of the best practicable available technology. Similar guidelines are required for assessing the degree of effluent reduction attained in the use of the best available technology. Such guidelines shall specify the factors to be taken into consideration in assessing both the best practicable and available technology, including the age and equipment and facilities, the process employed, and the cost of achieving such a reduction.

***3802** The section requires the Administrator to issue information on processes, procedures, and operating methods that would result in the reduction or elimination of discharges to meet required performance standards. The Administrator is required to issue information on alternative waste treatment systems which will be considered under treatment works construction grants.

The Administrator is required to publish guidelines and procedures on the impact of water quality of hydrographic modification work, and for identifying and controlling pollution from such nonpoint sources as agriculture, mining activities, and construction. The Administrator shall publish guidelines on pretreatment standards for pollutants which are not susceptible to treatment by publicly owned treatment works.

Guidelines for the required test procedures to analyze pollutants, and for the monitoring, reporting, and enforcement requirements under a State permit program shall be published by the Administrator.

Beginning in fiscal 1973, $100 million would be authorized annually under section 304.

House Amendment

Section 304 of the House amendment basically requires the publication of the same criteria and guidelines as are provided in the Senate bill, except that it also requires the indentification of pollutants suitable for maximum daily load measurements and requires with respect to the factors relating to the assessment of best practicable control technology and best available demonstrated technology to include the economic, social, and environmental impact of achieving the effluent reduction and of foreign competition. In addition, in establishing guidelines for State programs under Section 402 (permits) the House requires that these include guidelines on funding, personnel qualifications, and manpower requirements (including conflict of interest provisions).

Conference substitute

Section 304(a)(1) is the same as that provision in the Senate bill and the House amendment.

Section 304(a)(2) is the same as that provision in the House amendment, except that information on the factors necessary for the protection and propagation of shellfish, fish, and wildlife must be developed for classes and categories of receiving waters, and on the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives is to be developed for the purpose of section 303.

Section 304(a)(3) is the same as the Senate bill and the House amendment.

Section 304(b)(1)(A) is the same as the Senate bill and the House amendment.

Section 304(b)(1)(B) provides that the Administrator's regulations providing guidelines for effluent limitations shall specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with section 301(b)(1) shall include consideration of the total cost of ***3803** application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employers, the engineering aspects of the application of various types of control techniques, process changes, non-water environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

Section 304(b)(2)(A) is the same as the comparable provision of the House amendment with the exception that the degree of effluent reduction attainable through the application of the best available demonstrated control measures and practices is revised to provide the degree of effluent reduction attainable through the application of the best control measures and practices achievable.

Section 304(b)(2)(B) would require that the guideline regulations specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 to be applicable to any point source (other than publicly owned treatment works) within categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various type of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

Section 304(b)(3) is the same as that provision in the Senate bill and the House amendment.

Sections 304(c) is the same as that provision in the Senate bill and the House amendment, except that the one-year period for the issuance of information is reduced to 270 days.

Sections 304(d) through (g) are the same as the comparable provisions of the Senate bill and the House amendment.

Section 304(h) is the same as the comparable provision of the House amendment, except that the 90-day period for guidelines for uniform application forms and minimum requirements is reduced to 60 days.

Section 304(i) is the same as the comparable provision of the Senate bill and the House amendment, except that the one-year period for issuance of information is reduced to 270 days.

Section 304(j) is the same as the comparable provision of the Senate bill and the House amendment.

Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.

WATER QUALITY INVENTORY

Senate bill

Section 305 requires the Administrator by July 1, 1973, to send Congress a report describing the specific quality of all United States waters as of January 1, 1973.

The section requires that the report identify all navigable waters which presently allow recreational activities and provide protection ***3804** for fish propagation, those waters which will meet such standards by 1976 or 1981, and those which will do so at some future date.

Each State is required to submit by July 1, 1974, and annually thereafter, a report describing the existing water quality of all its navigable waters. The report shall correlate existing water quality with the water quality criteria under section 304(a) and include an analysis of to what extent the waters provide swimming and fish protection. Each State is required to submit an estimate on the economic and social costs necessary to achieve such water quality, and when such achievement is expected.

The report describes the nature and extent of nonpoint sources of pollutants, programs to control such sources, and the cost of such programs.

House amendment

Section 305 requires the Administrator to report on the specific quality of all United States waters during 1972 by July 1, 1973. The report would identify and inventory point sources of discharge, together with an analysis of each discharge.

Each State is required to submit a report describing the existing water quality of all its navigable waters by July 1, 1974, and annually thereafter. The States are required to submit an estimate of the costs of achieving water quality that protects fish and wildlife areas suitable for recreation.

Conference substitute

This is the same as the Senate bill and the House amendment except that subsection (b)(1)(D) has been revised to require the annual State report to include an estimate of (i) the environmental impact, (ii) the economic and social costs necessary to achieve the objectives of the Act in that State, (iii) the economic and social benefits of such achievement, and (iv) an estimate of the date of such achievement. Appropriate reporting date revisions have been made.

