



WITNESSES

1  
2  
3  
4  
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11  
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14  
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18  
19  
20  
21  
22  
23  
24  
25

NAME:	PAGE NO.
RANDALL R. LaBAUVE	
Examination by Mr. Butler	234
Prefiled Testimony Inserted	236
Examination by Mr. Rehwinkel	253
Examination by Ms. Kaufman	263
Examination by Mr. Cavros	284
Examination by Mr. Butler	305

## EXHIBITS

NUMBER:	ID.	ADMTD.
1 through 24 (as identified in Comprehensive Exhibit List)	224	
1, 2, and 4 through 24		224
3		309
25 Excerpt from NextEra Energy Annual Report	290	310

## P R O C E E D I N G S

1  
2 (Transcript continues in sequence following  
3 Volume 1.)

4 **CHAIRMAN GRAHAM:** Exhibits?

5 **MR. MURPHY:** Yes. Staff recommends -- staff  
6 has compiled a stipulated Comprehensive Exhibit List  
7 which includes the prefiled exhibits attached to the  
8 witnesses' testimony in this case. The list has been  
9 provided to the parties, the Commissioners, and the  
10 court reporter. The list is marked as the first hearing  
11 exhibit, and the other exhibits should be marked as set  
12 forth in the chart.

13 At this time staff would move all exhibits  
14 into the record as set forth in the comprehensive list  
15 with the exception of Exhibit 3, which will be proffered  
16 at the end of Mr. LaBauve's testimony.

17 **CHAIRMAN GRAHAM:** Okay. So we will enter  
18 Exhibits 1 through 24, except for Exhibit 3, into the  
19 record as well, unless there's any objections. Seeing  
20 none, we'll enter those into the record.

21 **MR. MURPHY:** Thank you.

22 (Exhibits 1 through 24 marked for  
23 identification.)

24 (Exhibits 1, 2, and 4 through 24 admitted into  
25 the record.)

1           **CHAIRMAN GRAHAM:** Okay. We have opening  
2 statements.

3           **MR. BUTLER:** Thank you, Mr. Chairman.

4           Good morning. All but one of the  
5 environmental clause issues has been stipulated, so I'll  
6 limit my opening statement to the remaining issue,  
7 approval of FPL's proposed Waters of the United States  
8 rulemaking project.

9           FPL witness Randy LaBauve's prefiled testimony  
10 explains why the project should be approved. There's no  
11 testimony to the contrary. This project is motivated by  
12 rulemaking that the United States EPA initiated in April  
13 of this year to expand the definition of waters in the  
14 United States. That phrase is a legal term of art that  
15 essentially determines whether complex and costly  
16 regulations under the federal Clean Water Act will apply  
17 to a particular body of water, be it a river, stream,  
18 lake, pond, wetland, or manmade structure. At its core  
19 the waters of the United States are bodies of water that  
20 are navigable and/or cross state lines.

21           FPL has also applied the term to lesser -- I'm  
22 sorry -- EPA has also applied the term to lesser bodies  
23 of water that are reasonably adjacent and have a  
24 rational significant nexus to the customary waters of  
25 the United States. Traditionally this significant nexus

1 has been determined on a case-by-case basis, but the  
2 EPA's proposed rule would establish broad swaths of the  
3 United States where all similarly situated bodies of  
4 water would be aggregated to determine if a significant  
5 nexus exists.

6 FPL believes that the EPA's expansive approach  
7 flies in the face of guidance from the United States  
8 Supreme Court that the significant nexus with navigable  
9 waters must be more than speculative or insubstantial.

10 Without delving into details, suffice it to  
11 say that EPA's proposal would substantially increase the  
12 likelihood that costly and complex Clean Water Act  
13 regulatory requirements will apply to bodies of water,  
14 including manmade structures which are geographically  
15 isolated and very small.

16 To give you an idea of what's at stake, EPA  
17 published with its proposed Waters of the U.S. rule a  
18 map that shows that broad swaths of northern and central  
19 portions of Florida would be subject to this concept of  
20 aggregation. Other provisions of EPA's proposed rule  
21 would expand the jurisdictional waters of the U.S. even  
22 further. The federal Clean Water Act applies to  
23 numerous FPL facilities under the current interpretation  
24 of waters of the U.S., and FPL complies with the act at  
25 those facilities.

1           In addition, the Florida Department of  
2 Environmental Protection has a wide ranging regulatory  
3 program to protect bodies of water in Florida which are  
4 not waters of the U.S., and FPL complies with those  
5 regulations as well.

6           In short, FPL already is subject to  
7 regulations that comprehensively protect water quality.  
8 FPL's concern is that EPA's proposed waters of the U.S.  
9 definition will expand federal regulation into areas,  
10 excuse me, that are already addressed effectively and  
11 efficiently by the Florida DEP, greatly increasing  
12 compliance costs borne by FPL's customers through the  
13 environmental clause.

14           FPL is proposing to join many other voices in  
15 Florida -- state agencies, local governments, and a wide  
16 range of private interests -- in advocating against  
17 EPA's proposal because it is necessary -- or  
18 unnecessary, I'm sorry, to protect legitimate  
19 environmental interests and would be needlessly  
20 burdensome and expensive. FPL is asking the Commission  
21 to approve environmental clause recovery for these  
22 advocacy activities because they are being undertaken in  
23 order to control environmental compliance costs that FPL  
24 and our customers must bear.

25           This is fully consistent with Commission

1 precedent. For example, the Commission has previously  
2 approved environmental clause recovery for advocacy  
3 costs associated with the EPA's Clean Air Interstate  
4 Rule and it's 316B Phase 2 rule.

5 FIPUG and SACE assert that FPL should not  
6 recover costs for its advocacy activities because they  
7 are what they call lobbying costs. This is inaccurate.  
8 The FERC uniform system of accounts, which this  
9 Commission has adopted, has a separate account where  
10 lobbying costs are to be recorded below the line. That  
11 account, number 426.4, has a specific exclusion in it  
12 for advocacy before regulatory or other governmental  
13 bodies in connection with a utility's existing or  
14 proposed operations. That is exactly what FPL is  
15 proposing here. FPL never records cost of advocacy as  
16 lobbying costs. It would be improper to do so here.

17 In summary, FPL's proposed Waters of the U.S.  
18 project should be approved. Commission precedent  
19 properly recognizes the role of advocacy in helping to  
20 control what customers have to pay for environmental  
21 compliance. FPL's witness Randy LaBauve will  
22 demonstrate that this project fits squarely within that  
23 precedent. Thank you.

24 **CHAIRMAN GRAHAM:** Thank you, Mr. Butler.

25 OPC, do you have an opening statement?

1           **MR. REHWINKEL:** Our opening would be our  
2 position in the order, so I would commend the Commission  
3 to our position in the Prehearing Order on Issue 9.

4           **CHAIRMAN GRAHAM:** Okay. FIPUG.

5           **MS. KAUFMAN:** Good morning, Chairman,  
6 Commissioners. It's nice to be back here. I'm Vicki  
7 Gordon Kaufman with the Moyle Law Firm appearing on  
8 behalf of the Florida Industrial Power Users Group.

9           I'll keep my opening short. As Mr. Butler  
10 said, there's one issue left in this docket, Issue  
11 Number 9. And the issue is whether ratepayers should be  
12 required to pay over \$225,000 for Florida Power & Light  
13 to engage in lobbying activities in Washington, D.C.  
14 The issue is not whether the activities are good, bad,  
15 or neutral. The issue is whether the activities fall  
16 within the requirements of Section 366.8255, which sets  
17 out exactly what sorts of activities may be recovered  
18 from ratepayers and which may not. We think that the  
19 activities that Mr. LaBauve describes in his testimony  
20 do not fall within the criteria of the statute and, in  
21 addition, it would be bad public policy to allow  
22 recovery for these kinds of costs.

23           As to the public policy issue, requiring  
24 ratepayers to pay for these sorts of activities could  
25 put ratepayers in the position of paying for lobbying

1 activities to oppose or promote programs, laws,  
2 regulations with which they disagree. That's part of  
3 the reason, I believe, that when lobbying activities are  
4 brought before the Commission, the utilities must put  
5 them below the line because they're not the sort of  
6 activities that ratepayers should be funding. But more  
7 importantly, if you look at Section 366.8255, it sets  
8 out explicitly the sorts of costs that are recoverable  
9 under this statute, and it provides that what utilities  
10 may recover are environmental compliance costs. And the  
11 statute lists in Section 366.8255, there's a laundry  
12 list of items. Nowhere in there will you see any items  
13 that are related to lobbying, advocacy, whatever you  
14 want to term the activities that Florida Power & Light  
15 would like to engage in.

16 Environmental compliance costs, as defined in  
17 subsection (2) of the statute, are compliance costs  
18 incurred by the utility to comply with new environmental  
19 laws, rules, or regulations, whether they be state or  
20 federal. And an easy example of this is one I think  
21 you've confronted before when a utility might have to  
22 put a scrubber on a coal plant in order to comply with  
23 either state or federal emissions requirements.

24 The costs that FPL wants to recover for its  
25 Waters of the United States project are in no way

1 required for compliance with any sort of environmental  
2 rule, regulation, or statute. I think this is  
3 abundantly clear in Mr. Butler's remarks, in Florida  
4 Power & Light's petition, in Mr. LaBauve's testimony,  
5 where FPL continually opines about things that could,  
6 would, might happen. These are not the sort of costs  
7 that the Legislature has noted may be covered under the  
8 statute, and for these reasons we would ask that their  
9 costs -- that their request for recovery be denied.

10 Thank you.

11 **CHAIRMAN GRAHAM:** Thank you. SACE.

12 **MR. CAVROS:** Good morning, Chairman,  
13 Commissioners. George Cavros on behalf of the Southern  
14 Alliance for Clean Energy.

15 The Southern Alliance for Clean Energy does  
16 not support the FPL request to use customer dollars to  
17 attack clean water protection, and the reasons are  
18 threefold. Number one, it is simply not permitted by  
19 statute. Number 2, it is fundamentally unfair for  
20 Florida Power & Light, a corporation which made over  
21 \$1.3 billion last year in profit, to have customers pick  
22 up their lobbying tab. They call it advocacy.  
23 Lobbying -- I think as we go through this, you know,  
24 they're trying to influence policy, which is clearly a  
25 lobbying activity. And, thirdly, clean water is the

1       lifeblood of Florida. Wetlands help protect clean  
2       water, and customers shouldn't have to be forced to pay  
3       in their bills for lobbying that could weaken  
4       protections for wetlands.

5               Now, the early -- the Environmental Cost  
6       Recovery Clause is plain on its face. It defines costs  
7       that are eligible for recovery under this provision as  
8       costs that are incurred in complying with environmental  
9       laws or regulations. The statute does not say that --  
10      it does not say costs incurred in trying to change, it  
11      does not say costs incurred in trying to influence the  
12      outcome of a regulation. So when the law is plain on  
13      its face, as this statute is, there's no need for  
14      statutory construction, there's no need for legislative  
15      analysis. This is simply not a cost that was incurred  
16      in complying with the statute. In fact, it's a  
17      preemptive attack on a clean water rule, and that is  
18      simply not consistent with Florida statute.

19              Now from a customer perspective, it's, you  
20      know, it's fundamentally unfair fair to ask customers to  
21      pick up this cost. Now the company is granted a  
22      generous rate return of 10.5 percent upon which they  
23      generate annually over a billion dollars in profit. Now  
24      while SACE may not agree with how they spend their  
25      profit, they're entitled to do with it what they want

1 and they have, and they've spent those dollars to  
2 influence policy in the past. They have hired lobbyists  
3 to influence state lawmakers on policies that may affect  
4 the company. They use their profit to provide political  
5 contributions to state legislators or the Governor on  
6 policies that may affect the company. So if the company  
7 chooses now to influence a policy on clean water,  
8 whether it's at the state or the federal level, likewise  
9 they should do that on their dime and not on the  
10 customers' dime.

11 And lastly, wetlands provide valuable public  
12 health and environmental protections. They help with  
13 aquifer recharge, they help with purifying water,  
14 drinking water. And aquifers is especially important in  
15 South Florida: They help with flood control, with storm  
16 water, storm surge protection. And, you know, given  
17 these public health benefits, these environmental  
18 benefits, customers shouldn't be forced to pay for  
19 something that is fundamentally against their interests.

20 I'm an FPL customer, and I know that I would  
21 be angry and my fellow customers would be angry as well  
22 if they knew that every time they wrote their check to  
23 FPL to pay their monthly bill that they were directly  
24 funding a tax on clean water. We believe the request is  
25 insensitive, outrageous, and should be denied.

1                   **CHAIRMAN GRAHAM:** Thank you, sir.

2                   Mr. Butler, your witness.

3                   **MR. BUTLER:** Thank you, Mr. Chairman. We  
4 would call Mr. LaBauve to the stand. I don't believe  
5 Mr. LaBauve has been sworn previously.  
6 Whereupon,

7                                   **RANDALL R. LaBAUVE**

8 was called as a witness on behalf of Florida Power and  
9 Light Company and, having first been duly sworn,  
10 testified as follows:

11                                   **EXAMINATION**

12 **BY MR. BUTLER:**

13                   **Q**     Would you please state your name and business  
14 address for the record, Mr. LaBauve.

15                   **A**     Randall R. LaBauve. My business address is  
16 700 Universe Boulevard, Juno Beach, Florida.

17                   **Q**     By whom are you employed and in what capacity?

18                   **A**     I'm employed by Florida Power & Light, and I'm  
19 the Vice President of Environmental Services.

20                   **Q**     Okay. Have you prepared and caused to be  
21 filed 14 pages of prefiled direct testimony on July 25,  
22 2014, in this proceeding?

23                   **A**     Yes, I have.

24                   **Q**     Do you have any changes or revisions to your  
25 prefiled direct testimony at this time?

1           **A**     No, I do not.

2           **Q**     Okay.  If I asked you the same questions  
3 contained in your direct testimony, would your answers  
4 be the same?

5           **A**     Yes, it would.

6           **MR. BUTLER:**  Okay.  Mr. Chairman, I would ask  
7 that Mr. LaBauve's prefiled direct testimony be inserted  
8 into the record as though read.

9           **CHAIRMAN GRAHAM:**  We'll insert Mr. LaBauve's  
10 prefiled direct testimony into the record as though  
11 read.

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1                   **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**  
2                   **FLORIDA POWER & LIGHT COMPANY**  
3                   **TESTIMONY OF RANDALL R. LABAUVE**  
4                   **DOCKET NO. 140007-EI**  
5                   **JULY 25, 2014**

6  
7   **Q.    Please state your name and address.**

8    A.    My name is Randall R. LaBauve and my business address is 700  
9            Universe Boulevard, Juno Beach, Florida 33408.

