



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

REPLY TO
ATTENTION OF

APR 24 2015

CECC-E

MEMORANDUM FOR Deputy Commanding General for Civil and Emergency Operations,
U.S. Army Corps of Engineers (ATTN: MG John W. Peabody)

THROUGH the Chief Counsel, U.S. Army Corps of Engineers (ATTN: David R. Cooper)

SUBJECT: Legal Analysis of Draft Final Rule on Definition of "Waters of the United States"

This memorandum responds to your request for a legal analysis of the draft final rule regarding the definition of the "waters of the United States" (WOUS) subject to Clean Water Act (CWA) jurisdiction, which the Environmental Protection Agency (EPA) submitted to the Office of Management and Budget (OMB) for inter-agency clearance on April 1, 2015.

Summary

The draft final rule regarding the definition of WOUS contains several serious flaws. If the rule is promulgated as final without correcting those flaws, it will be legally vulnerable, difficult to defend in court, difficult for the Corps to explain or justify, and challenging for the Corps to implement. The Corps has identified every serious area of concern in the draft final rule to both the Department of the Army (DA) and the EPA, and Corps legal and regulatory staff has provided numerous edits or "fixes" to rule language to correct those errors. However, to date, the fixes have not been adopted, so the flaws remain.

The fundamental problem reflected in every one of the flaws described below is that the proposed rule that was published on April 01, 2014, is based on sound principles of science and law, but many provisions of the draft final rule have abandoned those principles and introduced indefensible provisions into the rule. The following is a summary of the most serious flaws in the draft final rule; the proposed fixes are shown in track changes in the attached "Revised Draft Final Rule," which was provided most recently to DA and EPA on April 16, 2015.

Legal Standard

EPA and Corps staff agree with our colleagues at the U.S. Department of Justice that the final rule will survive the expected legal challenges that it will face in the federal courts only if the courts conclude that the rule complies with the test for CWA jurisdiction provided by Justice Kennedy in the *Rapanos* decision. The following is the essence of Justice Kennedy's test: a water body (such as a wetland) is subject to CWA jurisdiction if it has a significant nexus with navigable waters. 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 the downstream navigable waters. For an effect to be significant, it must be more than speculative or insubstantial.

Loss of CWA Jurisdiction

The draft final rule excludes from jurisdiction of the CWA large areas of lakes, ponds, and similar water bodies that are important components of the tributary system of the navigable waters and that the Federal government has been regulating as jurisdictional from 1975 to the present moment. Those water bodies are important to the physical, chemical, and biological integrity of the entire tributary system of the navigable waters and to the navigable waters themselves. However, those lakes, ponds, and wetlands would lose all federal CWA protection under the draft final rule merely because they happen to lay outside and beyond a distance of 4000 feet from a stream's ordinary high water mark (OHWM) or high tide line (HTL). The 4000-foot cut-off line (or "bright-line rule") for jurisdiction has no basis in science or law, and thus is "arbitrary." The Corps believes that the 4000-foot limit on jurisdiction would cause significant adverse environmental effects as a result of the loss of jurisdiction over a substantial amount of jurisdictional "waters," based on the Corps' experience in implementing the CWA Section 404 program and performing the majority of jurisdictional determinations under the CWA.

The arbitrary nature of the 4000-foot cutoff of jurisdiction is demonstrated by the fact that EPA staff engaged in drafting the rule told Corps staff during a conference call in March 2015 that EPA was going to cut off CWA jurisdiction at a distance of 5000 feet from the OHWM/HTL of traditional navigable waters, interstate waters, territorial seas, boundaries, or tributaries. Then, three days later, EPA staff changed its position and decided to cut off CWA jurisdiction at the narrower 4000-foot limit from an OHWM/HTL. EPA staff has never provided any scientific support or justification for either a 5000-foot or 4000-foot cut-off. Both distances are arbitrary and either limitation would be very difficult to defend in the federal courts when the final rule is challenged because neither limitation on CWA jurisdiction is supported by science or field-based evidence. It is significant that EPA's Science Advisory Board recommended against using any set distance to establish or limit CWA jurisdiction.