NATIONAL STANDARDS OF PERFORMANCE

Senate bill

Section 306 requires new sources of pollution in at least twenty-eight specified industries to be constructed to meet a standard that reflects the greatest degree of effluent reduction that can be achieved by use of the latest available control technology. If it is practicable, this could be a standard that permits no discharge of pollution. The Environmental Protection Agency must promulgate the best available technology standard for each industry. That technology must be followed by each plant which by modification becomes subject to the new source standards, unless the economic and social costs of achieving such a standard far exceeds the social and economic benefits. If that occurs, a lesser standard will be promulgated.

The Administrator may distinguish among classes and sizes of new sources. He may also delegate this authority to individual States if they develop procedures for setting and enforcing such standards.

House amendment

Section 306 requires all new stationary sources to be constructed to meet a standard which reflects the greatest degree of effluent reduction ***3805** that can be achieved by use of 'the latest available demonstrated technology'. If practicable, the standard would permit no discharge of pollutants.

In setting such standards, the Administrator is required to consider the costs and benefits of attaining such a degree of effluent reduction.

The House provision is very similar to the Senate bill, except for the elimination of cotton ginning from the list of industries initially required to be covered and the requirement that in establishing these performance standards for new sources, age of equipment, process employed, engineering aspects of the application of various techniques, process changes, and the cost and economic, social, and environmental impact, and foreign competition be taken into consideration. In addition, the House eliminates the authority for delegation of this provision to the States.

Conference substitute

Section 306(a) is the same as the comparable provision of the Senate bill and the House amendment with the exception of the elimination of the term 'modification', which reduces the application of this section solely to new construction.

Section 306(b)(1)(A), except for a minor technical change, is the same as the comparable provision of the Senate bill and the House amendment.

Section 306(b)(1)(B) is the same as the comparable provision of the Senate bill, except that in establishing or revising Federal standards of performance for new sources the Administrator shall take into consideration the cost of achieving the effluent reduction any non-water quality environmental impact and energy requirements.

Section 306(b)(1)(C) of the Senate bill and the House amendment has been eliminated.

Subsection (d) of this section of the conference substitute modifies the Senate bill to authorize a State to develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in that State. If the Administrator finds that this procedure and law require application and enforcement of standards of performance to at least the same extent as is required by this section, then the State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

The conferees included a provision comparable to section 301(f) of the House amendment. Any point source the construction of which is begun after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 which is constructed so as to meet all applicable standards of performance during the ten-year period beginning on date of completion or during the period of depreciation or amortization for Federal tax purposes, whichever period ends first.

The Conference substitute on section 306 follows, for all practicable purposes, the intent of both the Senate bill and House amendment. The Conference substitute requires establishment of a regulatory mechanism for new sources which anticipates not only that level of effluent reduction which can be achieved by the application of technology (including where practicable elimination of the discharge ***3806** of pollutants), but also the achievement of levels of pollution control which are available through the use of improved production processes, taking into consideration the cost of achieving such This does not mean that the Administrator is to determine the kind of production processes

or the technology to be used by a new source. It does mean that the Administrator is required to establish standards of performance which reflect the levels of control achievable through improved production processes, and of process technique, etc., leaving to the individual new source the responsibility to achieve the level of performance by the application of whatever technique determined available and desirable to that individual owner or operator.

The Conferees deleted reference to the term 'modification' when applied to new sources. The inclusion of this requirement in the Senate and the House bill was believed by the Conferees to be superfluous in light of the provisions which require existing sources (which might become subject to new source performance standards as a result of modification) to meet specific levels of effluent reduction by specific dates pursuant to section 301. To subject those sources to interim levels of control, simply because of a 'modification', would be redundant with the requirements of effluent limitations based on best practicable and best available technology. In any event, if an existing source modifies or changes its operation so as to alter the nature or amount of pollutants discharged, these would be a violation of the conditions of an existing permit and subject to review by the permitting agency. Further action by that source could be required. The Conferees determined that the process established under section 306 for 'modifications' would be burdensome, duplicative and, therefore, it was deleted.

TOXIC AND PRETREATMENT EFFLUENT STANDARDS

Senate bill

Section 307 requires the Administrator to publish, within 90 days of enactment, a list of pollutants that are determined to be toxic. Six months after publication of such list, the Administrator must publish proposed effluent limitations for the pollutants. The limitation can be a discharge prohibition.

The Administrator also is required to hold a hearing within 30 days after publishing the proposed limitations, and to promulgate the standards no later than six months after publishing the proposed standards. However, the standards may be varied if testimony at the hearing warrants such action. The bill provides that any standard or prohibition shall become effective no later than one year after promulgation.

Section 307(b) requires the Administrator to set national pretreatment standards for the discharge of pollutants into publicly owned treatment works. The standards shall cover pollutants that are not susceptible to treatment at the treatment facility or that would interfere with operation of a municipal treatment plant.