10   **Q.    By whom are you employed and in what capacity?**

11   A.    I am employed by Florida Power & Light Company ("FPL") as Vice  
12            President of Environmental Services.

13   **Q.    Have you previously testified in this docket?**

14   A.    Yes.

15   **Q.    What is the purpose of your testimony in this proceeding?**

16   A.    I will present for Commission review and approval FPL's request for  
17            recovery through the Environmental Cost Recovery Clause ("ECRC")  
18            of a new environmental compliance activity, the U.S. Environmental  
19            Protection Agency ("EPA") Waters of the United States ("WOUS")  
20            Rulemaking Project ("the Project").  Additionally, I will provide an  
21            update on the status of the CWA 316(b) Rule and FPL's Greenhouse  
22            Gas Reduction Project.

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**Waters of the United States Rulemaking Project**

**Q. Please describe the environmental law or regulation requiring this Project.**

A. On April 21, 2014, The EPA and the U.S. Army Corps of Engineers (“Army Corps”) published a proposed rule in the Federal Register defining the scope of waters protected under the Clean Water Act (“CWA”) and revising the definition for WOUS. The purpose of the rulemaking is to clarify the characteristics of streams, wetlands and other waters to which all CWA programs will apply.

**Q. How will the proposed rule impact FPL?**

A. The rulemaking proposes changes to the definition of WOUS that would result in the identification and protection of an increased number of new jurisdictional wetland and water bodies impacting existing facilities and future electric utility projects. FPL contends that the proposed rule revisions are overreaching and in conflict with United States Supreme Court decisions regarding WOUS. These proposed changes could result in CWA requirements applying to existing and future power plant, transmission, distribution, pipeline and renewable generation related projects that would not be subject to those requirements under the current WOUS definition. In turn, this would require FPL to incur substantially higher permitting and operational costs associated with those projects. FPL also could be required to

1 purchase additional costly mitigation credits for those projects. For  
2 example, the proposed rule revisions could result in a requirement to  
3 install cumbersome and very expensive compliance technologies on  
4 the cooling ponds or cooling canal systems at four FPL power plants.

5 **Q. How does FPL intend to respond to the EPA's potentially costly  
6 and burdensome WOUS rule proposal?**

7 A. FPL intends to actively participate in the rulemaking process,  
8 advocating that the rule proposal is both unnecessary to protect  
9 legitimate environmental interests and needlessly burdensome to  
10 licensees such as FPL.

11 **Q. Please describe the activities FPL will initiate as a result of the  
12 Project.**

13 A. FPL believes it is prudent at this time to actively engage in legislative  
14 and regulatory advocacy to limit the compliance cost impact of  
15 potential revisions to the CWA. Comments on the proposed rule are  
16 due on October 20, 2014. Because of the relatively short time frame to  
17 develop and submit comments, the amount of detail in the proposed  
18 rule, and the potentially large financial impact to FPL and its customers  
19 if the final rule is not favorable, FPL feels it is prudent to retain the  
20 services of qualified consultants and/or legal counsel to assist in  
21 developing comments and presenting FPL's positions on the proposed  
22 rule to state and federal government agencies and legislators. The  
23 consultant will perform the following activities:

- 1                   • Assist FPL in the identification of specific issues associated  
2                   with proposed rule requirements and develop specific  
3                   recommendations to facilitate more cost-effective  
4                   compliance for each FPL facility that is impacted by the  
5                   proposed rule.
- 6                   • Develop more workable solutions.
- 7                   • Develop a set of general comments on the proposed rule as  
8                   it affects FPL facilities.
- 9                   • Continue to work with state and federal government  
10                  agencies and legislators to advocate FPL's positions  
11                  following the comment period, as the rule moves to  
12                  finalization and, as necessary, thereafter.

13 **Q. Has FPL estimated the cost of its projected advocacy activities**  
14 **identified above?**

15 A. Yes. FPL projects to incur approximately \$228,500 of O&M costs for  
16 these advocacy activities from August 2014 through December 2015.

17 **Q. Is FPL recovering the costs of these activities through any other**  
18 **mechanism?**

19 A. No.

20 **Q. Has FPL already incurred costs associated with the proposed**  
21 **rulemaking?**

22 A. Yes. Because a formal rulemaking was announced in November of  
23 2013, and the proposed rule was published in April 2014, FPL began

1 incurring advocacy costs related to the rulemaking in late 2013.  
2 However, FPL is now significantly “ramping up” its advocacy activities  
3 in response to the proposed rule and is seeking recovery only for  
4 advocacy activities conducted after the date of this petition.

5 **Q. Has the Commission previously approved recovery of consulting**  
6 **or legal costs associated with these types of advocacy activities**  
7 **undertaken to control environmental compliance costs?**

8 A. Yes. On several occasions, the Commission has approved ECRC  
9 recovery of legal or consulting activities related to legislative and  
10 regulatory advocacy. In Order No. PSC 08-0775-FOF-EI, issued  
11 November 24, 2008 in Docket No. 080007-EI, the Commission  
12 approved FPL’s petition to modify the scope of its 316(b) Phase II Rule  
13 project to include costs associated with legal and consulting activities  
14 directed at limiting compliance costs associated with EPA rulemaking.  
15 In that order, the Commission stated:

16 “Utilities are expected to take steps to control the level of  
17 costs that must be incurred for environmental  
18 compliance. An effective way to control the costs of  
19 complying with a particular environmental law or  
20 regulation can be participation in the regulatory and legal  
21 processes involved in defining compliance.”

22  
23 In Order No. PSC-09-0759-FOF-EI, issued on November 18, 2009 in

1 Docket No. 090007-EI, the Commission approved Duke Energy  
 2 Florida’s (then Progress Energy Florida) request to recover costs  
 3 through the ECRC associated with its Total Maximum Daily Loads Hg  
 4 Emission (TMDLs-Hg emissions) Program. In that order, the  
 5 Commission reaffirmed the position taken in Order No. PSC-08-0775-  
 6 FOF-EI, and stated that:

7 “An effective way to control the costs for complying with  
 8 a particular environmental law or regulation can be  
 9 participation in the regulatory and legal processes  
 10 involved in defining compliance. PEF shall be permitted  
 11 to recover the costs associated with the TMDLs-Hg  
 12 Emissions Program. Such costs meet the requirements  
 13 of Section 366.8255, F.S., for recovery through the  
 14 ECRC.”

15  
 16 Additionally, in Order No. PSC-05-1251-FOF-EI issued on  
 17 December 22, 2005 in Docket No. 050007-EI, the Commission  
 18 approved FPL’s request for ECRC recovery of costs associated  
 19 with the technical analysis and legal challenges to the Clean Air  
 20 Interstate Rule. In that order, the Commission stated:

21 “We find that the definition of environmental compliance  
 22 costs in Section 366.8255, Florida Statutes, includes  
 23 prudently incurred litigation costs associated with FPL’s



1 Register, most likely in August 2014, and will become effective 60 days  
2 after the publication.

3 **Q. How will the Final Rule impact FPL?**

4 A. The Final Rule applies to all facilities that withdraw more than 2 million  
5 gallons per day of cooling water from Waters of the United States. The  
6 rule requirements are designed to reduce adverse environmental  
7 impacts that result from the impingement (organisms pinned against  
8 intake screens) and entrainment (organisms drawn completely through  
9 cooling water systems from intake to discharge) of aquatic organisms  
10 by requiring facilities to install Best Technology Available (“BTA”) to  
11 reduce the impacts to cooling water intakes.

12  
13 Although the Final Rule will require some FPL-affected facilities to  
14 install some form of controls to address Impingement Mortality (“IM”)  
15 and Entrainment Mortality (“EM”) reduction, unlike some previous  
16 proposals, it does not require costly cooling towers as BTA for all  
17 facilities that currently have once-through cooling water systems.

18  
19 FPL’s Cape Canaveral, Ft. Myers, Lauderdale, Port Everglades,  
20 Riviera and St. Lucie plants will have to conduct studies and/or install  
21 technology to demonstrate compliance with IM and EM standards.

22

1 FPL's Manatee, Martin, Putnam, Sanford and SJRPP plants, which  
2 have cooling ponds or cooling towers, will have greatly reduced  
3 requirements for IM and EM studies and should require no additional  
4 capital expenditures. Impacts on Scherer Plant will depend on Georgia  
5 Environmental Protection Department rulings.

6  
7 EM reduction is required for all facilities that withdraw an average of  
8 more than 125 million gallons of cooling water per day. EM reduction  
9 will be addressed on a site-specific, case-by-case basis, weighing the  
10 cost of technology that could be installed to reduce EM against the  
11 benefit that will be derived from EM reduction. The three main EM  
12 reduction options that must be considered are closed-cycle cooling (i.e.  
13 retrofit with cooling towers), fine mesh screens, and alternative cooling  
14 water sources and water reuse. Other entrainment control  
15 technologies, such as variable speed drives on cooling water pumps  
16 may be also considered.

17 **Q. Please briefly describe the differences between the Final Rule and**  
18 **the proposed 316 (b) Rule.**

19 A. While the proposed rule required facilities to meet unrealistic numeric  
20 IM reduction standards, the Final Rule gives permittees seven  
21 impingement mortality control options. Offshore velocity caps and  
22 closed-cycle cooling (cooling towers and cooling ponds) are pre-  
23 approved options. Modified traveling screens with fish return systems

1 represent a “streamlined” compliance alternative. A two-year  
2 impingement technology optimization study is required following  
3 installation of these systems to ensure they are working properly.

4 **Q. What is the implementation schedule for the Final Rule?**

5 A. Implementation of the Final Rule is expected to take place over the  
6 next 5+ years on a schedule that will be dictated by the DEP. EM  
7 reduction is addressed first. Biological sampling must be conducted to  
8 determine a facility’s impact; then the technical feasibility of various EM  
9 reductions must be determined. Finally, cost of instituting various  
10 technological or operational EM reduction solutions must be weighed  
11 against the benefit of the reduction in entrainment of organisms. This  
12 comparison will result in a BTA determination that could range from  
13 retrofitting facilities that currently have once-through cooling with  
14 closed-cycle cooling (i.e. cooling towers) to a “do nothing” approach.

15 **Q. Does FPL anticipate that there will be court challenges to the**  
16 **Final Rule?**

17 A. Yes. Rule challenges by the environmental groups are almost certain,  
18 as the Final Rule does not require closed-cycle cooling for EM. The  
19 environmental groups previously participated in litigation against the  
20 EPA associated with the previously issued 316 (b) Phase II Rule which  
21 was issued in 2004. As with the new Final Rule, this rule also did not  
22 consider closed-cycle cooling to be BTA in all cases.

23

1 **Greenhouse Gas Reduction Project Update**

2

3 **Q. Please provide an update on FPL's Greenhouse Gas ("GHG")**  
4 **Reduction Project.**

5 A. On, June 2, 2014, the EPA released its Clean Power Plan as a  
6 proposed rule establishing, for the first time, GHG performance  
7 standards for existing power plants under Clean Air Act (CAA) §111(d).  
8 The proposed rule was subsequently published in the Federal Register  
9 on June 18, 2014 (79 Fed. Reg. 34,830). The EPA proposed the rule  
10 as 40 CFR Subpart UUUU: Emission Guidelines for Greenhouse Gas  
11 Emissions and Compliance Times for Electric Utility Generating Units.  
12 The proposal consists of two main parts: 1) The EPA's establishment  
13 of state-specific CO<sub>2</sub> emission reduction goals from existing units  
14 measured in lb. CO<sub>2</sub>/MWh starting in 2020, with a final rate for 2030  
15 and beyond; and 2) requirements for state plans that must be designed  
16 to reach these goals.

17 **Q. Which FPL units would be subject to the EPA's proposed rule?**

18 A. The EPA's proposed rule for existing units applies to "affected EGUs,"  
19 which are defined as a steam generating unit, integrated gasification  
20 combined cycle ("IGCC"), or stationary combustion turbine (including  
21 combined cycle units) that has a base load rating greater than 73 MW  
22 (250 MMBtu/h) heat input of fossil fuel and generates more than one-  
23 third of its potential electrical output. All of FPL's fossil generating

1 units would be subject to the proposed rule with the exception of FPL's  
2 peaking combustion turbines at the Ft. Myers, Lauderdale and Port  
3 Everglades plants, and the Port Everglades Energy Center combined  
4 cycle unit, which is presently under construction and thus meets the  
5 definition of a new unit that is regulated separately.

6 **Q. What emission limits would be established by the EPA for**  
7 **existing units under the proposed rule?**

8 A. CAA §111(d) requires that the EPA implement emission limits based  
9 on demonstrated Best System of Emission Reduction ("BSER") on  
10 affected units. The EPA interpreted this BSER requirement broadly  
11 and has taken a "building block" approach that would address emission  
12 reductions on a system basis, with the goal of achieving a 30%  
13 system-wide reduction in GHG emissions in 2030 using a 2005 year  
14 baseline. The EPA's four main building blocks and their associated  
15 emission-reduction assumptions are:

- 16 1. Increase fuel efficiency of fossil fuel power plants by 6%.
- 17 2. Increase dispatch of Natural Gas Combined Cycle units to  
18 achieve a 70% capacity factor, proportionately reducing coal oil  
19 and natural gas steam generation.
- 20 3. Include non-emitting generation in the calculation of emission rate  
21 including new nuclear under construction, 6% of existing nuclear  
22 generation, and existing and new development of renewable  
23 generation.

1           4. Reduce electric consumption (and hence generation) through  
2           energy efficiency and demand side management by 1.5%  
3           annually through 2030.

4  
5           The EPA's proposed emission rate for Florida is an interim goal (2020  
6           – 2029 average) of 794 lb. CO<sub>2</sub>/MWh with a final goal of 740 lb.  
7           CO<sub>2</sub>/MWh by 2030. Florida's 2012 baseline emission rate for existing  
8           units was approximately 1,160 lb. CO<sub>2</sub>/MWh, which would require a  
9           more than 36% reduction to achieve EPA's 2030 goal for the state. As  
10          an alternative option, the EPA is also considering an alternative BSER  
11          determination that combines heat rate improvements (building block 1)  
12          with reduced utilization of the affected fossil-fuel fired EGUs with less  
13          stringent targets for Florida with an interim goal of 907 lb. CO<sub>2</sub>/MWh  
14          and a final goal of 884 lb. CO<sub>2</sub>/MWh.