To abandon existing Federal CWA jurisdiction over ecologically important water bodies that significantly affect the biological, physical, and chemical integrity of the downstream waters would lead to significant adverse effects on the environment, because, shorn of CWA protection, those lakes, ponds, and wetlands can be polluted, filled, drained, and degraded at will, with no Federal regulation to prevent, regulate, or mitigate for those destructive activities. Pollutants dumped into no-longer-jurisdictional water bodies would flow downstream to the navigable waters, polluting drinking water supplies and killing or harming fish, shellfish, and wildlife, and harming human populations. Consequently, the abandonment of CWA jurisdiction over important parts of the tributary system of the navigable waters cannot be done without first preparing an environmental impact statement (EIS) to identify precisely what water bodies would lose CWA protection under the final rule and what significant adverse environmental effects would result from that loss of jurisdiction.

In a limited time frame during the development of the draft final rule (roughly the last two months), the Corps' professional staff has documented representative examples of the many lakes, ponds, and wetlands that are part of the tributary system of the navigable waters and that would lose CWA jurisdiction and protection under the draft final rule. This documentation has

been presented to both the Assistant Secretary of the Army (Civil Works) (ASA(CW)), and to EPA decision-makers and technical staff. Thus far, no one has refuted or denied the professional, technical, and well-documented examples of lost jurisdiction under the draft final rule. No one has presented any basis to refute or challenge the Corps' determination that the draft final rule would cause significant adverse effects on the human environment and thus would require an EIS before the final rule could be promulgated in its current form.

During discussions with EPA staff on April 9, 2015, EPA representatives suggested that, although the proposed abandonment of substantial parts of the CWA's long-standing jurisdiction would cause significant adverse effects on the human environment, those adverse effects might be offset by the hope that the final rule will lead to the assertion of CWA jurisdiction over five categories of "isolated" waters under section (a)(7) of the draft final rule. That argument is unpersuasive for at least two reasons:

First, a well-established principle of NEPA law states that a proposed Federal action that would cause significant adverse effects on any part or aspect of the human environment requires an EIS to address those significant adverse effects, even if the Federal agency believes that other aspects of its proposed action would have environmental benefits. For example, the Council on Environmental Quality's (CEQ's) legally binding NEPA regulations state the rule of law regarding how a Federal agency must determine whether its proposed action could cause significant adverse environmental effects as follows:

"Significantly" as used in NEPA required consideration of . . . intensity: (b) Intensity. This refers to the severity of the impact. (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." (40 CFR 1508.27)

Secondly, in section (a)(7) of the draft final rule, EPA has determined that every hydrologically/geographically isolated water body of each of the five defined subcategories of isolated waters is "similarly situated" with all other isolated waters in those subcategories in the watershed that drain to the nearest traditional navigable water, interstate water, or territorial sea. Leaving aside the legal, scientific, and technical problems presented by section (a)(7), which are discussed below, section (a)(7) does not assert CWA jurisdiction over any of the isolated water bodies identified in that provision. CWA jurisdiction could be asserted over those isolated water bodies identified in section (a)(7) only if and when the Corps (or possibly EPA as a "special case") was to determine on a case-specific basis that those isolated water bodies have a significant nexus with navigable or interstate waters. Given the fact that, by definition, the vast majority of those isolated water bodies have no hydrologic connection with navigable or interstate waters, it is uncertain whether many, if any, of those isolated waters will pass the "significant nexus" test and be found to be subject to CWA jurisdiction. Even if the Corps or the EPA were to assert that those isolated waters are jurisdictional under the significant nexus test, it is doubtful that the federal courts would uphold such assertions of CWA jurisdiction.