House amendment

Section 307 requires the Administrator to publish a list of toxic pollutants within 90 days of enactment of the title. Six months later the Administrator must publish a proposed effluent standard for each ***3807** listed toxic pollutant.The standards may include a prohibition of the discharge of a toxic pollutant or combination of pollutants.

The section also requires the Administrator to set national pretreatment standards. The standards shall be utilized to prevent introduction of industrial and commercial pollutants into municipal collection systems and treatment plants.

Conference substitute

Sections 307(a)(1) and (2) are the same as the comparable provisions of the House amendment, except that the Administrator is required to take into account the usual or potential presence of the affected organisms in any water rather than in the receiving waters as is provided in the House amendment.

Sections 307(a)(3) and (4) are the same as the comparable provisions of the Senate bill and the House amendment.

Section 307(a)(5) provides that when proposing or promulgating any effluent standard or prohibition under this section the Administrator shall designate the category or categories of sources to which the standard or prohibition shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

Section 307(a)(6) and (7) and section 307(b) are the same as the comparable provisions in the Senate bill and the House amendment.

Pretreatment of biological waste that is compatible with the treatment provided by a publicly owned waste treatment plant into which such waste is introduced may not be necessary. Examples of such biological waste may be the normal effluent of a brewery and of food processing plants where the composition and proportion of such effluent is compatible with the municipal waste treatment system. In no event is it intended that pretreatment facilities be required for compatible wastes as a substitute for adequate municipal waste treatment works.

The conference substitute also contains two new subsections lettered (c) and (d). Subsection (c) provides that, in order to insure that any source introducing pollutants into a publicly owned treatment works which would be a new source subject to section 306 if it were to discharge directly into the navigable waters the pollutant itself will not cause a violation of the effluent limitations established for the treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 306 for the equivalent category of new sources. These pretreatment standards shall prevent the discharge of any pollutant into the treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works. Subsection (d) provides that after the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

Under the conference substitute individual users of municipal waste treatment plants will not be required to obtain a permit under section 402. However, the conferees agree, in section 402(b)(8), that each municipal waste treatment plant permit must identify any industrial users and the quality and quantity of effluents ***3808** introduced by them. The Conference substitute provides that violation of pretreatment standards is enforceable directly against the industrial user by the Administrator. The conferees intend that the agency which issues the permit for a publicly owned treatment works shall receive notice of changes in the quality and quantity of the effluent to be introduced into such treatment works by any industrial user and have an opportunity to examine the impact on the discharge from such works resulting from such changes for the purpose of determining if there may be a violation of the permit. The conferees intend that the monitoring requirements of section 308 shall apply to industrial users introducing effluents to a publicly owned treatment works.

The conference substitute also provides that the Administrator shall establish pretreatment standards for new sources simultaneously with the establishment of new source performance standards in order to assure that any new source industrial user of municipal waste treatment plants will achieve the effluent controls necessary to assure that such users' effluents when introduced into the publicly owned works will not cause a violation of the permit and to eliminate from such effluents any pollutants which might interfere with, pass through, or otherwise be incompatible with the functioning of the municipal plant.

INSPECTIONS, MONITORING, AND ENTRY

Senate bill

Section 308 requires the owner or operator of any effluent source to install and maintain pollution control equipment. The requirement includes monitoring of the biological effects of any discharge.

The Administrator is given authority to inspect records, monitoring equipment, and effluents. The Administrator could delegate such authority to any State establishing its own program.

The bill also grants the public access to any records or reports obtained by the Administrator or a State unless a report includes a trade secret.

House amendment

Section 308 authorizes the Administrator to require monitoring of all point sources, to enter and inspect any premise where an effluent source is located, and to inspect any records.

This provision is basically the same as the Senate bill except for authority for a State to be delegated to carry out this section.

Conference substitute

This provision of the conference substitute is the same as that of the Senate bill and the House amendment with the following exceptions:

(1) Records, reports, and information obtained under this section shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards.

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

*3809 FEDERAL ENFORCEMENT

Senate bill

Section 309 requires the Administrator to provide notice to a polluter and the State upon discovering violation of any effluent limitation. The Administrator also is required to issue a compliance order or to bring a civil suit against the polluter.

If the Administrator discovers widespread violations of the limitations, he is required to notify the State. If the State fails to act within 30 days, he is required to give public notice and assume enforcement over all effluent limitation requirements in the State.

When the Administrator finds anyone violating any effluent limitations, performance standards, toxic and pretreatment standards, inspection and monitoring requirements, or permit requirements, the section requires him to either issue an order that requires immediate compliance or to bring a civil suit. If the violation involves the inspection and monitoring requirements, the Administrator's order would not take effect until the polluter has had an opportunity to confer with him. If such an abatement order is not complied with, the Administrator would initiate a civil suit for appropriate relief, such as an injunction.