15   **Q.   How does the EPA intend to implement the proposed GHG rule in**  
16   **Florida?**

17   A.   EPA has not published any specifics about how the proposed rule  
18          would be implemented in Florida or other states. The proposed rule  
19          requires each state to submit a plan by June 30, 2016 that identifies  
20          affected units, the emission performance level that will be achieved, a  
21          geographic scope of the plan (single or multi-state), and enforceable  
22          measures and corrective measures that will assure compliance with  
23          the plan goals. Emission standards of a state's plan must be

1 permanent and enforceable against an affected entity. The DEP would  
2 likely begin development of its state plan after a final rule is published,  
3 which is anticipated to occur on June 1, 2015.

4 **Q. Does FPL intend to submit comments and otherwise engage EPA  
5 and the DEP on development of the Final Rule?**

6 A. Yes. FPL is actively participating with industry groups including the  
7 Edison Electric Institute, the Clean Energy Group, and the Class of '85  
8 Regulatory Response Group in providing comments to the EPA on the  
9 proposed rule and anticipates a significant advocacy effort to minimize  
10 potential rule impacts to our customers. FPL also plans to work closely  
11 with the DEP in development of their state plan and associated state  
12 rule development to implement the Final Rule. FPL also anticipates  
13 that there will be several legal challenges to the proposed rule  
14 including EPA's authority to regulate GHGs from existing units under  
15 §111(d).

16 **Q. Does this conclude your testimony?**

17 A. Yes.

1 **BY MR. BUTLER:**

2 Q Mr. LaBauve, are you also sponsoring Exhibit  
3 RRL-1, which has been identified as hearing Exhibit  
4 Number 3 in this proceeding?

5 A Yes, I am.

6 Q Okay. Was that prepared under your direction,  
7 supervision, and control?

8 A Yes, it was.

9 Q Okay. Have you prepared an oral summary of  
10 your direct testimony?

11 A Yes, I have.

12 Q Would you please give it at this time?

13 A Certainly. Good morning, Commissioners. Good  
14 morning staff, counsel. My testimony supports a new  
15 environmental compliance activity for recovery through  
16 the Environmental Cost Recovery Clause the Waters of the  
17 United States rulemaking, or the Waters of the U.S.  
18 project.

19 On April 21st, 2014, the United States  
20 Environmental Protection Agency and the U.S. Army Corps  
21 of Engineers published a proposed rule redefining the  
22 scope of waters protected under the Clean Water Act.  
23 The purpose of the rulemaking is to clarify the  
24 characteristics of streams, wetlands, and other waters  
25 to which all Clean Water Act programs will apply.

1           The rulemaking proposes changes to the  
2 definition of waters of the U.S. that would result in a  
3 substantially increased number of new jurisdictional  
4 wetland and water body determinations. These  
5 determinations would impact FPL's existing facilities  
6 and future electric utility projects. FPL believes that  
7 the proposed rule revisions are overreaching and in  
8 conflict with the Supreme Court decisions regarding  
9 waters of the U.S. These proposed changes could result  
10 in additional expensive Clean Water Act requirements  
11 applying to existing and future power plant  
12 transmission, distribution, pipeline, and renewable  
13 generation related projects.

14           For example, the proposed rule revisions could  
15 result in a requirement to install cumbersome and very  
16 expensive compliance technologies on the cooling ponds  
17 or cooling canal systems at four FPL power plants. FPL  
18 is proposing to actively participate in the rulemaking  
19 process, advocating that the rule proposal is both  
20 unnecessary to protect legitimate environmental  
21 interests and needlessly burdensome to licensees such as  
22 FPL.

23           Consistent with prior Commission orders, FPL  
24 is asking to recover costs associated with retaining the  
25 services of qualified consultants and/or legal counsel

1 to assist in developing comments and presenting FPL's  
2 positions on the proposed rule to state and federal  
3 governmental agencies. Additionally, consultants will  
4 assist FPL in the identification of specific issues  
5 associated with proposed rule requirements and develop  
6 specific recommendations to facilitate more  
7 cost-effective compliance for FPL's affected facilities.

8 On several occasions the Commission has  
9 approved recovery of legal and consulting activities  
10 related to advocacy that seeks to control the cost to  
11 customers of complying with environmental requirements.

12 For example, in Order Number PSC-08-0775-  
13 FOF-EI, the Commission approved ECRC recovery of FPL  
14 legal and consulting costs directed at limiting  
15 compliance requirements under EPA's 316B Phase 2 rule  
16 which affects intake structures at FPL's power plants.  
17 In that order, the Commission observed that utilities  
18 are expected to take steps to control the level of costs  
19 that must be incurred for environmental compliance. An  
20 effective way to control the cost of complying with a  
21 particular environmental law or regulation can be  
22 participation in the regulatory and legal processes  
23 involved in defining compliance.

24 Similarly, in Order Number PSC-05-1251-FOF-EI  
25 the Commission approved ECRC recovery of FPL's costs

1 incurred for the technical analysis and legal challenges  
2 to the EPA's Clean Air Interstate Rule. This concludes  
3 my summary.

4 **MR. BUTLER:** Thank you, Mr. LaBauve. I tender  
5 the witness for cross-examination.

6 **CHAIRMAN GRAHAM:** Thank you, sir.

7 OPC.

8 **MR. REHWINKEL:** Thank you, Mr. Chairman.

9 **EXAMINATION**

10 **BY MR. REHWINKEL:**

11 **Q** Good morning, Mr. LaBauve.

12 **A** Good morning.

13 **Q** Charles Rehwinkel with the Office of Public  
14 Counsel. I just have a few questions for you.

15 First off, have you read the Public Counsel's  
16 position on Issue 9 in this docket?

17 **A** It's been a while. You'll need to refresh me.

18 **Q** Okay. Mr. Chairman, may I approach the  
19 witness and give him a copy of the Prehearing Order?

20 Do you have a copy of the Prehearing Order  
21 with you?

22 **A** I don't think so.

23 **Q** Okay. I've handed you the Prehearing Order in  
24 this docket and turned it to page 16, and it has the  
25 Public Counsel's position on Issue 9. Do you see that?

1           **A**    Yes, I do.

2           **Q**    Have you had a chance to read it and refresh  
3 yourself?

4           **A**    Yes, I have.

5           **Q**    Okay. Is there anything in the Public  
6 Counsel's position that you disagree with as far as it  
7 being applicable to the dollars that you're seeking  
8 recovery for?

9           **A**    Yes, there is. As I noted in my testimony and  
10 in my summary, we believe that there is precedent with  
11 previous PSC Commission orders that advocacy costs  
12 related to arguing in regards to new environmental  
13 requirements so that they are appropriate and necessary  
14 and that they meet the requirements of the statutes on  
15 appropriate recoverable expense under the ECRC clause.

16          **Q**    Okay. Well, let me do this. Let me go  
17 through the points that we have asked about, we have  
18 taken there, and ask you about them specifically.

19                   First of all, the Public Counsel has stated  
20 that legal and regulatory advocacy costs should not be  
21 recovered through the ECRC if they're of the type or  
22 amount that are already, that are already being  
23 recovered in base rates. Do you have a problem with  
24 that?

25          **A**    I do not have a problem with that. Our belief

1 in this particular instance and in the previous  
2 occasions in which we've sought advocacy costs is that  
3 those costs were incremental to any existing advocacy  
4 costs that we would have currently in our base  
5 structure.

6 Q Okay. So did you provide testimony that these  
7 costs are incremental and are not included in base  
8 rates?

9 A I have checked with our accounting department  
10 and we have checked our MFRs, and these are indeed  
11 incremental costs.

12 Q Are they incremental in the sense that they  
13 would be incurred in 2014 and beyond and the test year  
14 was 2013 in the last case?

15 A This new proposed rule was promulgated after  
16 we developed our test year minimum filing requirements.  
17 It was not anticipated at that time. No costs were put  
18 into those minimum filing requirements. So it is new  
19 and incremental.

20 Q Okay. The next piece of the Public Counsel's  
21 position is that any such advocacy costs should not be  
22 allowed for ratemaking recovery if they are not  
23 ratemaking recovery in this clause, if they are not  
24 environmental compliance costs as intended in Section  
25 366.8255, *Florida Statutes*. Do you have a problem -- do

1 you disagree with that as a policy that the Commission  
2 ought to follow?

3 **A** Yes, I do disagree with that. As the  
4 Commission has previously stated, utilities are expected  
5 to take steps to control the level of costs that must be  
6 incurred for environmental compliance. An effective way  
7 to control the cost of complying with a particular  
8 environmental law or regulation can be participation in  
9 the regulatory and legal processes involved in defining  
10 compliance.

11 **Q** So you are an attorney; right?

12 **A** I am.

13 **Q** Is it your, is it your testimony here today  
14 that the Commission statement that you have cited to is  
15 an interpretation of the intent of the statute?

16 **A** I think the Public Service Commission is the  
17 governmental body that is given the responsibility for  
18 interpreting that statute, and they have done so not  
19 only on the occasion that I cite but on previous  
20 numerous occasions.

21 **Q** Okay. So I guess my question to you is is it  
22 your testimony here that that statement is, evinces  
23 compliance with the intent of Section 366.8255?

24 **A** Yes.

25 **Q** Okay. We have also advocated to the

1 Commission that any such advocacy costs should not be  
2 allowed for ratemaking recovery if the costs do not  
3 provide a clear benefit to customers. Do you disagree  
4 with that?

5 **A** I believe that the advocacy costs are being  
6 made on behalf of our customers to hopefully improve the  
7 regulation such that their future environmental cost  
8 recovery costs are lower than they would otherwise be,  
9 and I would cite to precedent on two previous occasions.

10 On the 316B rule when we sought recovery  
11 dollars through the Commission and it was approved, we  
12 were looking at a proposed rule that was potentially  
13 going to have billions of dollars of impact on our  
14 customers. It's not an issue of us not wanting to  
15 comply with the law. We want to find and advocate for a  
16 law that's going to work effectively for addressing  
17 environmental issues that need to be addressed. And in  
18 the end, the 316B rule, which was recently promulgated  
19 this year, is a very effective rule. We actively used  
20 the dollars that we were approved and came out with a  
21 better rule for our customers.

22 In the same regards on the CAIR rule that we  
23 received dollars for, one of the primary impacts of that  
24 rule is that it was going to result in a shift of the  
25 so-called allowances using a fuel adjustment factor that

1 was going to shift our allowances to other companies.  
2 We utilized the dollars that were approved to challenge  
3 that and eventually won that in the D.C. circuit, and  
4 they ruled that the fuel adjustment factors were  
5 inappropriate. The new rule which has been promulgated  
6 by EPA does not use the fuel adjustment factors, and so  
7 our customers were successful in that challenge.

8 **Q** Is the advocacy that you are testifying about  
9 and that you're, and for which you are seeking cost  
10 recovery, is it for FPL specifically or is it NextEra on  
11 behalf of all of their units that would be subject to  
12 the rule?

13 **A** This is for FPL.

14 **Q** Okay. Is there advocacy separate and apart  
15 that is being done by NextEra?

16 **A** There is separate advocacy.

17 **Q** Okay. And is it your testimony that the costs  
18 that you're seeking recovery for are only intended to  
19 benefit FPL?

20 **A** Well, I think the advocacy that we would have  
21 would certainly benefit FPL. FPL is uniquely impacted  
22 by this rule in that we have four major facilities that  
23 have cooling ponds or cooling canals that would be  
24 directly impacted by this rule. We have numerous  
25 projects that will need to be permitted, and so FPL will

1 be directly impacted by the rule.

2 But if we're indeed successful at working with  
3 EPA in coming up with an effective rule, it would not  
4 only benefit FPL, it will benefit any other company in  
5 Florida, and it could benefit other companies across the  
6 U.S. as well.

7 Q Now, are the costs that you're seeking  
8 recovery for here today, are they in any way allocated  
9 to any other FPL or NextEra subsidiaries or affiliates?

10 A No.

11 Q But you have units like -- I think you have  
12 one in Goree, Texas; right?

13 A Yes, we do.

14 Q And other units. And it doesn't have to be,  
15 it doesn't necessarily have to be a fossil plant. It  
16 could be a nuclear plant that would be impacted; right?

17 A Well, the unique situation that we have in  
18 Florida is that we have cooling ponds and cooling canals  
19 at four facilities, and that's not a situation that we  
20 have at the plant that you referenced.

21 Q Okay. But it could affect -- it could --  
22 other FPL or NextEra -- other NextEra units could have  
23 cooling ponds that could be impacted?

24 A No, they do not.

25 Q They don't? Okay.

1           The final policy position that the Public  
2 Counsel advocates is that any such advocacy costs should  
3 not be allowed for ratemaking recovery if the costs are  
4 otherwise classified as below the line costs under  
5 applicable Commission precedent.

6           Do you disagree with that as being a principle  
7 the Commission should apply?

8           **A**     I do disagree with that. As Mr. Butler noted  
9 in his opening comment, we have checked the FERC uniform  
10 system of accounting rules very carefully and we have  
11 checked our accounting practices and have determined  
12 that any so-called lobbying dollars which are associated  
13 with lobbying Congress or a state legislature for  
14 legislative activities are appropriately budgeted below  
15 the line. However, that system of accounting provision  
16 does have an exception for regulatory advocacy costs  
17 that affect your current or future operations, and that  
18 is the provision under which we would be seeking  
19 recovery here.

20           **Q**     Well, I guess my question to you is is it, is  
21 it your position that these costs are being, not being  
22 treated any differently than other such costs, for  
23 example, that you might recover in base rates that would  
24 be considered advocacy costs?

25           **A**     Well, within our current base structure, you

1 would have to go back to check the MFRs to see what is  
2 in there, but there are things that we do that are  
3 regulatory advocacy, but it's in the normal course of  
4 working on various issues.

5 To the extent that we've had incremental  
6 significant items that are above and beyond what we have  
7 in our rate structure such as under 316B under CAIR and  
8 now under the Waters of the U.S., we see that as  
9 incremental. And to the extent that we believe, and the  
10 Commission has previously held, that this is covered by  
11 the Environmental Cost Recovery Clause, that's why we  
12 seek recovery for those incremental costs.

13 **Q** Okay. So just so I understand, is there  
14 anything in your testimony that you prefiled about the  
15 accounting for advocacy above or below the line?

16 **A** No, I do not think so.

17 **Q** Okay. Is it your testimony that these costs,  
18 if -- forget about whether they're being sought in the  
19 ECRC clause, if these costs were being sought for  
20 recovery in a base rate case, you're saying that they  
21 would meet the Commission's regulations precedence about  
22 whether they're recorded above or below the line as  
23 being recordable above the line?

24 **A** Yes, I do agree with that. There's an  
25 exception under the FERC system of accounts that allows

1 for an exception for regulatory advocacy costs if it  
2 were brought in a base rate proceeding and could be  
3 demonstrated that that was prudent. It would be up to  
4 the Commission to approve that, but I think that's where  
5 we would account for it.