The Corps has questioned what legal authority exists that would enable DA and EPA to abandon CWA jurisdiction over large areas of lakes, ponds, and wetlands that are important parts of the tributary system of the navigable waters, and over which the Corps and EPA have asserted CWA

jurisdiction since 1975. But even if such legal authority exists, at present there is no legally adequate administrative record to support such a move. The proposed rule did not propose any limitation for CWA jurisdiction comparable to the 4000 feet cut-off, which was presented for the first time in the draft final rule. Consequently, the public did not have the opportunity to evaluate that idea or to comment on it during the public comment period and thus the addition of this limitation likely violates the Administrative Procedures Act (APA).

In some ways the proposed abandonment of CWA jurisdiction over many lakes, ponds, and wetlands that are important parts of the tributary system of the navigable waters also has the effect of calling attention to legal and scientific questions regarding other parts of the final rule. For example, the draft final rule asserts CWA jurisdiction *by rule* over every "stream" in the United States, so long as that stream has an identifiable bed, bank, and OHWM. That assertion of jurisdiction over every stream bed has the effect of asserting CWA jurisdiction over many thousands of miles of dry washes and arroyos in the desert Southwest, even though those ephemeral dry washes, arroyos, etc. carry water infrequently and sometimes in small quantities if those features meet the definition of a tributary. The draft final rule's assertion that the dry washes all have a "significant nexus" with navigable waters contrasts sharply with the contradictory position in the rule that large areas of lakes, ponds, and wetlands in the well-watered parts of the USA, which water bodies actually send large amounts of water, sediments, nutrients, and (potentially) pollutants to the navigable waters, would lose CWA jurisdiction under the 4000-foot cutoff.

When these flaws were described to EPA staff during the April 9, 2003 meeting, the response was that the agencies have legal authority to place any limitation that they choose on the extent of CWA jurisdiction, even if that would have the effect of excluding from CWA jurisdiction lakes, ponds, and wetlands that have already been determined by the Corps to have a significant nexus with navigable waters, or that would satisfy that jurisdictional test in any future site-specific jurisdictional determination. Even if that limitation is valid, that sort of abandonment of CWA jurisdiction cannot take place without having first prepared an EIS to analyze and seek public comment on the potentially significant adverse effects on the natural and human environment that would result.

It is easy to fix the draft final rule to avoid the legal necessity of preparing an EIS. The Corps has suggested the necessary fix many times during the last several months. To date, consensus has not been reached to resolve the Corps' continuing concerns. The reason that EPA has given for not adopting the Corps' fixes is that EPA apparently believes that the 4000-foot cut-off of CWA jurisdiction would provide greater clarity (i.e., a "bright line") to the regulated public by limiting the Corps' ability to perform site-specific jurisdictional determinations. The Corps has explained why the EPA's 4000-foot limit would be more difficult to understand, identify, implement, or defend in the federal courts than the Corps' suggested approach, as explained in the technical memorandum accompanying this memorandum.

The Corps' fix is shown in the attached revised draft final rule. If this problem is not fixed, then the Corps must prepare an EIS before the final rule can be promulgated and leaves the rule vulnerable to an APA challenge.

Definition of "Adjacent"

On the day that the draft final rule was sent to OMB to begin the inter-agency review process, EPA introduced into the rule's definition of "adjacent" a new sentence that would exclude from the final rule's definition of "adjacent waters" large areas wetlands that are used, or have been used, for farming, forestry, or ranching activities. That sentence reads as follows: "Waters subject to established, normal farming, silviculture, and ranching activities (33 U.S.C. Section 1344(f)(1)) are not adjacent." On its face, the sentence is indefensible: it is a textbook example of rulemaking that cannot withstand judicial review. This is true because a wetland is, by definition, "adjacent" to a tributary stream if, as a matter of geographical fact, that wetland is "bordering, contiguous, or neighboring" to the stream, regardless of whether farming, forestry, or ranching activities are taking place on that wetland. That sentence must be removed or modified to retain credibility and legal defensibility for the final rule's definition of "adjacent."