Anyone willfully or negligently violating provisions of the Act is liable to a fine not to exceed $25,000 per day of violation and one year in jail. For a willful or negligent violation under which the Administrator is required to issue an order requiring immediate compliance or to bring a civil suit, the fine would not be less that $2,500 per day. The penalty for a second conviction would be up to $50,000 per day of violation and two years in jail.

Anyone who is found to have knowingly made a false statement on any application or report, or who has tampered with a monitoring device, is liable to a $10,000 fine and six months' imprisonment.

House amendment

Section 309 is basically the same as the Senate bill except that the Administrator is authorized rather than required to initiate civil actions or criminal proceedings. Civil penalties cannot exceed $10,000 per day of violation, and criminal penalties cannot exceed $50,000 per day of violation and two years' imprisonment.

Conference substitute

This is the same as the House amendment.

INTERNATIONAL POLLUTION ABATEMENT

Senate bill

Section 310 provides for international pollution abatement. If the Secretary of State requests abatement of pollution from a United States source that endangers the health or welfare of persons in a foreign country, the Administrator must notify the State where the discharge originates.

The section further states that if the pollution is sufficient quantity to warrant such action, and if the foreign nation has given the United States similar rights over pollutionoriginating in that nation, the Administrator will call a hearing. The hearing board would make a recommendation, and the Administrator shall initiate abatement action if the board recommendation calls for a halt of the pollution.

***3810** House amendment

Section 310 is identical to the Senate bill.

Conference substitute

This provision is the same as the House amendment.

OIL AND HAZARDOUS SUBSTANCE LIABILITY

Senate bill

Section 311 which deals with oil and hazardous substance liability is basically the same as existing law. The section is modified, however, to add liability for the cleanup of any hazardous material discharged into navigable waters.

House amendment

Section 501 continues the provisions of section 22 of existing law, with one major change. A new subsection (f) allows the Administrator, upon request of a State water pollution control agency, to detail employees to assist the State agency in carrying out the provisions of the bill.

Conference substitute

Section 501 is the same as the Senate bill and the House amendment.

GENERAL DEFINITIONS

Senate bill

Section 502 defines the following terms: State water pollution control agency, interstate agency, State, municipality, person, pollutant, pollution, navigable waters, territorial seas, contiguous zone, ocean, ***3821** effluent limitation, schedule and timetable for compliance, discharge, toxic pollutant, point source, biological monitoring, and permit.

House amendment

Section 502 defines words and phrases included in the bill. All of the terms defined in the Senate bill are defined in the House amendment except for the elimination of the defined terms ‘schedule and timetable for compliance ‘ and ‘permit‘. The definitions of the terms are basically the same as provided in the Senate bill except as hereafter noted: (1) The term ‘State‘ is not defined to mean a river basin agency as provided in the Senate bill; (2) thermal discharges and organic fish wastes are excluded from the definition of the term ‘pollutant‘; (3) the term ‘schedule of compliance‘ is defined in the same manner as the term ‘schedule and timetable for compliance‘ in the Senate bill; (4) discharges by industrial users into publicly owned treatment works are excluded from the definition of the term ‘discharge of a pollutant‘; and (5) the terms ‘thermal discharge‘ and ‘discharge of a pollutant‘ are defined.

Conference substitute

Section 502 of the conference substitute is the same as the comparable provision of the Senate bill and the House amendment with the following exceptions:

(1) The definition of the term ‘pollutant‘ contained in paragraph (6) has been amended to read as follows:

‘(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' within the meaning of section 312 of this Act; 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.‘

(2) The term ‘navigable waters‘ has been amended to read as follows:

‘(8) The term 'navigable waters' means the waters of the United States, including the territorial seas.‘

(3) The definition of the term ‘effluent limitation‘ contained in paragraph (12) has been amended to eliminate the concept of ‘schedules and timetables for compliance‘, inserting in lieu thereof ‘schedules of compliance‘.

(4) Two new terms have been defined for the purposes of the Act. In paragraph (19) the term ‘schedule of compliance‘ has been added, and in paragraph (20) the term ‘industrial user‘ has been defined, and these terms read as follows:

‘(19) 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.

***3822** ‘(20) 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 'Division D-- Manufacturing' and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.‘

The conferees omitted the Senate definition of ‘permit‘. It is the conferees' intent that a permit means any permit or equivalent document or requirement issued to regulate the discharge of pollutants. The conferees fully intend that the term ‘navigable waters‘ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

WATER POLLUTION CONTROL ADVISORY BOARD

Senate bill

Section 503 restates section 9 of existing law which establishes a Water Pollution Control Advisory Board within the Environmental Protection Agency. The section is modified to allow $100 per diem for board members while attending conferences or board meetings.

House amendment

Section 503 is essential the same as the Senate provision.

Conference substitute

Section 503 is the same as the Senate bill and the House amendment.

EMERGENCY POWERS

Senate bill

Section 504 grants new authority to the Administrator to take remedial action in case of a water pollution episode.