6 Q Well, are these costs only for regulatory  
7 advocacy? Is there any congressional advocacy or is  
8 this purely at an executive -- at a federal agency  
9 level?

10 A This is just at the federal agency level.

11 Q Would you agree that it is nevertheless the  
12 company's burden to demonstrate that these costs meet  
13 the statutory requirements that they benefit customers  
14 and are not impermissible ratemaking costs that should  
15 be recorded below the line? Do you agree that that's  
16 your burden to prove?

17 A I think it is our burden to prove.

18 MR. REHWINKEL: Okay. Mr. Chairman, I have no  
19 further questions. Thank you.

20 CHAIRMAN GRAHAM: Thank you, sir.

21 MR. REHWINKEL: Thank you, Mr. LaBauve.

22 CHAIRMAN GRAHAM: FIPUG.

23 MS. KAUFMAN: Thank you, Mr. Chairman. I have  
24 two documents I'm going to ask Mr. Cavros to help me  
25 distribute. One of them is just the statute for ease of

1 reference, and the other one is an order that I'll ask  
2 the Commission to take recognition of, so I don't need  
3 to have an exhibit number. I think it'll just move the  
4 process along.

5 **CHAIRMAN GRAHAM:** Okay.

6 **MS. KAUFMAN:** While that's being distributed,  
7 I'm simply handing out a copy of Section 366.8255, and  
8 the order that I'm distributing is Order Number  
9 PSC-11-0080-PAA-EI, which I'd ask the Commission to  
10 officially recognize.

11 **CHAIRMAN GRAHAM:** This is Order Number  
12 PSC-11-0080-PAA-EI in its entirety?

13 **MS. KAUFMAN:** Yes, it should be.

14 **CHAIRMAN GRAHAM:** So recognized.

15 **MS. KAUFMAN:** Thank you. Thank you, Mr.  
16 Chairman, Commissioners.

17 **EXAMINATION**

18 **BY MS. KAUFMAN:**

19 **Q** Mr. LaBauve, whenever you're ready.

20 **A** Certainly.

21 **Q** I guess it's still morning, so good morning.  
22 I'm Vicki Kaufman. I'm here on behalf of the Florida  
23 Industrial Power Users Group. And I just have a  
24 preliminary question based on some of the things you've  
25 said in your summary before I go into my prepared

1 questions. And that is if the Commission were to deny  
2 Florida Power & Light's request for the 228,000 some  
3 dollars in this docket, would FPL engage in this  
4 activity?

5 **A** I think we would continue to engage in this  
6 activity because we think it's important for the company  
7 and for our customers. I think the funding is always an  
8 issue as to what we can do, but I think we would have to  
9 continue to work on the rule.

10 **Q** I'm correct, am I not, that you have appeared  
11 for FPL in these proceedings, in the environmental cost  
12 recovery proceedings for some time; is that correct?

13 **A** Yes, I have. Probably about 19 years.

14 **Q** That qualifies as some time. Would I be  
15 correct that you are familiar with my client, the  
16 Florida Industrial Power Users Group?

17 **A** Somewhat, yes.

18 **Q** And you would agree or you know, do you not,  
19 that many FIPUG members take power from Florida Power &  
20 Light and many in very large quantities?

21 **A** Yes.

22 **Q** And you would certainly agree, would you not,  
23 that FIPUG is concerned, its members are concerned with  
24 the level of rates at FPL?

25 **A** I'll take your word for that.

1           **Q**     Okay. Well, if you've been here 19 years,  
2 would you agree that FIPUG's certainly been here that  
3 long?

4           **A**     Yes.

5           **Q**     And you would agree, would you not, that any  
6 increases or decreases in Florida Power & Light's rates  
7 impact the FIPUG members that take service from Florida  
8 Power & Light?

9           **A**     Yes. Any increases in rates affect all  
10 customers.

11          **Q**     So now I want to talk with you for a moment  
12 about this program, the Waters of the United States,  
13 WOUS. And I'm correct, am I not, that you want to  
14 recover \$228,500 so that FPL can retain consultants and  
15 legal counsel to advocate on FPL's behalf in a federal  
16 rulemaking proceeding; is that right?

17          **A**     That's correct.

18          **Q**     Can you tell us exactly to whom this \$228,500  
19 is going to be paid?

20          **A**     The primary group that we will be retaining is  
21 a group called the Clean Energy Group, which is a group  
22 of utilities that work across the country to try to  
23 advocate on behalf of clean energy issues. And the  
24 particular consulting firm that works with our group is  
25 called Michael J. Bradley firm, and it's out of

1 Massachusetts.

2 Q So is this Clean Energy Group, it's an ongoing  
3 group; correct? It is not one that has been established  
4 especially to deal with this rulemaking?

5 A That's correct.

6 Q And this group employs legal counsel as well  
7 as what we will call advocates or lobbyists?

8 A It is a group that includes scientific-based  
9 people, lawyers, advocates, all the resources they need  
10 to work on these issues.

11 Q Now is this \$228,500 in the nature of dues  
12 being paid to this organization?

13 A It would be a specific project where we would  
14 retain them on our behalf to work on this issue. So is  
15 it -- it's fee for services.

16 Q And are other concerns besides FPL contracting  
17 with this group?

18 A Yes.

19 Q Do you know how many?

20 A I don't have the full list here, but probably,  
21 approximately ten to 12.

22 Q And this \$228,500 is the amount that you  
23 intend to pay this group in 2015; is that correct?

24 A The dollars associated with this request are  
25 only those dollars associated with after the point that

1 we filed the petition in 2014 and then the dollars  
2 associated with 2015. Because the rule actually was  
3 promulgated when we started this process, we actually  
4 started working with them prior to the time that we made  
5 our filing. Those dollars are not being recovered here.

6 **Q** The dollars that we're talking about though  
7 are dollars that you, that you expect to expend in 2015  
8 now; correct?

9 **A** 2015 is in this request.

10 **Q** Okay. Do you have some sort of a document or  
11 a work plan from this group in regard to what they're  
12 going to do for Florida Power & Light for this \$228,500?

13 **A** Well, we have an agreement. We have lots of  
14 documentation around position papers and scope of work  
15 of what the whole group expects them to accomplish. We  
16 agreed on a strategy plan and a work plan. So, yes, we  
17 do have documentation on that.

18 **Q** And the strategy or work plan includes, does  
19 it not, the advocacy in this rulemaking process?

20 **A** Yes, it does.

21 **Q** And I guess I'm going to assume this, but I'll  
22 ask you, am I correct that the other ten to 12  
23 participants are on board with the same strategy and  
24 advocacy that FPL is paying for?

25 **A** Yes.

1           **Q**     Am I correct that you expect to spend more  
2 money on this lobbying advocacy beyond 2015?

3           **A**     Well, it's not lobbying. It's regulatory  
4 advocacy. But the rule is set to go final and it  
5 possibly will go final as late as the end of this year,  
6 possibly early next year, and then we will continue to  
7 work on the rule through 2015. We don't, we don't know  
8 what will happen beyond 2015.

9           **Q**     But if, as sometimes happens in rulemakings,  
10 it were to extend beyond 2015, you would -- would you  
11 expect to be expending more money with this group?

12          **A**     It could be. It could be.

13          **Q**     Do you have any idea how much that would be?

14          **A**     I do not.

15          **Q**     Now I think it's clear that we have a  
16 difference of opinion about advocacy versus lobbying and  
17 you and I are probably not going to agree on that, but  
18 would you agree with me that utilities are not permitted  
19 to recover lobbying fees in their base rates?

20          **A**     I would agree with you that lobbying is  
21 dollars that should be accounted for below the line.

22          **Q**     And you would agree, would you not, that in  
23 FPL's last rate case they removed all lobbying dollars  
24 and put them below the line?

25          **A**     I'll trust what you're saying. I'm not

1 personally aware of that, but --

2 Q Okay. Would you accept that subject to check,  
3 as we like to say here?

4 A I'll accept that subject to check.

5 Q Okay. Now I want to talk specifically about  
6 the rulemaking itself. Do you have the petition that  
7 Florida Power & Light filed in this case?

8 A I do.

9 Q Okay. I think I do too.

10 A I take it back. I think I do not actually  
11 have the actual petition. I have the testimony and the  
12 discovery, but I do not have the petition.

13 Q I think Mr. Rehwinkel might be able to help  
14 you out and give you a copy, if that's all right.

15 A Thank you.

16 Q Okay. Do you want to take a minute and review  
17 this and let me know if you're familiar with it? This  
18 is FPL's petition filed in this docket on July 25th,  
19 2014.

20 A Yes, this is our petition.

21 Q Okay. And am I correct to assume that you had  
22 some input into this petition?

23 A Yes, I did.

24 Q Okay. If you would look at paragraph 7 for  
25 me, which is on page 2, and the very first sentence

1 there says, "The rulemaking proposes changes to the  
2 definition of WOUS." Correct?

3 **A** That's correct.

4 **Q** Would I also be correct that as we sit here  
5 today no changes have occurred to that definition;  
6 correct?

7 **A** They've proposed changes but they're not  
8 final. That's correct.

9 **Q** So as we sit here today, there have been no  
10 changes to that definition as it exists in the current  
11 rule?

12 **A** That's correct.

13 **Q** And as we sit here today, would you agree that  
14 FPL is not required to take any action to comply with  
15 the proposed rule or with definitions that might change  
16 in the future?

17 **A** I don't think that FPL is required to take any  
18 actions in regards to permitting on the proposed rule  
19 because it's not final. However, we feel like we're  
20 obligated on behalf of our customers to take action on  
21 addressing a rule that we think affects their interests  
22 and affects the costs that you talked about your  
23 customers would have to bear through increased rates.

24 **Q** But as we sit here today -- you and I and the  
25 Commissioners -- discussing this, FPL is -- there's no

1 activity that FPL needs to undertake to bring its plants  
2 or cooling ponds or cooling towers into compliance with  
3 the proposed rule; correct?

4 **A** That's correct.

5 **Q** Now if you look in the same paragraph about  
6 midway down, there's a sentence that says, "These  
7 proposed changes could result in CWA," which I guess is  
8 Clean Water Act, "requirements applying to existing and  
9 future power plants, transmission, distribution," et  
10 cetera. Do you see that?

11 **A** I do.

12 **Q** And, again, as we sit here today, there have  
13 been no changes that have occurred that would require  
14 FPL to take any action with regard to power plants,  
15 transmission, distribution, pipeline, or renewable  
16 generation projects; correct?

17 **MR. BUTLER:** I object to the question. It's  
18 already asked and answered.

19 **MS. KAUFMAN:** I don't think it was asked and  
20 answered. I was talking to him about the first  
21 sentence, and now I'm talking to him about the second  
22 sentence.

23 **CHAIRMAN GRAHAM:** Ask the question again,  
24 please.

25 **BY MS. KAUFMAN:**

1           **Q**     Referring to the second sentence in paragraph  
2 7, it says, "These proposed changes," and I assume that  
3 that's reference to the proposed rule, "could result in  
4 CWA requirements applying to existing and future power  
5 plant, transmission, distribution, pipeline, and  
6 renewable generation related projects." Do you see  
7 that?

8           **A**     I do see that.

9           **Q**     And, Mr. Chairman, my question is as we sit  
10 here today, there is no requirement that FPL take any  
11 action in regard to existing and future power plants, et  
12 cetera, as a result of the proposed rule.

13          **A**     That is correct.

14          **Q**     Okay. Now this is the same paragraph, but if  
15 you flip over to page 3, the first full sentence there,  
16 it says that, "Further, the proposed rule revisions  
17 could result in a requirement to install cumbersome and  
18 expensive compliance technologies." Do you see that?

19          **A**     I do.

20          **Q**     As we sit here today, have you had to install  
21 any cumbersome and expensive compliance technologies as  
22 a result of the proposed rule?

23          **A**     No.

24          **Q**     Now if you'd flip over to your testimony at  
25 pages 2 and 3, and, as you see, the question begins at

1 line 11 and goes on to the next page. And at the very  
2 bottom when you're talking about the rule, you say that,  
3 "FPL also could be required to purchase additional  
4 costly mitigation credits." Do you see that?

5 **A** I do.

6 **Q** Has FPL had to, as we sit here today, purchase  
7 any costly mitigation credits?

8 **A** We've had for the current rule but not in  
9 regards to the proposed rule.

10 **Q** Now you had a discussion with Mr. Rehwinkel  
11 about Section 366.8255, which is the statute at issue  
12 here. Do you recall discussing that with him?

13 **A** Yes, I do.

14 **Q** Okay. And that's what I've distributed. And  
15 you have a copy, do you not?

16 **A** I do.

17 **Q** Okay. And I just want to walk through the  
18 statute with you. But, first of all, you would agree  
19 with me, would you not, that in order for FPL to recover  
20 these costs in the Environmental Cost Recovery Clause,  
21 that they must comply with the requirements of the  
22 statute?

23 **A** Yes.

24 **Q** Now if you take a look at Section 1, you can  
25 see that there are a number of definitions. Do you see

1 that?

2 **A** I do.

3 **Q** And if you see subsection (d), you'll see that  
4 that is a definition of environmental compliance costs;  
5 correct?

6 **A** I do.

7 **Q** And (d) 1 through 8 is what I like to call a  
8 laundry list of items that are regarded to be  
9 environmental compliance costs. Do you see that?

10 **A** I do.

11 **Q** In those eight items do you see anything there  
12 that could be regarded as, we'll use your word, advocacy  
13 or, my word, lobbying costs?

14 **A** I don't specifically see the word "advocacy"  
15 in here.

16 **Q** Well, if you want to just take a moment and  
17 look at the categories of items that are enumerated in  
18 section 1(d). Do any of those items relate even  
19 remotely to advocacy or lobbying costs?

20 **A** I think the first line says, "Environmental  
21 compliance costs includes all costs or expenses incurred  
22 by an electric utility in complying with laws or  
23 regulations." And this Commission, in previous  
24 precedent on numerous occasions, has interpreted that to  
25 mean advocacy costs.

1           **Q**    I understand your position.  Let me ask my  
2 question again, if I could.

3                    Do you see anything in the enumerated items  
4 1 through 8 that is by any stretch of the imagination  
5 advocacy or lobbying costs?

6           **A**    As I mentioned earlier, I do not see any  
7 provision specifically in regards to advocacy costs.

8           **Q**    And if you look in subsection (2), which is,  
9 tells the utility here's how you go about submitting  
10 these costs for approval, if you look about midway down,  
11 it says, "If approved, the Commission shall allow  
12 recovery of the utility's prudently incurred  
13 environmental compliance costs."  Correct?

14          **A**    Correct.