According to the draft preamble to the draft final rule, the intended effect of the new sentence is to require a site-specific "significant nexus" determination before the particular adjacent waters could be determined to be subject to CWA jurisdiction, rather than to declare the waters jurisdictional by rule, as is the case with all other "adjacent" wetlands and other adjacent waters. For many years wetland areas adjacent to rivers and streams have been used for cutting hay or other farming, ranching, or silviculture purposes. All normal farming, ranching, and silviculture activities have been exempted by statute from CWA Section 404 permitting requirements since 1977. The proposed rule that was published in the Federal Register did not propose to exclude from the definition of "adjacent" any categories of adjacent waters based on the activities that occur in those waters, so the public did not have an opportunity to comment on the new definition, again leaving the rule vulnerable to an APA challenge. The last-minute decision to distinguish adjacent farmed waters from other adjacent wetlands is highly problematic, both as a matter of science and for purposes of implementing the final rule.

Nevertheless, if EPA and DA decide that the final rule should implement the idea underlying the sentence quoted above, then at the least the sentence should be revised as follows: "Waters subject to established, normal farming, silviculture, or ranching activities (33 U.S.C. Subsection 1344(f)(1)) are not jurisdictional by rule under sub-section (a)(6) of this paragraph as "adjacent waters," but may be determined to be jurisdictional on a case-by-case basis under subsection (a)(8)."

Definition of "Neighboring"

The draft final rule would provide a new definition of the term "neighboring," which would declare "jurisdictional by rule" all water bodies within 1500 feet of an OHWM or HTL, so long as the water body is located within a 100-year flood plain. The 1500-foot limitation is not supported by science or law and thus is legally vulnerable. The Corps has advocated the more scientifically and legally defensible distance of 300 feet for declaring by rule that all neighboring water bodies are jurisdictional, based on the Corps' experience in implementing the CWA Section 404 program and performing the majority of jurisdictional determinations under the CWA. Site-specific significant nexus determinations of jurisdiction are necessary to justify the assertion of CWA jurisdiction over water bodies that lie more than 300 feet from an OHWM or

HTL. The definition of "neighboring" also contains other fixable flaws. The edits are shown and explained in the attached revised draft final rule.

Categories of Isolated Waters

The draft final rule's treatment of five categories of "isolated" waters (i.e., prairie potholes, western vernal pools, Carolina bays and Delmarva bays, Texas coastal prairie wetlands, and pocosins) is problematic. Such isolated waters undoubtedly are ecologically valuable and important, so the policy goal of providing CWA protection for such waters is understandable. However, to be subject to CWA jurisdiction, those isolated water bodies must be demonstrated to have a significant nexus with navigable or interstate waters, which nexus will be difficult to show for isolated waters that are not hydrologically connected to the tributary system of either navigable or interstate waters.

The draft final rule would declare that all isolated waters in each of these five listed categories of isolated waters are "similarly situated," but the Corps has never seen any data or analysis to explain, support, or justify this determination. In essence, section (a)(7) of the draft final rule provides a definition of each of five categories of isolated waters and then asserts that every water that fits into each definition is similar to all other waters that fit into that same definition within any single point of entry watershed. This approach is circular reasoning, making use of a tautology, so that the determinations of "similarly situated" do not have much substance.

Moreover, the determination that all isolated waters in each of the listed five categories of isolated waters are "similarly situated" is in conflict with the draft final rule's definition of "similarly situated," which is embedded in the definition of "significant nexus." The current draft final rule defines the concept of "similarly situated" as follows: "Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters." This definition requires findings on two matters: the functions of the waters and how close to each other those similar waters are located. However, the current definition for each category of isolated waters in section (a)(7) of the draft final rule is based entirely on the functions of those waters, leaving out the required findings regarding proximity. In other words, the definitions in section (a)(7) for the five categories of isolated waters are not based on any findings that those isolated waters "are sufficiently close together to function together in affecting downstream waters." as required by the definition of "similarly situated." Significantly, EPA's technical staff has demonstrated that in some areas prairie potholes (for example) are located close together and, in other areas, they are spaced far apart. Yet, the assertion that all prairie potholes are "similarly situated" does not account for that discrepancy, which renders section (a)(7) legally vulnerable.