If a pollution source presents an imminent or substantial endangerment to the health or welfare of persons, the Administrator shall issue an immediate abatement order. If a pollution source presents a substantial economic injury to persons because of their inability to market shellfish, the Administrator shall initiate a civil suit for relief.

House amendment

Section 504 authorizes the Administrator to bring suit on behalf of the United States if he determines that a pollution source presents an imminent and substantial danger to health. The section is similar to section 303 of the Clean Air Act.

Conference substitute

Section 504 is the same as the House amendment, with the addition that the Administrator is also authorized to bring a suit in behalf of the United States if he determines that a pollution source presents an imminent and substantial danger to the welfare of persons where such endangerment is to the livelihood of such persons such as inability to market shellfish.

CITIZEN SUITS

Senate bill

Section 505 establishes citizen participation in the enforcement of control requirements and regulations created in the Act.

***3823** Anyone may initiate a civil suit against any person who is alleged to be in violation of an effluent limitation, or a Federal or State abatement order. Anyone also may initiate a civil suit against the Administrator for failure to perform a nondiscretionary act.

The bill requires that no action on a suit may begin for 60 days following notification to the alleged polluter. If the Administrator or a State begins a civil or criminal action on its own against an alleged polluter, no court action could take place on the citizen's suit. Litigation costs may be awarded to any party if a court determines that such an award is appropriate.

A Governor, without regard to any time limitation, could initiate action against the Administrator for an alleged failure to abate a pollution violation in another State that adversely affects the Governor's State.

House amendment

Section 505 allows citizen suits in essentially the same manner as is provided in the Senate bill but limits the right to bring actions to persons directly affected by a violation of the proposed Act or to groups who have participated in the administrative proceedings of a case.

Conference substitute

Section 505 of the conference substitute is the same as the comparable provision of the Senate bill and the House amendment, except as follows:

(1) The provision in subsection (b) which permits the bringing of an immediate action has been modified to permit the bringing of immediate actions after notification only with respect to a violation of sections 306 and 307(a) of the Act.

(2) The definition of the term ‘citizen‘ has been amended to provide that it means a person or persons having an interest which is or may be adversely affected.

It is the understanding of the conferees that the conference substitute relating to the definition of the term ‘citizen‘ reflects the decision of the U.S. Supreme Court in the case of Sierra Club v. Morton (No. 70-34, April 19, 1972).

APPEARANCE

Senate bill

Section 506 allows the Administrator to appoint his own attorney to represent the agency in any court action if the United States Attorney General does not notify the Administrator within a reasonable time that the Justice Department will represent the Administrator.

House amendment

Section 506 provides that the Administrator shall request the Attorney General to represent the United States in any civil or criminal action. Unless the Attorney General notifies the Administrator that he will appear in civil actions, the Administrator's attorneys would represent the United States. Criminal actions involving the United States could not be handled by attorneys other than those appointed by the Attorney General.

Conference substitute

Section 506 is the same as the House amendment.

***3824** EMPLOYEE PROTECTION

Senate bill

Section 507 offers protection to employees who believe they have been fired or discriminated against as a result of the fact that they have testified or brought suit under this Act.

The employee would be able to apply to the Secretary of Labor for review of his case, and the Secretary could issue an order for the employee to be rehired, or otherwise compensated, if that is justified. The section does not apply to an employee who acts without direction from his employer in violating the Act.

House amendment

Section 507 is essentially the same as the provisions of the Senate bill with the addition of a new subsection (e) which requires the Administrator to investigate threatened plant closures or reductions in employement allegedly resulting from any effluent limitation or order under the Act. Such investigation shall be conducted on request of an employee or a representative of an employee. At public hearings the employer is required to present information relating to the alleged discharge, lay-off, or discrimination. This hearing is to be on the record and on the basis of it the Administrator is to make findings of fact and recommendations. These are to be available to the public. This provision is not to be constructed to require or authorize the Administrator to modify or withdrawn an effluent limitation or order.

Conference substitute

Section 507 is the same as the House amendment.

FEDERAL PROCUREMENT

Senate bill

Section 508 ensures that the Federal Government will not patronize or subsidize polluters through its procurement practices and policies.

No Federal agency could enter into any contract involving any facility convicted under section 309. The prohibition would continue until the Administrator certifies that the violation which led to the conviction no longer exists.

The President could exempt any contract if the exemption is in the paramount interest of the United States. The President would be required to submit an annual report to Congress on this section.

House amendment

Section 508 is basically the same as the provisions of the Senate bill.

Conference substitute

Section 508 is the same as the Senate bill and the House amendment.

ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

Senate bill

Section 509 grants the Administrator authority to issue subpenas, protects trade secrets from public reporting, and requires that any suit against a Federal standard be filed in the United States Court of Appeals in Washington, D.C. Suits for review of the Administrator's action in approving or promulgating any effluent limitation under section ***3825** 301 or 302 or issuing or denying a permit under section 402 of this Act would have to be filed in the Court of Appeals for the appropriate circuit. Such suits are required to be filed within 30 days of promulgation, approval, issuance, or denial.