15          **Q**    Would you agree that the environmental cost  
16 recovery mechanism I think has been in existence, I want  
17 to say, since about 1993?  Does that sound about right?

18          **A**    That's approximately correct, yes.

19          **Q**    And I think you've said you've testified  
20 several times, so I can assume, can I, that you are  
21 familiar with the criteria that the Commission has used  
22 to approve these sorts of costs?

23          **A**    Yes.

24          **Q**    Okay.  And would you agree with me that the  
25 Commission has had several occasions to address what is,

1 what is or is not an environmental compliance cost?

2 **A** Yes.

3 **Q** Okay. So I've given you Order Number  
4 PSC-11-0080. Do you have that in front of you?

5 **A** Yes, I do.

6 **Q** Okay. And just so we're all on the same page,  
7 this was a petition that Florida Power & Light filed to  
8 recover Scherer Unit 4 turbine uprate costs through the  
9 environmental cost recovery or the fuel cost recovery  
10 clause; right?

11 **A** That's correct.

12 **Q** And you're familiar with this case, are you  
13 not?

14 **A** I am.

15 **Q** And you were a witness in this case; right?

16 **A** I was.

17 **Q** And just on a side note, you referenced, and I  
18 think Mr. Butler referenced as well, in your remarks  
19 some orders that you were relying on for your position,  
20 some orders of the Commission; correct?

21 **A** Yes.

22 **Q** Would you agree with me that this is a more  
23 current expression of the Commission's view of the  
24 criteria for recovery than the orders that you cited?

25 **A** I don't know that I can conclusively say that.

1 I don't know if this is the most recent case in regards  
2 to the issue that we're discussing here. And the other  
3 thing is that this issue was not so much about advocacy  
4 as it was the replacement of the turbine.

5 Q Understood. You would agree with me that this  
6 is a more recent order of the Commission than the orders  
7 that you cited in your testimony; correct? I think  
8 yours are from '96, 2005, 2007, 2008.

9 A I think it's more recent than the two that I  
10 cited there. There are others that I'd have to check.

11 Q Okay. And I'm just digressing for a moment.  
12 Would you agree with me that the orders that you cited  
13 and that you're relying upon were stipulated among the  
14 parties; in other words, the issue was not contested?

15 A I would have to check with my counsel to  
16 recall that.

17 Q Okay. Well, if he would accept that subject  
18 to check. I did not make copies of all those orders to  
19 distribute. I can show him my copies.

20 A I can tell you that I went back, now that I'm  
21 thinking about it, I went back and read the record on  
22 the CAIR proceedings, and there was an extensive debate  
23 at this hearing about the CAIR issue, which was  
24 eventually approved by the Commission.

25 **MR. BUTLER:** Yeah. That was definitively not

1 stipulated.

2 **MS. KAUFMAN:** Okay. Well, let me show you the  
3 orders then. And may I approach the witness? I  
4 apologize that I didn't anticipate that he wouldn't  
5 agree that these were stipulated. I was --

6 **CHAIRMAN GRAHAM:** Do you have a copy for both  
7 the witness and his attorney?

8 **MS. KAUFMAN:** I do not, Mr. Chairman. And I  
9 guess what I could do is, since he's already cited in  
10 his testimony, I could ask that you take official  
11 recognition of them, and I think the fact that they were  
12 stipulated will speak for themselves, if that's all  
13 right.

14 **CHAIRMAN GRAHAM:** Mary Anne.

15 **MS. HELTON:** I think maybe we might want to  
16 hear from Mr. Butler on this too.

17 **MS. KAUFMAN:** His -- I'm sorry.

18 **MR. BUTLER:** I certainly have no objection to,  
19 you know, taking recognition of the orders. The orders  
20 show what they show.

21 I'm not going to agree to her characterization  
22 of them, but whatever they show, they show. There's  
23 certainly no objection to the Commission taking  
24 recognition of its own orders.

25 **CHAIRMAN GRAHAM:** Okay.

1           **MS. KAUFMAN:** Yes. And that's fine.

2           **CHAIRMAN GRAHAM:** Can I get you to read those  
3 orders that you want to take recognition of?

4           **MS. KAUFMAN:** Yes. These are the same ones  
5 that Mr. LaBauve cited in his testimony.

6                   PSC-05-1251-FOF-EI, PSC-08-0775-FOF-EI,  
7 PSC-09-0759-FOF-EI, and PSC-96-117-FOF-EI.

8           **CHAIRMAN GRAHAM:** Okay.

9           **MS. KAUFMAN:** And I think the record will  
10 reflect, as Mr. Butler has stated, that they were  
11 stipulated.

12           **MR. BUTLER:** That's not what I stated.

13                   I would note, by the way, Ms. Kaufman, that --  
14 do you remember Timothy Perry who used to represent  
15 FIPUG?

16           **MS. KAUFMAN:** I do.

17           **MR. BUTLER:** He was one of the people who  
18 spoke against our proposal to recover the CAIR costs  
19 when that was at issue before the Commission.

20           **MS. KAUFMAN:** Okay.

21           **CHAIRMAN GRAHAM:** Continue.

22 **BY MS. KAUFMAN:**

23           **Q** Let's take a look at this order, Mr. LaBauve,  
24 PSC-11-0080. And I think we've established that this is  
25 the request by Florida Power & Light to recover turbine

1 uprate costs. And that request was denied, was it not?

2 **A** That's correct.

3 **Q** Okay. If you would turn to page 2 of that  
4 order, and about a quarter of the way down it says,  
5 "Decision." And if you want to, just to make this a  
6 little bit quicker, if you want to kind of flip  
7 through -- let me ask you a preliminary question. Would  
8 you agree with me that in this order the Commission took  
9 the time to review the criteria for recovery through the  
10 Environmental Cost Recovery Clause and it reviewed a  
11 number of orders and what it expected utilities to  
12 demonstrate? Would that be a fair characterization?

13 **A** I would have to read this 11-page document  
14 before I could be able to answer that question.

15 **Q** Well, a lot of the order has to do with the  
16 fuel recovery. So the part that I'm talking about is  
17 page 2 through page 5, which deals with the issues we're  
18 discussing today.

19 **MS. KAUFMAN:** Could the witness take a moment  
20 and look at that?

21 **CHAIRMAN GRAHAM:** Sure.

22 **BY MS. KAUFMAN:**

23 **Q** And just let me know when you're ready, sir.

24 (Pause.)

25 **A** Okay. I have read pages 2 through 5 of this

1 order.

2 Q Thank you. And that's all we're going to be  
3 discussing, so I think that will be adequate. So would  
4 you agree with my sort of general question that in pages  
5 2 through 5 of this order the Commission reviewed its  
6 policy in various orders on what would be and would not  
7 be recovered pursuant to the Environmental Cost Recovery  
8 Clause?

9 A I think it's correct to say that the  
10 Commission reviewed the applicability of the clause in  
11 previous cases that were decided underneath it.

12 Q Okay.

13 A However, none of them dealt with advocacy  
14 costs.

15 Q If you would take a look on page 2 right under  
16 where it says, "Decision," and if you see the sentence  
17 that starts with the word, "Pursuant." Do you see that,  
18 sir?

19 A I do.

20 Q Okay. I would ask if you would read those two  
21 sentences, beginning with "Pursuant."

22 A "Pursuant to Section 366.8255, *Florida*  
23 *Statutes*, only the utility's prudently incurred  
24 environmental compliance costs may be recovered through  
25 the ECRC. Environmental compliance costs include all

1 costs or expenses incurred by an electric utility in  
2 complying with the environmental laws or regulations."

3 Q I'm sorry. If you'd read the next sentence as  
4 well, I'd appreciate it.

5 A "Environmental laws or regulations include all  
6 federal, state, or local statutes, administrative  
7 regulations, orders, ordinances, resolutions, or other  
8 requirements that are applied to electric utilities and  
9 are designed to protect the environment."

10 Q Still looking at that section where it says  
11 "Decision," and at the very bottom and actually going  
12 over to page 3, the Commission lists three factors that  
13 have to be met in order to receive recovery under the  
14 clause. Would you agree with that? The factors  
15 actually are at the top of page 3 of that order.

16 A Right. It says in the Gulf order at page 6,  
17 "We said petitioner shall recover environmental  
18 compliance activity if these three items are met."

19 Q Okay. And so you would agree with me that in  
20 order to prevail on your petition today, all three of  
21 those items would have to be met; correct?

22 A That's what was said by the Commission, so  
23 that's their interpretation. Yes.

24 Q Okay. And I want to focus on item number 2,  
25 which I'll just paraphrase, but it basically says that

1 the activity is legally required to comply with a  
2 governmentally imposed environmental regulation enacted  
3 or became effective or whose effect was triggered after  
4 the company's last rate case." Correct?

5 **A** I see that.

6 **Q** Okay.

7 **A** However, I would note that the Commission in  
8 previous cases interpreting whether advocacy costs are  
9 covered by the Environmental Cost Recovery Clause have  
10 looked at these same criteria and have made the  
11 determination that appropriate advocacy costs are  
12 recoverable under the clause.

13 **Q** This second criteria, the one that we're  
14 focusing on, you would agree with me that that criteria  
15 must be complied with for recovery.

16 **A** That's one of the criteria, yes.

17 **Q** Right. Well, I -- that's the one I want to  
18 focus on.

19 Would you also agree with me that the  
20 activities for which you want to seek recovery in this  
21 case are not legally required to comply with any  
22 environmental regulation, rule, statute, or law that is  
23 currently in effect?

24 **A** I would agree that there is current laws that  
25 require us to get wetlands permits and to get

1 determinations in regards to the Waters of the U.S. and  
2 that this provision will potentially change those  
3 provisions and be more costly to our customers. And --  
4 but I would disagree that we're not allowed to recover  
5 those dollars because I think there's clear Commission  
6 precedent that says that advocacy costs on behalf of our  
7 customers to prevent those changes to laws that will  
8 result in customer, cost to our customers are  
9 recoverable.

10 Q I understand your position. And my question  
11 is the activities that you want to engage in that you  
12 seek recovery here on the \$228,000 some dollars, those  
13 activities are not required to comply with any federal,  
14 state, local law or regulation, are they?

15 A At this time, no.

16 MS. KAUFMAN: Thank you. That's all I have.

17 CHAIRMAN GRAHAM: Thank you. Mr. Cavros.

18 MR. CAVROS: Thank you, Chairman.

19 EXAMINATION

20 BY MR. CAVROS:

21 Q Good afternoon, Mr. LaBauve. Nice to see you  
22 again.

23 A Good afternoon.

24 Q Ms. Kaufman did a very thorough job of  
25 cross-examination, so I don't have a lot of questions

1 for you. But you're an attorney; is that correct?

2 **A** That's correct.

3 **Q** Okay. And this is an administrative hearing;  
4 correct?

5 **A** That's correct.

6 **Q** Okay. And the Commission sits as a finder of  
7 fact in an administrative hearing; right?

8 **A** That's correct.

9 **Q** And the facts in each, in each year's  
10 Environmental Cost Recovery Clause docket change; is  
11 that correct?

12 **A** Please repeat the question.

13 **Q** Yeah. Sure. The facts presented to the  
14 Commission in any given annual environmental cost  
15 recovery docket will change.

16 **A** It'll be whatever items for recovery were  
17 submitted that year, yes.

18 **Q** Uh-huh.

19 **A** Some could be the same as previous years, but  
20 there could be new ones.

21 **Q** Uh-huh. Okay. And as a finder of fact, the  
22 Commission will make a decision based on the facts  
23 presented to them; is that correct?

24 **A** Yes.

25 **Q** Okay. And in doing so, the Commission is not

1 tied to past precedent; correct?

2 **A** That's correct.

3 **Q** Okay. Now would you agree that the definition  
4 of an advocate can be an entity that publicly supports  
5 or recommends a particular policy?

6 **A** Yes.

7 **Q** Okay. So then it's fair to say that an  
8 advocate would attempt to influence policy or could  
9 influence policy or that would be the role of an  
10 advocate?

11 **A** Yes.

12 **Q** I want to take it to the state level for a  
13 second. FPL hires lobbyists to lobby the Florida  
14 Legislature on its behalf; is that correct?

15 **A** I'm not personally familiar with our state  
16 governmental affairs activities.

17 **Q** Uh-huh. Okay. Do you -- you would agree  
18 though that FPL hires lobbyists to represent its  
19 interests at the Florida Legislature.

20 **A** I do know that we have people that work inside  
21 the company that are considered lobbyists and that they  
22 advocate on our behalf. And I would -- again, I'm not  
23 personally responsible for that, I don't know it, but I  
24 would presume that they have people that they hire to  
25 help them as well.

1           **Q**    Very good.  And those people are expected to  
2 advocate on FPL's behalf on any issues that might  
3 implicate the company; is that correct?

4           **A**    I think there -- and, again, I'm not sure what  
5 they're hired for, but I would assume they have a  
6 certain scope of work that they're hired for.

7           **Q**    Uh-huh.  And that scope of work could include  
8 or typically includes advocating FPL's position to a  
9 legislator.

10          **A**    Again, I'm not familiar with that personally,  
11 but that's certainly possible.

12          **Q**    And as you testified earlier, the costs  
13 associated with those activities, well, number one, is  
14 an expense of the company; is that correct?  The company  
15 incurs expenses when it, when it -- either in-house or  
16 goes out of house to incur the service of lobbyists.

17          **A**    Yes.

18          **Q**    Okay.  And as you previously testified,  
19 lobbying expenses are typically paid not directly by  
20 customers but the company itself; is that correct?

21          **A**    It's put below the line according to the FERC  
22 accounting standards.

23          **Q**    Okay.  On page 4 of your testimony, I just  
24 want to talk to you briefly about that last bullet  
25 point.  You state there that one of, one of the

1 activities performed by the consultant will be to  
2 continue to work with state and federal government  
3 agencies and legislators to advocate FPL's positions  
4 following the comment period as the rule moves to  
5 finalization and as necessary thereafter. When you  
6 state "federal government agencies and legislators,"  
7 you're referring to the Environmental Protection Agency  
8 and Congress; is that right?

9 **A** I think what's being referred there is that  
10 the scope of our work that we in my particular group  
11 hire people to work on our regulatory advocacy issues.  
12 And it's mainly with the Environmental Protection  
13 Agency, or here in the state it's typically the  
14 Department of Environmental Protection.

15 But given that this rule is so important,  
16 there is the potential that it may move to a legislative  
17 context. If it moves to a legislative context where we  
18 have to seek some sort of either congressional or state  
19 legislation, that may have to happen. But that is not  
20 dollars that would be sought for recovery under this  
21 clause.