It is also worth noting that section (a)(7) asserts that every example of the five categories of isolated waters identified in that section have essentially the same functions regarding navigable and interstate waters, and the territorial seas, as every other isolated water in that category. But how can that be true, when some of those isolated waters have been hydrologically connected to the tributary system of the navigable waters by drainage ditches, while other isolated waters in that same category have not been so connected, and are truly "isolated?" Their functions would

not necessarily be the same and even if they share some of the same functions, the effects of the functions would be varied such that they would not be functioning "alike."

Functions of Wetlands/Water Bodies Indicating Significant Nexus

The draft final rule presents a limited and exclusive list of nine (9) functions that wetlands and other water bodies perform, which can be evaluated and documented to establish a significant nexus between that wetland or other water body and downstream navigable or interstate waters to establish CWA jurisdiction over that water body. The Corps on numerous occasions has advised EPA that the list of functions is incomplete, based on the Corps' experience and expertise in performing significant nexus evaluations in the nearly eight years since the release of the *Rapanos* guidance. During that period the Corps has made more than 51,800 significant nexus determinations by analyzing the biological, physical, and chemical functions provided by such water bodies. Nevertheless, thus far EPA has not expanded the list or revised the provision to designate EPA's list of functions as representative and non-exclusive. The proposed fix for this problem is presented in the attached revised draft final rule.

Transition to New Rule

The draft final rule does not include an adequate provision for "grandfathering," that is, for transitioning from the existing rule to the new rule. The transition could be difficult and fraught with problems, all of which require careful treatment in a well-conceived provision that has not yet been drafted. The needed provision should consider the various types of authorizations provided under the CWA, the different types of jurisdictional determinations provided to landowners, and various other types of actions related to jurisdictional determinations. Without a well-considered transition provision, implementation of the rule will generate significant legal problems.

Essential Principles in the Proposed Rule

To understand the fundamental legal problems with the draft final rule, all that one needs to do is read the language of the proposed rule and compare it to the very different language of the draft final rule. The comparison reveals that many essential principles that made the proposed rule legally defensible have been abandoned or obscured in the draft final rule. Given the fact that the proposed rule was carefully developed by the EPA and the Corps, and then reviewed and cleared by the EPA, the Corps, DA, the Department of Justice, OMB, and other Federal agencies, the draft final rule's deviation from fundamental legal and scientific principles that were essential components of the proposed rule reveals the basic problems of the draft final rule.

The fundamental legal and scientific principles of the proposed rule are fairly straightforward, elegantly simple, easily understood, based on sound scientific and legal principles, and thus very legally defensible. Those principles included the following:

The proposed rule would assert CWA jurisdiction by rule over all of the natural water bodies that constitute the tributary system of the navigable and interstate waters, subject to a limited number of specified exclusions from CWA jurisdiction. The proposed rule would do that by asserting

CWA jurisdiction by rule over all tributaries of the navigable and interstate waters. Those tributaries are defined in the proposed rule as all water bodies (i.e., rivers, streams, lakes, ponds, wetlands, etc.) that contribute a flow of water (directly or through another water body) to the navigable or interstate waters, plus all other waters that are adjacent to those tributary water bodies. In accordance with the Supreme Court's legally binding, precedential decisions, the proposed rule and its administrative record would establish the reasonable proposition that the natural water bodies that constitute the tributary system of the navigable and interstate waters have a significant nexus with those downstream waters because they provide the water to those downstream navigable and interstate waters, and because pollutants, sediments, etc., flow from the upper parts of the tributary system down to the navigable and interstate waters.

Under the proposed rule, for truly isolated water bodies that have no shallow subsurface or confined surface connection to the tributary system of the navigable or interstate waters, those isolated water bodies could be evaluated on a case-by-case basis in site-specific jurisdictional determinations made by the Corps or EPA to determine whether various "aggregations" of those isolated water bodies might be "similarly situated" and might have a "significant nexus" with navigable or interstate waters, or the territorial seas, and thus might be subject to CWA jurisdiction despite the fact that they have no shallow subsurface or confined surface hydrologic connection to the navigable or interstate waters. Whatever result those specific significant nexus analyses might yield for various aggregations of truly isolated water bodies, at least the legal challenges to those jurisdictional determinations would be independent of, and would not undermine the legal defensibility of, the final rule as a whole.