House amendment

Section 509 is basically the same as the Senate bill except that review of any of the Administrator's actions may be had by any interested person in the district court of the United States for the district in which the person resides or transacts business and the requirement that action of the Administrator which is otherwise reviewable is not to be subject to judicial review in enforcement proceedings is eliminated.

Conference substitute

Section 509 is the same as the Senate bill and the House amendment except as follows:

(1) The district courts of the United States are authorized to issue subpenas for witnesses, books, papers, and documents for the purpose of obtaining information under sections 304(b) and (c) of this Act.

(2) Judicial review is to be had in the circuit court of appeals for the judicial district in which the interested person resides or transacts business, and the time for application for judicial review is extended from 30 to 90 days.

(3) An action of the Administrator with respect to which review could have been obtained under paragraph (1) of subsection (b) of this section is not to be subject to judicial review in any criminal or civil proceeding for enforcement. The conferees intend that this provision limit the availability of judicial review of a standard or requirement where judicial review was available at the time the standard or requirement was established. The conferees do not intend to, in any way, affect the right of a party for which judicial review was not available.

STATE AUTHORITY

Senate bill

Section 510 provides that States, political subdivisions, and interstate agencies retain the right to set more restrictive standards and limitations than those imposed under this Act.

House amendment

Section 510 is the same as the Senate bill and the House amendment.

Conference substitute

Section 510 is the same as the Senate bill and the House amendment.

OTHER AFFECTED AUTHORITY

Senate bill

Section 511 preserves the authority of other Federal laws which are consistent with this Act, specifically the authority of the Secretary of the Army to maintain navigation and his authority under the Rivers and Harbors Act of 1899. In the case of dredge and fill activities permitted under section 10 of the 1899 Act, a section 401 certification or a section 402 permit would be conclusive as to the effect on water quality. This section also provides that the Act does not affect or impair treaties.

***3826** Subsection (by provides that the requirements of the Fish and Wildlife Coordination Act shall apply only to section 306, the publication of information under section 304, and the establishment of guidelines under section 403.

Subsection (c) provides that discharges of pollutants into navigable waters shall be regulated under this Act and not the Rivers and Harbors Act of 1910 and the Supervisory Harbors Act of 1888 except as to effect on navigation and anchorage.

Subsection (d) of this section provides that the requirements of the National Environmental Policy Act of 1969 as to water quality considerations shall be satisfied (1) by certification pursuant to section 401 with respect to any Federal license or permit for the construction of any activity which may result in the discharge into the navigable waters and (2) by certification pursuant to section 401 and issuance of a permit pursuant to section 13 of the 1899 Act or section 402 of this Act with respect to any activity which may result in discharge into the navigable waters.

House amendment

Section 511 is basically the same as the Senate provision modified to conform with the requirements of section 404 of the House amendment as to dredging, and eliminating the restrictions on application of the Fish and Wildlife Coordination Act contained in the Senate bill.

Conference substitute

Sections 511(a) and 511(b) are the same as the comparable provisions of the Senate bill and the House amendment.

Section 511(c) of the conference substitute provides that, except for the provision of Federal financial assistance for the purpose of assisting construction of publicly owned treatment works, the issuance of a permit under section 402 for the discharge of a pollutant by a new source as defined in section 306, no action of the Administrator taken pursuant to this Act 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. Further, nothing in that Act 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 Act or the adequacy of any certification under section 401; or (B) authorize any such agency to impose, as a condition precedent to the issuance of a license or permit, an effluent limitation other than the limitation established pursuant to this Act.

Section 511(c) clarifies certain relationships between the Federal Water Pollution Control Act (FWPCA) and the National Environmental Policy Act (NEPA).

The Federal Water Pollution Control Act Amendments of 1972 charge the Administrator of EPA with a comprehensive mandate to regulate the discharge of pollutants into the waters of the United States. The sole purpose of the Act is the enhancement of environmental quality. In the administration of the Act, EPA will be required to establish numerous guidelines, standards and limitations. With respect to each of these actions, the Act provides Congressional guidance to the Administrator in as much detail as could be contrived. Virtually ***3827** every action required of the Administrator by the Act, however, involves some degree of agency discretion, judgments involving a complex balancing of factors that include technological considerations, economic considerations, and others. The Act seeks to guide the Administrator, to the extent possible, in the matter of assigning relative weight to the many factors that he must consider.

If the actions of the Administrator under this Act were subject to the requirements of NEPA, administration of the Act would be greatly impeded.

SEPARABILITY

Senate bill

Section 512 provides that if this Act or any provision of it is held invalid the application of that provision and the remainder of the Act is not to be affected thereby.

House amendment

Section 512 is the same as the Senate bill.

Conference substitute

Section 512 is the same as the Senate bill and the House amendment.