22 **Q** If that were to happen, you understand that  
23 Congress can wield potentially significant influence  
24 over the agency?

25 **A** Well, certainly.

1           **Q**     They could potentially, for instance, threaten  
2 cuts to the agency's budget; right?

3           **A**     Yes.

4           **Q**     Okay. They could potentially hold oversight  
5 hearings; right?

6           **A**     Yes.

7           **Q**     They could potentially narrow the agency's  
8 statutory authority; correct?

9           **A**     By legislation, yes.

10          **Q**     And they could even keep a rule from going  
11 into effect through the Congressional Review Act; right?

12          **A**     Yes, they could. But, again, the advocacy  
13 dollars that we're petitioning for here in this hearing  
14 are not related to any interactions with legislators.

15          **Q**     But were you to continue down this road, it  
16 could.

17          **A**     And then that would be below the line.

18          **Q**     Just for context, FPL generated about  
19 \$1.3 billion in net income in 2013. Is that about  
20 right?

21          **A**     I don't have the numbers here with me.  
22 Subject to verification, so be it.

23          **Q**     Okay. I can verify it for you. I have just  
24 an excerpt from the FPL annual report that I'd be more  
25 than happy to distribute to you.

1           **MR. CAVROS:** Chairman --

2           **CHAIRMAN GRAHAM:** Sure.

3           **MR. CAVROS:** -- I'd like to mark it as an  
4 exhibit. Thank you.

5           **CHAIRMAN GRAHAM:** Sure. Just make sure his  
6 attorney has got a copy as well.

7           **MR. CAVROS:** And, Chairman, I believe this  
8 would be Exhibit Number 25. It's an excerpt from the  
9 NextEra Energy annual report.

10                   (Exhibit 25 marked for identification.)

11 **BY MR. CAVROS:**

12           **Q**     And, Mr. LaBauve, if you'd be kind enough to  
13 turn to page 2. There's three columns there. In the  
14 second column starting on line 2, it says FPL's net  
15 income in 2013 was \$1.35 billion.

16           **A**     Yes, I see that.

17           **Q**     Do you see that? Okay.

18                   If FPL were to continue without the Commission  
19 approving cost recovery, it's safe to say that \$228,500  
20 would not be overly burdensome to the company; correct?

21           **A**     I wouldn't agree with that. Our budgets are  
22 very, very tight across the board. Each year we're  
23 going through line by line reviews of everything that we  
24 spend to make sure that we're appropriately spending  
25 dollars on behalf of our customers, and \$228,000 is a

1 significant item in, certainly in my budget.

2 **Q** So you believe that a company that generates  
3 more than \$1.3 billion net income from your customers,  
4 that your customers ought to pay the \$228,500; correct?

5 **A** It's our position that, based on previous  
6 precedent, that it is the appropriate public policy to  
7 approve the types of environmental advocacy costs that  
8 we're talking about here so that we can go out and  
9 advocate on behalf of our customers so that we have the  
10 most effective environmental laws on their behalf for  
11 their customers, and it reduces their costs just like it  
12 has in several significant rulemakings that we've been  
13 able to work on.

14 **Q** Okay. Mr. LaBauve, we've been talking  
15 wetlands today, so I want to ask you just a few  
16 questions about wetlands.

17 Would you agree that wetlands are among the  
18 most biologically productive natural ecosystems in the  
19 world?

20 **A** Yes.

21 **Q** Would you agree that wetlands often function  
22 like natural sponges storing flood water and slowly  
23 releasing it?

24 **A** I think there are tremendous stories across  
25 Florida where wetlands function very effectively to

1 provide environmental protection and to restore  
2 ecosystems. And it's certainly not our position in this  
3 matter to take any exception with current law in regards  
4 to either federal or state law. We comply with all  
5 wetlands requirements, we always get all permits, we've  
6 done extensive mitigation. And to the extent that  
7 federal law does not cover a wetlands issues, there's  
8 state laws that cover wetlands issues, and I think they  
9 work very, very effectively. The issue before this  
10 challenge that we have and the advocacy that we're  
11 trying to bring is an overreach by the federal  
12 government into state issues, and it's really a matter  
13 of going contrary to what the Supreme Court said it was  
14 allowed by the EPA through the Clean Water Act.

15 Q And just to be clear, that's your contention.

16 A That is my contention.

17 Q Okay. And would you agree that in addition to  
18 improving water quality through filtering, some wetlands  
19 maintain stream flow during dry periods and replenish  
20 the ground water that many Americans depend upon for  
21 drinking?

22 A Yes.

23 **MR. CAVROS:** I have no further questions.

24 Thank you.

25 **CHAIRMAN GRAHAM:** Thank you. Staff?

1           **MR. MURPHY:** No questions.

2           **CHAIRMAN GRAHAM:** Commissioners, any  
3 questions?

4           Commissioner Brown.

5           **COMMISSIONER BROWN:** Thank you. You stated in  
6 your testimony that FPL is going to be retaining Clean  
7 Energy Group. Have they already retained that group?

8           **THE WITNESS:** Yes, we have.

9           **COMMISSIONER BROWN:** Have they performed  
10 services for FPL in 2013?

11          **THE WITNESS:** In 2014 they have.

12          **COMMISSIONER BROWN:** Okay.

13          **THE WITNESS:** Yes.

14          **COMMISSIONER BROWN:** I know your testimony  
15 says that FPL began incurring advocacy costs though in  
16 around late 2013. Those were not associated with that  
17 group?

18          **THE WITNESS:** I think you're correct. I think  
19 they had made an announcement late in 2013 that they  
20 would be coming forth with their proposed rule and that  
21 the rule actually came out in April of '14, and it was  
22 initially when they came out that we first started  
23 working with them. It was in that in-between time when  
24 we did not have a pending petition before the Commission  
25 for recovery of costs. So all the initial costs related

1 to working with the Clean Energy Group is not sought for  
2 recovery here in this matter. It's only, it's only for  
3 those dollars from the point that we actually filed our  
4 petition forward.

5 **COMMISSIONER BROWN:** I'm just curious why FPL  
6 did not seek the costs that have already been spent back  
7 in 2013 as well.

8 **THE WITNESS:** It's traditionally been my  
9 understanding that it's a rule of the Commission that  
10 only dollars prospective to the date that we actually  
11 file a petition are recoverable, and anything prior to  
12 that point is typically not recoverable unless we make a  
13 special case for it.

14 **COMMISSIONER BROWN:** Okay. And formal  
15 rulemaking though was announced back in November 2013?

16 **THE WITNESS:** They indicated that they were  
17 going to be moving down this path of developing a  
18 proposed rule. Yes.

19 **COMMISSIONER BROWN:** Just a couple of  
20 questions regarding the Clean Energy Group. Is it going  
21 to be primarily doing legal work or lobbying work as  
22 part of its advocacy?

23 **THE WITNESS:** It will be primarily working  
24 with environmental agencies to advocate on our behalf.

25 **COMMISSIONER BROWN:** Is that legal work or

1 lobbying work?

2 **THE WITNESS:** Well, we don't consider this  
3 lobbying. We consider it regulatory advocacy. But  
4 there are lawyers involved that will give  
5 interpretations along the way but it's not really legal  
6 work. It's not -- they're not a law firm. They do know  
7 something about the law and the previous law, but it's  
8 mostly regulatory advocacy.

9 **COMMISSIONER BROWN:** Okay. So of the  
10 \$228,500, I guess how much would you attribute to legal  
11 expenses as part of its advocacy efforts?

12 **THE WITNESS:** I think probably a very small  
13 portion.

14 **COMMISSIONER BROWN:** Okay. Thank you.

15 **CHAIRMAN GRAHAM:** Commissioner Brisé.

16 **COMMISSIONER BRISÉ:** Thank you, Mr. Chairman.  
17 You seem to rely on the FERC accounting  
18 standard to talk about advocacy is allowed. Can you  
19 expound on that standard and what is, how they make the  
20 difference between lobbying and advocacy?

21 **THE WITNESS:** Yes. In my understanding of the  
22 FERC uniform system of accounting is that it defines  
23 lobbying as those activities undertaken to advocate  
24 before legislative and congressional bodies, but that  
25 it -- and that it requires that those expenses would be

1 recorded below the line; whereas, it has an exception  
2 that says for regulatory advocacy before agencies that  
3 are done before agencies that affect our current or  
4 future operations, that is an exception to the lobbying  
5 rule and that it is not to be recorded below the line.

6 **COMMISSIONER BRISÉ:** Okay. With respect to  
7 the orders that you mentioned, and so I'm just seeking a  
8 little bit of clarification on this, on all of those  
9 particular cases were those rules implemented already or  
10 were those rules coming to be?

11 **THE WITNESS:** They were coming to be  
12 implemented.

13 **COMMISSIONER BRISÉ:** Okay. So then, so then  
14 the Commission allowed for expenses to be incurred  
15 towards those expenses?

16 **THE WITNESS:** Yes, Commissioner.

17 **COMMISSIONER BRISÉ:** Okay. And I'm trying to  
18 think -- I think I'll leave it there for now.

19 **CHAIRMAN GRAHAM:** Commissioner Brown -- I  
20 mean, Balbis.

21 **COMMISSIONER BALBIS:** Thank you, Mr. Chairman.

22 Thank you, Mr. LaBauve, for your testimony. I  
23 have a few questions. And I want to start with the  
24 scope of work that this company is going to be  
25 providing, is it, is the company going to be involved in

1 providing information to the regulatory agencies,  
2 specifically the Environmental Protection Agency, as it  
3 pertains to FPL-specific facilities?

4 **THE WITNESS:** Potentially, yes. In general,  
5 when we work with the Clean Energy Group, they come up  
6 with policy papers and talking points, and often times  
7 they like to refer to specific company examples. So it  
8 very well could include FPL-specific examples.

9 **COMMISSIONER BALBIS:** Okay. And -- because I  
10 have seen, and I don't know if you have as well, but  
11 have you seen the EPA move forward with proposed  
12 regulations that perhaps have errors or mistakes in  
13 their assumptions on Florida-specific conditions?

14 **THE WITNESS:** Yes. There have been times when  
15 the EPA is advocating a rule that has some inaccuracies  
16 in the modeling or the data that they use to develop the  
17 rule.

18 **COMMISSIONER BALBIS:** Okay.

19 **THE WITNESS:** And previously in the CAIR rule,  
20 which the Commission approved dollars for, part of those  
21 dollars were associated with pointing out those  
22 inaccuracies.

23 **COMMISSIONER BALBIS:** Okay. So some of the  
24 information that the Clean Energy Group puts together  
25 can be provided to EPA so that whatever rule comes out

1 of this process perhaps eliminates some of these  
2 mistakes or incorrect assumptions.

3 **THE WITNESS:** Absolutely.

4 **COMMISSIONER BALBIS:** So that whatever rule  
5 comes out will be effective for Florida without having,  
6 you know, burdensome costs associated with that.

7 **THE WITNESS:** Yes, Commissioner.

8 **COMMISSIONER BALBIS:** Okay. And the other  
9 question I have, in looking at the specific scope of  
10 work that's listed on your page 4, that last bullet item  
11 where it was discussed to continue to work with state  
12 and federal government agencies and legislators, none of  
13 the dollars associated with the \$225,000 go to any  
14 campaign contributions for the legislators. What would  
15 be some of the work associated with that work with  
16 legislators?

17 **THE WITNESS:** You're correct, Commissioner,  
18 none of those dollars would go to campaign contributions  
19 or legislative activities. Those dollars would be  
20 associated with the fundamental technical analysis  
21 around the rule, finding the inaccuracies that you  
22 articulated, developing position papers, having meetings  
23 at EPA, working with other groups to try to develop  
24 consensus positions around what would be an effective  
25 Waters of the U.S. rule.

1                   **COMMISSIONER BALBIS:** Okay. And your position  
2 is whatever results from the final rule, that any costs  
3 associated with that would likely pass through the ECRC  
4 clause and paid by customers; correct?

5                   **THE WITNESS:** Yes, Commissioner, with your  
6 approval.

7                   **COMMISSIONER BALBIS:** So essentially FPL  
8 shareholders would not be harmed by these rules as the  
9 customers would be the ones that pay for compliance?

10                  **THE WITNESS:** I think that's correct. If the  
11 Commission approves any compliance costs, and typically  
12 you have, and it is indeed recovered under the  
13 Environmental Cost Recovery Clause, it'll be a customer  
14 expense as opposed to a shareholder expense.

15                  **COMMISSIONER BALBIS:** Okay. And I think  
16 that's important because I think there's a misconception  
17 out there that utility companies fight environmental  
18 regulations because they don't want to incur those  
19 costs. But in some cases, you know, specifically in  
20 Florida where we have this clause to pass through those  
21 costs to customers, in essence, you know, really the  
22 cost will be borne by them, so there is no true  
23 incentive for utility companies to fight those rules.  
24 Just a -- I don't know if you agree with that statement  
25 or not. You don't have to.

1           **THE WITNESS:** Well, I think it's a very good  
2 point that you make. And I would just note that Florida  
3 Power & Light, traditionally we will support rules that  
4 are protective of the environment, and there are many  
5 rules that have been promulgated such as EPA's match  
6 rule, the new 316B rule. Most recently the 111D rule we  
7 think can actually, with some modifications, work  
8 effectively for us here in Florida.

9           But we feel like it's important on our  
10 customers' behalf because it is a cost that's going to  
11 go through the clause, it is going to be a pass-through  
12 that we advocate on their behalf to try to get effective  
13 rules. And that's why on several rules it would have  
14 cost them an enormous amount of money. We were able to  
15 successfully advocate for better rules that avoided  
16 those costs.

17           **COMMISSIONER BALBIS:** Okay. And back to the  
18 specific scope of work of Clean Energy Group, is there a  
19 breakdown on what their expenses would be in dealing  
20 with the legislative, the legislators through their  
21 legislative effort versus regulatory agencies, or is it  
22 all grouped into one specific task in the scope?

23           **THE WITNESS:** They, on this rule, would not be  
24 addressing anything legislatively.

25           **COMMISSIONER BALBIS:** Okay. Okay. I don't

1 have any further questions.

2 **CHAIRMAN GRAHAM:** Commissioner Edgar.

3 **COMMISSIONER EDGAR:** Thank you. Thank you,  
4 Mr. Chairman.

5 And I would like to ask just a few questions.  
6 They may be somewhat redundant to questions that you've  
7 answered here in the last little bit, but bear with me,  
8 please.

9 Mr. Cavros, representing SACE, in his opening  
10 statement said ratepayers should not be required to pay  
11 within their utility bill for something that is  
12 fundamentally against ratepayer interest. Do you agree  
13 with that statement?