The basic principles of the proposed rule described above reflect the controlling Federal law and undeniable scientific facts about pollution control and hydrology, and thus are legally sound and defensible. Unfortunately, the draft final rule has departed markedly from the sound legal and scientific principles of the proposed rule, in several important ways, and those basic changes make the draft final rule legally vulnerable.

Change in Definition of "Tributary"

The draft final rule would change the definition of "tributary" to exclude from that important definition all lakes, ponds, and wetlands that are part of the tributary system of the navigable or interstate waters and that send a flow of water into those waters. This change would have the effect of excluding from CWA jurisdiction potentially vast areas of lakes, ponds, and wetlands that are integral parts of the tributary system of the navigable and interstate waters. Those excluded wetlands, lakes, and ponds have been subject to CWA jurisdiction since at least 1975 and are subject to CWA jurisdiction now. Excluding those lakes, ponds, and wetlands from CWA jurisdiction under the draft final rule is not supported by an administrative record or EIS to provide the NEPA compliance for the significant adverse environmental effects that would result from such an action. Also, no notice of such a change was provided in the proposed rule to allow for public comment leaving the rule vulnerable to an APA challenge.

Attempts to remedy the problems that the new definition of tributary causes has led to the addition of several new provisions in the draft final rule, which were not in the proposed rule, and which try to patch the final rule to recapture CWA jurisdiction over some of the lakes,

ponds, and wetlands that the new definition of tributary would abandon. These patches are difficult to understand, explain, implement, or defend in court.

For example, the draft final rule adds new provisions to allow the agencies to assert CWA jurisdiction on a case-by-case basis over lakes, ponds, or wetlands that contribute flow to navigable or interstate waters and that are located no more than 4000 feet from a stream's OHWM/HTL. The same provision excludes from CWA jurisdiction altogether any lake, pond, or wetland that contributes a flow of water to navigable or interstate waters, but that lies more than 4000 feet from that same OHWM/HTL. This 4000-foot bright line rule is not based on any principle of science, hydrology or law, and thus is legally vulnerable. The fundamental fact that the tributary lakes, ponds, or wetlands inside or outside the 4000-foot boundary all contribute the same flow of water, pollutants, sediments, etc., to the navigable or interstate waters is ignored in the draft final rule. This rule is not likely to survive judicial review in the federal courts.

Other examples of problematic patches in the draft final rule that are intended to correct problems created by the new definition of tributary can be found in the revised definition of "neighboring," which asserts that water bodies that lie within 1500 feet of a stream's OHWM or HTL are neighboring to that stream. Once again, the 1500-foot figure is not based on any principle of science or law, and thus is legally vulnerable. Additionally, the federal courts may find that common sense dictates that a water body located 1500 feet from a stream is too far away from that stream to be defined as neighboring and thus adjacent to that stream. The fact that the draft final rule abandons the fundamental legal and scientific principle of the proposed rule that asserted CWA jurisdiction by rule over water bodies that are part of the tributary system of navigable or interstate waters, and substitutes for that principle non-science-based tests based on distances from OHWMs/HTLs, makes the draft final rule legally vulnerable.

Site-Specific JDs for Water Bodies Draining into Jurisdictional Waters

A related example of a serious legal flaw in the draft final rule is the fact that it imposes novel limitations on the ability of the Corps and EPA to make jurisdictional determinations based on case-specific "significant nexus" determinations for any lake, pond, or wetland that contributes a flow of water to navigable or interstate waters, or to the territorial seas. The Corps and EPA can make such case-specific significant nexus determinations now, but not under the draft final rule. No final rule should be promulgated unless this flaw is fixed. The Corps' proposed edit is set forth in the attached revised draft final rule.