LABOR STANDARDS

Senate bill

Section 513 requires the application of the Davis-Bacon Act to treatment works for which grants are made under this Act. This is essentially the same as existing law.

House amendment

Section 513 is essentially the same as the Senate bill and existing law.

Conference substitute

Section 513 is the same as the House amendment.

PUBLIC HEALTH AGENCY COORDINATION

Senate bill

No comparable provision.

House amendment

Section 514 provides that before the owner or operator of property used for agricultural purposes is required to construct any water pollution control facility the plan for such facility and its operation must have been approved by the Administrator, and the Administrator must certify that the plan and the construction and operation of the facility in accordance therewith will not result in a violation of the laws or regulations of any local, State, or Federal health agency or other governmental agency.

Conference substitute

Section 514 of the conference substitute provides that the agency issuing a permit under section 402 shall assist the applicant for the permit in coordinating the requirements of this Act with the requirements of the appropriate public health agencies.

***3828** EFFLUENT STANDARDS AND WATER QUALITY INFORMATION ADVISORY COMMITTEE

Senate bill

Section 514 establishes a nine member scientific committee to hold hearings and transmit to the Administrator information on any proposed effluent limitation regulations or national performance standards or toxic and pretreatment standards.

House amendment

DON H. CLAUSEN,
CLARENCE E. MILLER,
Managers on the Part of the House.

(Note: 1. PORTIONS OF THE SENATE, HOUSE AND CONFERENCE REPORTS, WHICH ARE DUPLICATIVE OR ARE DEEMED TO BE UNNECESSARY TO THE INTERPRETATION OF THE LAWS, ARE OMITTED. OMITTED MATERIAL IS INDICATED BY FIVE ASTERISKS: *****. 2. TO RETRIEVE REPORTS ON A PUBLIC LAW, RUN A TOPIC FIELD SEARCH USING THE PUBLIC LAW NUMBER, e.g., TO(99-495))

S. CONF. REP. 92-1236, S. Conf. Rep. No. 1236, 92ND Cong., 2ND Sess. 1972, 1972 U.S.C.C.A.N. 3776, 1972 WL 12735 (Leg.Hist.)

H.R. CONF. REP. 104-494, H.R. Conf. Rep. No. 494, 104TH Cong.,
2ND Sess. 1996, 1996 WL 168956, 1996 U.S.C.C.A.N. 683 (Leg.Hist.)

**683 P.L. 104-127, *1 FEDERAL AGRICULTURE IMPROVEMENT AND REFORM ACT OF 1996

DATES OF CONSIDERATON AND PASSAGE

House: February 28, 29, March 28, 1996

Senate: January 31, February 1, 6, 7, March 12, 27, 28, 1996

Cong. Record Vol. 142 (1996)

House Report (Agriculture Committee) No. 104-462,
Feb. 9, 1996
(To accompany H.R. 2854)

House Conference Report No. 104-494,
Mar. 25, 1996
(To accompany H.R. 2854)

HOUSE CONFERENCE REPORT NO. 104-494

**0 March 25, 1996

Mr. Roberts, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 2854]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2854), to modify the operation of certain agricultural programs, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.-This Act may be cited as the "Federal Agriculture Improvement and Reform Act of 1996".

(b) Table of Contents.-The table of contents of this Act is as follows:

(2) Wetland conservation exemption

The Senate amendment amends Section 1222(b)(1) of the Food Security Act of 1985 by adding a new exemption from swampbuster **744 penalties for converted wetlands if the extent of the conversion is limited to the reversion to conditions that will be at least equivalent to the wetland functions and values that existed prior to implementation of a voluntary wetland restoration, enhancement, or creation action. (Section 358)

The House bill contains no comparable provision.

The Conference substitute adopts the Senate provision with a technical amendment. (Section 322)

The Managers intend that the Secretary permit a person to cease to use "farmed wetlands" or "farmed wetlands pasture" for agricultural purposes, allow them to return to wetland conditions and subsequently bring these lands back into agricultural production after any length of time without violating swampbuster, if: 1) the person first notifies the Secretary of the intent to allow improved wetland conditions to return to the "farmed wetland" or "farmed wetland pasture"; 2) the Secretary documents the specific site conditions prior to the initiation of the wetland improvement; 3) the Secretary approves the subsequent proposed conversion action prior to implementation, and; 4) the subsequent conversion action returns the site to wetland conditions at least equivalent to the functions and values that existed prior to the time the wetland was restored or enhanced. The Managers do not intend for this provision to supersede the wetlands protection authorities and responsibilities of the Environmental Protection Agency or of the Corps of Engineers under Section 404 of the Clean Water Act.

(3) Abandonment of converted wetlands

The Senate amendment amends Section 1222 of the Food Security Act of 1985 to require that the Secretary not determine that a prior converted or cropped wetland is abandoned, and therefore *380 that the wetland is subject to swampbuster penalties, on the basis that a producer has not planted an agricultural crop on the prior converted or cropped wetland after the date of enactment of this subsection, so long as any use of the wetland thereafter is limited to agricultural purposes. (Section 364)

The House bill contains no comparable provisions.