14 **THE WITNESS:** I do not agree with that  
15 statement, because I think the record would show that in  
16 previous rulemakings and as we're advocating here, the  
17 low-cost dollars that we're talking to spend on behalf  
18 of our customers will actually save them an enormous  
19 amount of capital dollars later. So it's in their best  
20 interest.

21 **COMMISSIONER EDGAR:** In this instance.

22 **THE WITNESS:** And in the previous rulemakings  
23 that we've done where we've successfully shown that  
24 we've been able to effectively use the dollars that you  
25 approve to advocate on their behalf.

1                   **COMMISSIONER EDGAR:** You're not answering the  
2 question I asked.

3                   **THE WITNESS:** I'm sorry, Commissioner.

4                   **COMMISSIONER EDGAR:** That's okay. Actually  
5 you're four questions ahead of me. But I'd like to back  
6 up just because it will help with my thought process.

7                   **THE WITNESS:** Certainly.

8                   **COMMISSIONER EDGAR:** My understanding and my  
9 memory of Mr. Cavros' statement in his opening statement  
10 was a more general blanket statement, so I'd like to  
11 start with that, which I believe was ratepayers should  
12 not be required to pay within their utility bill costs  
13 that are fundamentally against ratepayer interest from a  
14 general perspective. Do you agree with that statement?

15                   **THE WITNESS:** I don't agree with that  
16 statement.

17                   **COMMISSIONER EDGAR:** Okay. The costs that are  
18 being requested for recovery here, the \$228,500 for this  
19 specific project, do you believe that those costs, those  
20 dollars are fundamentally against ratepayer interest?

21                   **THE WITNESS:** I do not.

22                   **COMMISSIONER EDGAR:** Can you walk me through  
23 with more specificity what exactly the \$228,500 will  
24 cover and how that number is arrived at?

25                   **THE WITNESS:** Yes. The dollars are associated

1 with -- and previously when we estimated these dollars,  
2 it was associated with three different areas, the first  
3 of which was dollars associated with working with the  
4 Clean Energy Group both in 2014 and 2015. And as I  
5 mentioned earlier, it's associated with developing  
6 technical papers, doing analysis, developing position  
7 papers, talking points, arranging meetings, travel and  
8 everything associated with meeting with regulatory  
9 agencies to advocate on the particular rule.

10 We previously were also a member of what was  
11 called the Utility Waste Advocacy Group. We have since  
12 decided to not be part of that group, and so there could  
13 be some dollars associated with where we were  
14 participating in that group that either won't get spent  
15 or it could be spent on another effort. It could be  
16 through the Clean Energy Group or it could be through  
17 another group if we think that's more appropriate.

18 And the third area is that we think there  
19 probably needs to be some scientific and biological  
20 consulting costs that will help inform the process so  
21 that we come up with the right answers and that there  
22 are some dollars associated with that as well.

23 **COMMISSIONER EDGAR:** Okay. That's helpful and  
24 that did answer my question. Thank you.

25 So my next question is recognizing those

1 activities more specifically that you've just described  
2 in response to my question, how is the \$228,500 figure  
3 arrived at? I mean, are you looking at specific travel  
4 amounts, specific hourly consulting rates? I just would  
5 like a little more specificity as to how that number  
6 would be backed up.

7 **THE WITNESS:** I understand. For each one we  
8 reached out to those particular groups and asked them  
9 what, to effectively proceed along the scope of work  
10 that was planned what the costs would be for 2014 and  
11 2015, and they gave us their reasonable estimate as to  
12 both what those costs would be. And then those specific  
13 figures and the documentation for that was used to  
14 develop this estimate.

15 **COMMISSIONER EDGAR:** Is that documentation a  
16 part off the record in this case?

17 **THE WITNESS:** I do not believe it is.

18 **COMMISSIONER EDGAR:** Is it your understanding  
19 that documentation would come to the Commission for  
20 review at a future date?

21 **THE WITNESS:** I think I may need a little help  
22 with that in terms of procedure on how we would actually  
23 submit that, but I know that it's subject to review and  
24 audit by the Commission.

25 **COMMISSIONER EDGAR:** Perhaps as part of the

1 true-up process?

2 **THE WITNESS:** Yes.

3 **COMMISSIONER EDGAR:** All right. Thank you.

4 **CHAIRMAN GRAHAM:** Any further Commissioners?  
5 Mr. Butler, redirect.

6 **MR. BUTLER:** Thank you, Mr. Chairman. Just a  
7 couple.

8 **EXAMINATION**

9 **BY MR. BUTLER:**

10 **Q** Mr. LaBauve, just to clarify something that  
11 you probably covered with Commissioner Edgar, but is FPL  
12 currently incurring advocacy costs in connection with  
13 the Waters of the United States rule?

14 **A** Yes.

15 **Q** Okay. And it has been incurring those costs  
16 since approximately when?

17 **A** The end of 2013.

18 **Q** Okay. Would you comment, Mr. LaBauve, on what  
19 signals will be sent to FPL and other utilities  
20 regarding future advocacy activities if the Commission  
21 approves the request in this project for recovery for  
22 advocacy costs for the Water of the United States rule?

23 **MS. KAUFMAN:** Excuse me, Mr. Chairman. I  
24 would object. I think that's outside the scope of any  
25 cross questions that were asked. Sending signals?

1                   **CHAIRMAN GRAHAM:** Can I hear the question  
2 again?

3 **BY MR. BUTLER:**

4           **Q**     Would you comment, Mr. LaBauve, on what  
5 signals would be sent to utilities regarding the  
6 appropriateness of incurring advocacy costs for  
7 rulemaking if the Commission approves the project that  
8 we've proposed here?

9                   **CHAIRMAN GRAHAM:** I'll allow it.

10           **THE WITNESS:** As Commissioner Balbis noted,  
11 when these dollars and the eventual cost of these  
12 dollars are passed through to our customers, I think  
13 there is the appropriate incentive that when we bring  
14 forward the significant rulemakings that can affect  
15 their interest and that will really result in high cost  
16 for them, and that we are given approval to go out and  
17 get the proper resources to advocate on those rules, I  
18 think it creates the right policy position for us and  
19 for others to develop effective laws so that when we're  
20 in a compliance situation and dealing with the costs  
21 that our customers are going to bear, that we can  
22 minimize those costs for them.

23 **BY MR. BUTLER:**

24           **Q**     You were asked some questions by Ms. Kaufman  
25 about Section 366.8255. Do you still have your, a copy

1 of it available to you there?

2 **A** Yes.

3 **Q** And I'd asked you to look at subsection (1)(d)  
4 that she had been asking about, and would you please  
5 read all of the, what I guess I would call the  
6 introductory portion of that before you get into the  
7 series of eight specific types of environmental  
8 compliance costs?

9 **A** Yes. "Environmental compliance costs includes  
10 all costs or expenses incurred by an electric utility in  
11 complying with environmental laws or regulations  
12 including but not limited to."

13 **Q** And then it goes into the list of the  
14 eight items that you were asked to review by  
15 Ms. Kaufman; is that right?

16 **A** That's correct.

17 **Q** Okay. What is your understanding of the  
18 phrase "including but not limited to" as used in that  
19 introductory language of subsection (d)?

20 **A** My interpretation would be that these  
21 eight items are an illustrative list but they're not an  
22 exclusive list, and that you go to the Commission's  
23 prior interpretations to decide whether they believe  
24 that there are additional items that can be recovered  
25 above and beyond what is listed in this illustrative

1 list.

2           **Q**     Thank you. Last question for you, Mr.  
3 LaBauve. Do you have any examples of potential savings  
4 that might result from FPL's advocacy efforts in  
5 connection with the Waters of the United States rule?

6           **A**     Yeah. One key example that I could provide  
7 for you is that currently we have four major power plant  
8 locations that have cooling ponds or cooling canal  
9 structures associated with them. These large structures  
10 are the water bodies that were built, and they were  
11 designed into the original permitting of the plant that  
12 allows us to recirculate water to cool the plants.  
13 Those water bodies are not considered waters of the U.S.  
14 and, as a result, they do not have to meet the  
15 requirements that this new rule potentially could impose  
16 upon them.

17                   If these new impoundments are now considered  
18 waters of the U.S., this would be water bodies that we  
19 would actually have to have a permit to discharge into  
20 and to take out of. And not only would you have to have  
21 a permit to discharge into and take out of, you would  
22 have to meet the compliance and the technology costs  
23 associated with being able to do that. And we estimate  
24 the cost on each one of those to be about \$25 million.  
25 So for four locations, if they suddenly become waters of

1 the U.S., they're going to have to have intake  
2 structures to meet 316B, and then they're going to have  
3 to have discharge limitations and all types of equipment  
4 that prevents us from discharging to the very water body  
5 that they were built to actually recirculate water into.

6 **MR. BUTLER:** Thank you. That's all the  
7 redirect that I have.

8 **CHAIRMAN GRAHAM:** Okay. Do you have any  
9 exhibits?

10 **MR. BUTLER:** We have Exhibit 3. We'd move the  
11 admission of Exhibit 3.

12 (Exhibit 3 admitted into the record.)

13 **CHAIRMAN GRAHAM:** Okay. And OPC, FIPUG, SACE.

14 **MR. CAVROS:** Thank you, Chairman. Exhibit 25,  
15 which is the NextEra annual report excerpt.

16 **CHAIRMAN GRAHAM:** Exhibit 25. Is that the  
17 exhibit that you handed out?

18 **MR. CAVROS:** Correct.

19 **CHAIRMAN GRAHAM:** Well, the next exhibit  
20 number would be Exhibit 72.

21 **MR. CAVROS:** Okay. I apologize.

22 **MR. BUTLER:** In this docket I think it's 25.

23 **MS. HELTON:** That's correct.

24 **CHAIRMAN GRAHAM:** Oh, I stand -- I apologize.  
25 25. See, it's a rarity, but from time to time the

1 Chairman is wrong. We'll enter Exhibit 25 into the  
2 record. Okay.

3 (Exhibit 25 admitted into the record.)

4 **MR. MURPHY:** Mr. Chairman, did you rule on 3?  
5 Did you move it?

6 **CHAIRMAN GRAHAM:** Yes.

7 **MR. MURPHY:** Okay. Thank you.

8 **MR. REHWINKEL:** On the CFR, the *Federal*  
9 *Register*, you're taking recognition but it's not going  
10 to be given an exhibit number; is that correct?

11 **MR. BUTLER:** I didn't propose to give it an  
12 exhibit number. If that's the preference of the  
13 Commission, I'm happy to do so. But since it's been  
14 distributed and is readily ascertainable on the *Federal*  
15 *Register* site, I didn't feel the need to do so.

16 Mr. Chairman, would you prefer to have it as  
17 an exhibit?

18 **CHAIRMAN GRAHAM:** No.

19 **MR. BUTLER:** Okay. Thank you.

20 **CHAIRMAN GRAHAM:** Okay. Staff -- would you  
21 like to excuse your witness, Mr. Butler?

22 **MR. BUTLER:** I'm sure he would like me to, and  
23 I very much appreciate the reminder.

24 Yes. May Mr. LaBauve be excused?

25 **CHAIRMAN GRAHAM:** Thank you, sir.

1           **THE WITNESS:** Thank you.

2           **CHAIRMAN GRAHAM:** Staff, where are we?

3           **MR. MURPHY:** Mr. Chairman, since there's been  
4 a bench decision, there are no need for briefings on  
5 this except for number nine, and those would be due on  
6 November 5th, and would be limited to 20 pages. And  
7 since we've got factors that are subject to true-up, we  
8 would like to bring this to the December agenda rather  
9 than having waited for the brief, try to rush it to the  
10 November agenda.

11           **CHAIRMAN GRAHAM:** Okay. So you're going to  
12 have briefings all due on November 5th, and this is  
13 going to come before the December 16th agenda?

14           **MR. MURPHY:** Yes, sir.

15           **CHAIRMAN GRAHAM:** Okay. Any questions of the  
16 parties? Okay. Is that it for us, staff?

17           **MR. MURPHY:** Nothing further that I'm aware  
18 of.

19           **CHAIRMAN GRAHAM:** All right. Well, then we  
20 will adjourn this docket. I do want to thank everybody  
21 for your time today and your patience, and I hope that  
22 you all travel safe. Thank you very much. We're  
23 adjourned.

24                           (Proceeding adjourned at 12:58 p.m.)

25

1 STATE OF FLORIDA )  
2 COUNTY OF LEON ) : CERTIFICATE OF REPORTER

3  
4 I, LINDA BOLES, CRR, RPR, Official Commission  
5 Reporter, do hereby certify that the foregoing  
6 proceeding was heard at the time and place herein  
7 stated.

8 IT IS FURTHER CERTIFIED that I stenographically  
9 reported the said proceedings; that the same has been  
10 transcribed under my direct supervision; and that this  
11 transcript constitutes a true transcription of my notes  
12 of said proceedings.

13 I FURTHER CERTIFY that I am not a relative, employee,  
14 attorney or counsel of any of the parties, nor am I a  
15 relative or employee of any of the parties' attorney or  
16 counsel connected with the action, nor am I financially  
17 interested in the action.

18 DATED THIS 30th day of October, 2014.

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LINDA BOLES, CRR, RPR  
FPSC Official Hearings Reporter  
(850) 413-6734

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power & Light Company to recover Scherer Unit 4 Turbine Upgrade costs through environmental cost recovery clause or fuel cost recovery clause.	DOCKET NO. 100404-EI ORDER NO. PSC-11-0080-PAA-EI ISSUED: January 31, 2011
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The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman  
LISA POLAK EDGAR  
RONALD A. BRISÉ  
EDUARDO BALBIS  
JULIE I. BROWN

NOTICE OF PROPOSED AGENCY ACTION  
ORDER DENYING PETITION TO RECOVER SCHERER UNIT 4 TURBINE UPGRADE COSTS THROUGH THE ENVIRONMENTAL COST RECOVERY CLAUSE OR THE FUEL COST RECOVERY CLAUSE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

Florida Power & Light Company (FPL) has requested approval to recover the costs associated with a turbine upgrade to the Scherer Unit 4 coal generating facility through either the Environmental Cost Recovery Clause (ECRC) or the Fuel Cost Recovery Clause (Fuel Clause). FPL asserts that with the installation of a new high pressure rotor to the Unit 4 turbine-generator, the plant will be able to generate approximately 35 MW of additional electricity output, which, in turn, will substantially offset the parasitic load imposed by the plant's environmental equipment which is being installed to comply with the Environmental Protection Agency's (EPA) Clean Air Interstate Rule (CAIR) and the Georgia Multipollutant Rule. The environmental equipment to be installed at Unit 4 includes a baghouse, a scrubber, and a selective catalytic reduction system. FPL expects to incur approximately \$5-7 million in capital costs for the turbine upgrade, and asserts that the upgrade will result in net present value fuel savings to customers of approximately \$240 million through 2045.