Isolated Waters Characterized as "Similarly Situated"

Another example of a provision of the draft final rule that makes the entire rule legally vulnerable is the provision that characterizes literally millions of acres of truly "isolated" waters (i.e., wetlands that have no shallow subsurface or confined surface connection with the tributary systems of the navigable waters or interstate waters) as "similarly situated." In at least three places in the preamble, it is stated that such a determination of "similarly situated" in a final rule would be tantamount to an inevitable future determination that all of those identified aggregations of similarly situated isolated waters do have a significant nexus with navigable or interstate waters, and thus will later be determined to be subject to CWA jurisdiction in future

jurisdictional determinations. That part of the draft final rule creates legal vulnerabilities for the entire rule.

It will be difficult, if not impossible, to persuade the federal courts that the implicit, effective determination that millions of acres of truly isolated waters (which have no shallow subsurface or confined surface connection to the tributary system of the navigable or interstate waters) do in fact have a "significant nexus" with navigable or interstate waters. Consequently, the draft final rule will appear to be inconsistent with the Supreme Court's decisions in *Rapanos* and *SWANCC*. As a result, this assertion of CWA jurisdiction over millions of acres of isolated waters may well be seen by the federal courts as "regulatory over-reach," which undermines the legal and scientific credibility of the rule.

The final rule should address isolated water bodies just as the proposed rule did --by leaving to future case-by-case determinations all findings regarding what isolated waters are similarly situated, which waters should be aggregated in what watersheds, and whether those case-specific aggregations of isolated waters actually have a significant nexus with navigable or interstate waters.

LANCIE WOOD
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cc: Revised Draft Final Rule

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PART 328 – DEFINITION OF WATERS OF THE UNITED STATES

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

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by removing the introductory text and revising subsections

(a), (b) and (c) to read as follows:

328.3 Definitions

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which ~~that~~ 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)(7) 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) through (E) of this paragraph 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 paragraph (A) through (E)

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of this paragraph 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. Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis.~~ Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

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.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets located in the upper mid-west.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

Comment [DRC1]: The Corps agrees with EPA that a water under section (a)(7) or (a)(8) cannot be found to be jurisdictional merely by aggregating that waterbody with adjacent waters and asserting that the adjacent waters somehow confer or transmit CWA jurisdiction to or over the isolated waters; that would be an inappropriate form of "bootstrapping" jurisdiction. The proposed insert would forbid that bootstrapping, but would still allow all waterbodies with similar functions within an SPOE watershed to be aggregated and evaluated together during a significant nexus determination. This fix is necessary to avoid the effect of the current language, which would forbid the aggregation of waterbodies that have similar functions and exist side by side in a SPOE watershed, merely because similar waterbodies happen to lie on one side or the other of a line that demarcates adjacency.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

Comment [DR2]: Previous language, "found in southeastern Oregon to northern Baja California," has been replaced with "in parts of California." Why are vernal pools in southeastern Oregon being omitted?

(8) All of the following waters, if 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: (1) All waters located within 4000 feet of the high tide line or ordinary high water mark, or within the 100-year floodplain, whichever is greater, of a water identified in paragraphs (a)(1) through (5) of this section; and (2) waters that contribute a flow of water (either directly or through another water body) to 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. The entire water is a water of the United States, a portion is located within 4000 feet of the high tide line or ordinary high water mark, or is within the 100-year floodplain, or if that water contributes a flow of water to a water identified in paragraphs (a)(1) through (5) of this section. Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent

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and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

Comment [DRC3]: Same comment as above on no "bootstrapping" under section (a)(7).

~~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)(1) 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:

(A) Ephemeral ditches that are not a relocated tributary or excavated in a tributary or other jurisdictional waterbody, and that would not have the effect of draining a jurisdictional waterbody.

(B) Ephemeral and intermittent roadside ditches that drain a Federal, state, tribal, county, or municipal road, and that are not a relocated tributary or excavated in a tributary.