The Conference substitute adopts the Senate provision with amendments that: 1) provide the Secretary with the discretion to determine which programs a person who violates swampbuster will become ineligible for; 2) assure producers have the right to request a review of, and to appeal, a certified wetland delineation; 3) provide that a certified wetland delineation will remain in effect until the producer requests a new delineation and certification; 4) ensure that wetlands which were certified as prior converted cropland will continue to be considered prior converted wetlands even if wetland characteristics return as a result of lack of maintenance of the land or other circumstances beyond the person's control as long as the prior converted cropland continues to be used for agricultural purposes; 5) require USDA to identify which categories of actions constitute a minimal effect on a regional basis; 6) provide producers who inadvertently convert a wetland greater flexibility to mitigate that loss through restoration, enhancement, or creation of wetlands; **745 7) allow the Secretary to waive penalties against a producer if the Secretary believes the producer was acting in good faith and did not intentionally violate swampbuster; 8) provide for a pilot program on mitigation banking; 9) repeal the requirement for consultation with the Fish and Wildlife Service; 10) provide that persons affiliated with a person who violates swampbuster will not be penalized if such affiliated persons are not responsible for the violation, and; 11) defines "agricultural lands" for purpose of implementing the interagency memorandum of agreement on federal wetland delineations. (Section 321-326)

The Managers intend that the Secretary should, in determining ineligibility for benefits under swampbuster, take away those program benefits that would not defeat the purposes of encouraging good conservation of our soil and water resources or endanger the ability of a borrower to continue to repay a USDA farm loan. The Managers intend that the amendments to abandonment provisions under swampbuster should not supersede the wetland protection authorities and responsibilities of the Environmental Protection Agency or the Corps of Engineers under Section 404 of the Clean Water Act. The minimal effect amendments are intended by the Managers to assist persons in avoiding a violation of the ineligibility provisions of Section 1221 by identifying types of minor wetland alterations and farming practices that are routinely determined by the Secretary in a given state or region to have minimal impact on wetlands functions and values. The Managers intend, in general, that categorical minimal effects exemptions be developed on a statewide, regional or local basis for categories of specific, normal agricultural practices conducted in specified wetland systems.

The Managers intend the mitigation banking pilot to determine the usefulness of such mitigation banking in assisting landowners in complying with the mitigation requirements of the Swampbuster provisions. In carrying out such a pilot, the Managers ***381** support permitting wetland acres to be entered into the Conservation Reserve Program (CRP) for the purpose of demonstrating the feasibility of agricultural wetlands mitigation. The Managers also support permitting producers to convert the frequently cropped wetlands mitigated under this pilot mitigation banking authority, and to produce an agricultural commodity on the converted acres. To ensure that the mitigation pilot does not diminish wetland resources, the Mangers expect that wetlands that producers may convert under this pilot program should be wetlands which are frequently cropped, and significantly degraded. Further, to offset the loss of wetland functions and values that may result from such conversion, the Committee expects that the Secretary will require producers who are permitted to harvest a crop on a converted wetland mitigated under this pilot program to assign the related CRP payments to a wetland mitigation bank approved by the Secretary.

The Managers intend the Secretary to determine under what circumstances the Fish and Wildlife Service should be utilized in the implementation of Swampbuster. The Managers intend that the Secretary define "affiliated person" so that persons with an insignificant interest will not be considered affiliated.

****746** For the purposes of the section relating to the Secretary of Agriculture's role under the interagency memorandum of agreement on wetland delineation, "tree farms" means farms devoted to the raising of trees designed to be sold whole, such as nurseries, Christmas tree farms and other small tree farms, and does not include large tree farms that are commercially planted, cultivated, and actively managed for the production of wood and wood fiber.

(4) Environmental Conservation Acreage Reserve Program

The House bill extends the authorization for ECARP through 2002. Protection of wildlife habitat is added as a purpose of ECARP. (Section 304)

The Senate amendment contains similar provisions including a farmland protection program under which the Secretary is directed to purchase conservation easements or other interests in 170,000 to 340,000 acres of land with prime, unique or other productive soil that is subject to a pending offer from a state or local government to limit non-agricultural uses of the land. Funding for the program, from the Commodity Credit Corporation, shall not exceed $35 million. (Section 301)

The Conference substitute adopts the Senate provisions with an amendment to add protection of wildlife habitat as a purpose of ECARP. (Section 331)

It is the intent of the Managers that the Secretary of Agriculture should, to the fullest extent practicable, recognize the responsibilities and utilize the authorities of state and local governments, including local conservation districts, in achieving the purposes of this section. In particular, Congress intends for the Secretary to acknowledge and maintain the

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I electronically filed the foregoing addendum with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Jessica O'Donnell*
JESSICA O'DONNELL