Comment [3AM4]: This language ensures that ditches that are constructed within or to drain jurisdictional waters, once constructed, are themselves waters of the U.S. That would have the effect of making the waterbody being drained a jurisdictional "adjacent" water, thereby providing some degree of CWA control over drainage of wetlands.

(C) 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:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(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 created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and 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 determining adjacency, a waterbody that ~~includes~~ includes, and is considered a single waterbody with all wetlands within or that are bordering, contiguous to, or abutting that waterbody, its ordinary high water mark is considered a single water. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. 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 are adjacent. Waters subject to established, normal farming, aquaculture, or ranching activities (33 USC § 1344(f)(1)) are not adjacent.

(2) *Neighboring*. The term *neighboring* means:

(A) all waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (a)(5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) all waters located within the 100 year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than ~~1500~~ 300 feet of the ordinary high water mark of such water. The entire water is neighboring if a portion is located within ~~1500~~ 300 feet of the ordinary high water mark and within the 100 year floodplain;

Comment [DRCS]: This language would correct a problem presented by the comparable sentence found in the draft final rule submitted to OMB. The problem is that often it is impossible to identify an OHWM for a river, stream, lake, pond, or similar waterbody that has adjacent wetlands; any OHWM is obscured by the wetlands. The current wording would require the Corps or EPA to identify an OHWM where none can be found because of the adjacent wetland.

Comment [JAM6]: Including this language conflates geographic jurisdiction with activity-based exemptions. There is no scientific basis to support the notion that waters subject to specific activities are any more or less "adjacent" than other adjacent waters.

Comment [DR7]: Per the Corps' prior comments, this language would capture all waterbodies that are separated vertically, which is inappropriate (e.g., wetlands and open waters on banks).

(C) all waters located within ~~1500~~³⁰⁰ feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within ~~1500~~³⁰⁰ feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located with 1500 feet of the high tide line.

(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, and 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 water excluded under paragraph (b) of this section, directly or through another water, to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Ditch*. The term *ditch* means a man-made channel whose physical characteristics are often straightened to efficiently convey water from a source to an outlet. Ditches are generally constructed for the purpose of drainage, irrigation, water supply, water management and/or distribution. A ditch may carry flows that are perennial, intermittent, or ephemeral.

(45) *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.

(56) *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 [waters performing similar functions 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 (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (J) of this paragraph. 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

Comment [JAMP]: This addition has been discussed previously and language provided previously. Many types of ditches are excluded and certain ditches are referred to in the definition of tributary; however, ditches are not defined. A common understanding is necessary for clarity.

Comment [JAMP]: This sentence, in particular, and in combination with the definition overall, does not work effectively for both paragraphs (a)(7) and (a)(8). Additionally, the sentence contains a partially incomplete thought. Waters are similarly situated when they function alike and are sufficiently close to each other? Downstream waters? Each other so it can be ascertained they are functioning as a single landscape unit? The bracketed language is offered to complete the thought.

This must be clarified and it may suggest clarification is necessary in (a)(7) to make it clear in what sense those waters are "similarly situated" - close to each other? Functioning as a landscape unit?

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 include, but are not limited to, the following:~~

- (A) sediment and pollutant trapping, transformation, filtering, and transport;
- (B) nutrient recycling, trapping, transformation, filtering, and transport;
- (C) pollutant trapping, transformation, filtering, and transport;
- (D) retention and/or attenuation of flood waters;
- (E) runoff storage;
- (F) contribution of flow;
- (G) export, trapping, and transformation of organic matter, including food resources;
- (H) export of food resources;
- (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 or dependent on a water identified in paragraphs (a)(1) through (3) of this section;
- (J) habitat support for aquatic and wetland plant communities;
- (K) groundwater discharge and recharge;
- (L) carbon sequestration.

Comment (JAM10): These changes were discussed and provided previously. Edits capture functions provided by Corps districts that are currently being used to demonstrate significant nexus in support of affirmative jurisdictional determinations.

(67) *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.

(78) *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 beach, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

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