DOCUMENT NUMBER DATE

00732 JAN 31 =

FPSC-COMMISSION CLERK

FPL originally planned to perform the turbine upgrade at the same time that the environmental equipment is installed at the unit, scheduled to take place during an outage in 2012. In May 2010, however, the EPA issued a new greenhouse gas tailoring rule that FPL believes may require a New Source Review of Scherer Unit 4 for greenhouse gas emissions unless construction begins on the turbine upgrade prior to July 1, 2011. (75 Fed. Reg. 31513 et seq). Therefore, FPL is presently planning to arrange for delivery of the high pressure rotor in June 2011, with installation to commence shortly thereafter.

As explained in detail below, we find that the costs of the turbine upgrade are not eligible for recovery through either the ECRC or the Fuel Clause. We have jurisdiction over this subject matter pursuant to the provisions of Chapter 366, Florida Statutes (F.S.), including Sections 366.04, 366.05, 366.06, 366.825, and 366.8255.

### DECISION

#### ECRC Eligibility

The ECRC, established in 1993 by the Florida Legislature, provides an investor-owned utility the opportunity to recover the costs associated with incremental changes in environmental regulations between rate cases. Pursuant to Section 366.8255, F.S., only the utility's prudently incurred environmental compliance costs may be recovered through the ECRC. Environmental compliance costs include "all costs or expenses incurred by an electric utility in complying with environmental laws or regulations . . ." Section 366.825(1)(d), F.S. Environmental laws or regulations include "all federal, state, or local statutes, administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment." Section 366.8255(1)(c), F.S. The statute authorizes us to review and decide whether a utility's environmental compliance costs are recoverable through an environmental cost recovery factor. A utility may submit a petition to us describing its proposed environmental compliance activities and projected costs, and if the activities are approved, we "shall allow recovery of the utility's prudently incurred environmental compliance costs, including the costs incurred in compliance with the Clean Air Act, and any amendments thereto or any change in the application or enforcement thereof. . . ." Section 366.8255(2), F.S. The statute provides that any costs recovered in base rates may not also be recovered in the ECRC. Section 366.8255(5), F.S.

We first implemented the provisions of Section 366.8255, F.S., in Docket No. 930613-EI, In re: Petition to establish an environmental cost recovery clause pursuant to Section 366.8255, Florida Statutes (Gulf Order).<sup>1</sup> There, we identified the criteria required to demonstrate eligibility for cost recovery under the ECRC. We interpreted the statute to prescribe three requirements for recovery of environmental compliance costs through the clause. In the Gulf Order at page 6, we said:

Upon petition, we shall allow the recovery of costs associated with an environmental compliance activity if:

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<sup>1</sup> Order No. PSC-94-0044-FOF-EI, issued January 12, 1994.

1. such costs were prudently incurred after April 13, 1993;
2. the activity is legally required to comply with a governmentally imposed environmental regulation enacted, became effective, or whose effect was triggered after the company's last test year upon which rates are based; and,
3. such costs are not recovered through some other cost recovery mechanism or through base rates.

Beginning with the Gulf Order, and in several other decisions over the years, we have considered proposals for recovery of environmental compliance costs on a case-by-case basis, and with some flexibility; but, we have required fundamental compliance with the provisions of Section 366.8255, F.S. As the following review of our decisions indicates, and of particular importance to this case, we have consistently enforced the requirement that projects eligible for ECRC cost recovery must be required to comply, or remain in compliance with, a governmentally imposed environmental regulation.

The Gulf Order allowed recovery through the ECRC of Gulf's Environmental Auditing Program because the program ensured the efficient management of approved environmental programs to ensure cost-effective compliance with environmental regulations.<sup>2</sup> It also allowed recovery for general air quality costs and emission monitoring costs associated with changes in the scope of compliance with existing environmental regulations and new environmental regulations.<sup>3</sup> It denied recovery of Gulf's Clean Coal Technology program, however, because the program was a discretionary, voluntary research and development program not needed for compliance with any environmental regulations.

In Docket No. 990667-EI, In re: Petition by Gulf Power Company for approval of Plant Smith Sodium Injection System as new program for cost recovery through environmental cost recovery clause,<sup>4</sup> we approved the project both to comply with new Clean Air Act Amendment (CAAA) Phase II requirements and to maintain compliance with existing air permit requirements. In Docket No. 980007-EI, In re: Environmental Cost Recovery Clause,<sup>5</sup> we approved Gulf's additional groundwater monitoring equipment to continue to comply with an existing environmental requirement, because greater treatment capacity was needed. In that docket, we also approved two additional coal crushers that contributed to overall compliance with the CAAA at the Tampa Electric Company (TECO) Gannon station even though it was not clear that the additional crushers had initially been a part of TECO's overall NOx compliance strategy for Phase II of the CAAA.

In Docket No. 020648-EI, In re: Petition for approval of environmental cost recovery of St. Lucie Turtle Net Project for period of 4/15/02 through 12/31/02 by Florida Power & Light Company,<sup>6</sup> FPL's Nuclear Regulatory Commission (NRC) license to operate the St. Lucie

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<sup>2</sup> Gulf Order at 19.

<sup>3</sup> Gulf Order at 17.

<sup>4</sup> Order No. PSC-99-1954-PAA-EI, issued October 5, 1999.

<sup>5</sup> Order No. PSC-98-1764-FOF-EI, issued December 31, 1998.

<sup>6</sup> Order No. PSC-02-1421-PAA-EI, issued October 17, 2002.

nuclear power plant included Appendix B, which imposed certain requirements on FPL to protect several species of endangered sea turtles from entrapment in the cooling water intake canals of the plant. The NRC requirements included installation and maintenance of a five-inch mesh barrier net across the intake canal. Although the NRC requirements had not changed, FPL requested recovery of the costs for a new turtle net project, which included installation of a new net of sturdier material and support structures, conducting a bottom survey of the intake canal, maintenance dredging the canal in the vicinity of the net, and installing a sand pump near the net. These additional activities were not specifically required by Appendix B, but FPL explained that they were necessary to ensure that the net worked properly so that it could continue to comply with its NRC license. In this year's ECRC docket FPL has requested approval of additional modifications to its Turtle Net Project, which FPL asserts are necessary to remain in compliance with the requirements of Appendix B.

In Docket No. 050958-EI, In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause by Tampa Electric Company,<sup>7</sup> we approved a new flue gas desulfurization system reliability program to amplify an existing program that we had approved earlier, because the program would allow TECO to comply with additional requirements of its Consent Decree with the EPA, even though the specific project TECO engineered was not required by the Consent Decree.

Finally, in Docket No. 060162-EI, In re: Petition by Progress Energy Florida, Inc. for approval to recover modular cooling tower costs through environmental cost recovery clause,<sup>8</sup> we approved Progress Energy Florida's (PEF) modular cooling tower project in order to continue compliance with wastewater discharge standards required by the Florida Department of Environmental Protection (DEP). PEF's discharge permit limits the temperature of discharge water into the Gulf of Mexico from the Crystal River plants to 96.5 degrees Fahrenheit. Increased inlet water temperatures from the Gulf during the summers of 2004 and 2005 forced PEF to reduce the output of the plants in order to remain in compliance with its discharge permit. The modular cooling towers along the discharge canal provided additional cooling capacity that allowed PEF to comply with its permit and avoid numerous, expensive derates of its base load generating units.

The Office of Public Counsel (OPC) argued that the cooling towers project was not eligible for cost recovery through the ECRC. OPC put forth several reasons for its position, but OPC's fundamental concern was that utilities were attempting to inappropriately expand the use of the clause dockets to recover costs that should be addressed in base rate proceedings. In Order No. PSC-07-0722-FOF-EI (Cooling Tower Order), we acknowledged OPC's concern, but asserted the need for flexibility in the application of the ECRC statute, as long as the basic criteria of the statute were met. At page 8 of the Cooling Tower Order, we said:

We believe that this interpretation is consistent with our prior decisions, and with the intent of section 366.8255, Florida Statutes, which permits recovery of a wide variety of costs associated with compliance with governmentally imposed

<sup>7</sup> Order No. PSC-07-0499-FOF-EI, issued June 11, 2007.

<sup>8</sup> Order No. PSC-07-0722-FOF-EI, issued September 5, 2007.

environmental requirements, if the costs were incurred after section 366.8255 was enacted, and if the costs are not being recovered in base rates or another cost recovery mechanism. We understand OPC's concern that utilities have the incentive to pass many costs through cost recovery mechanisms, and we are attuned to that concern, but that cannot lead us to restrict the eligibility of environmental costs beyond what the statute contemplates. . . . Further, we are not persuaded that a decision to approve the eligibility of the modular cooling towers project would lead to the scenario OPC's witness Hewson describes, as long as we continue to require a direct nexus between the project, its compliance costs, and the relevant environmental requirement.

FPL relies heavily on our decision in the Cooling Tower Order to support its request for recovery of the turbine upgrade costs in this case. According to FPL, PEF's modular cooling tower project avoided reductions in generating plant output from discharge temperature requirements, and FPL argues that its turbine uprate project will offset reductions in generating unit output due to the installation and operation of pollution controls at the Scherer plant. FPL does not take into account, however, the critical distinguishing fact between the two cases. The modular cooling tower project was designed to allow PEF to run its Crystal River plants in compliance with a governmentally imposed environmental requirement, DEP's wastewater discharge permit. If PEF did not comply with the temperature requirements, it could not run its plants. FPL's turbine upgrade is not designed to allow FPL to run Scherer Unit 4 in compliance with a governmentally imposed environmental requirement. Without the turbine upgrade, it can still run its plant. When the baghouse, scrubber, and selective catalytic reduction system, whose costs we have approved for recovery through the ECRC, are installed in 2012, FPL will be in compliance with applicable environmental regulations, with or without the turbine upgrade. In its response to our staff's 4th Set of Interrogatories No. 44 in Docket. No. 100007-EI, FPL agreed that "not proceeding with the upgrade of the steam turbine would not violate any federal, state or local environmental rule or regulation." Allowing recovery of FPL's turbine upgrade project to offset parasitic load from environmental equipment through the ECRC would open up a whole new, perhaps extensive, subset of recoverable costs. Virtually every pollution control system creates a parasitic load for a generating unit. We find that this new subset of costs is not contemplated by Section 366.8255, F.S., or our orders implementing the statute.

As this review of our ECRC decisions indicates, the facts and circumstances of environmental compliance projects eligible for cost recovery vary considerably, but the principle that connects them is our consistent insistence that the projects comply with the essential criteria of the statute and the Gulf Order, in particular here, the requirement that the projects be required to comply, or remain in compliance with, a governmentally imposed environmental regulation. FPL's Scherer Unit 4 turbine upgrade is a discretionary, voluntary project, and the costs associated with it are not environmental compliance costs required by any known environmental rule or regulation. Thus there is no "direct nexus between the project, its compliance costs, and the relevant environmental requirement." We find that the proposed project does not meet established criteria for recovery through the ECRC.

### Fuel Clause Eligibility

The fuel clause is a regulatory tool designed to pass through to utility customers the costs associated with fuel purchases. The purpose is to prevent regulatory lag, which occurs when a utility incurs expenses but is not allowed to collect offsetting revenues until the regulatory body approves cost recovery. Regulatory lag has historically been a problem for utilities because of the volatility of fuel costs. It is not as much of a problem, however, when expenses, such as capital improvements, and operations and management costs, can be planned for and included in base rate calculations. Different states have addressed volatile fuel costs and the problem of regulatory lag in differing ways. Several jurisdictions, like Florida, have allowed recovery of fuel costs in a fuel adjustment clause, and in Florida the implementation of the fuel clause has changed and developed over the years.

From 1925 to 1951, before the Legislature granted us jurisdiction over investor-owned electric utilities, Florida's electric utilities benefited from a monthly fuel adjustment clause. Starting in 1951, when we obtained jurisdiction over them, the utilities applied a Commission-approved formula and placed the resulting charge on customers' bills. While some auditing functions were performed by our staff, no formal public hearing was held. In 1973-1974, a foreign oil embargo substantially increased the cost of oil, leading to increased consumer concern over fuel adjustment charges. On October 7, 1974, we opened a docket to fully review the clause process.<sup>9</sup> Two days later, on October 9, 1974, the Attorney General issued an advisory opinion which stated that the practice of allowing changes in the fuel adjustment charges without a public hearing was illegal under Florida law. 74 Op. Att'y. Gen. Fla. 309 (1974). On October 11, 1974, the first fuel adjustment clause hearing was held, which led to the approval of a stipulation that provided for a monthly hearing format on all fuel adjustment clauses.<sup>10</sup> During the 1974 proceeding, we also considered recommendations on the modification of the clause, and implemented a two-month lag between utilities filing for fuel clause recovery and the decision on cost recovery. The two month lag was intended as an incentive to the utilities to optimize fuel costs.

In 1980, we modified the clause again.<sup>11</sup> In Order No. 9273, we allowed the utilities to collect fuel and fuel-related expenses on a current basis. We subsequently modified the recovery clauses to allow recovery on the projections of future fuel and fuel-related expenditures subject to a true-up hearing in which the utilities' projected fuel expenditures are adjusted to recover only actual expenditures. From 1980 to 1998, we changed the fuel adjustment hearing schedule from once a month, to every six months, to the current yearly schedule.

In 1985, we amended the fuel clause process to better describe those items that would be recoverable under the fuel clause. Prior to the August 1985 fuel hearing, we instructed the parties and our staff to "provide information necessary for the Commission to be able to consider

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<sup>9</sup> Order No. 6357, issued November 26, 1974, in Docket No. 74680, In re: General Investigation of Fuel Adjustment Clauses of Electric Companies.

<sup>10</sup> Id.

<sup>11</sup> Order No. 9273, issued March 7, 1980, in Docket No. 74680, In re: General Investigation of Fuel Cost Recovery Clause. Consideration of Staff's Proposed Projected Fuel and Purchased Power Cost Recovery Clause with an Incentive Factor.

at the August 1985 fuel adjustment hearing whether the utilities were passing appropriate fixed and variable costs associated with fuel receipts through their fuel adjustment clauses.”<sup>12</sup> Order No. 14546 approved a stipulation between OPC, FPL, TECO, Gulf, and FPC (now PEF) after a workshop exploring the issue. The policy outlined in Order No. 14546 consisted of two essential points regarding the scope and application of the fuel adjustment clause:

1. When similar circumstances exist, the Commission should attempt to treat, for cost recovery purposes, specific types of fossil fuel-related expenses in a uniform manner among the various electric utilities. At times, however, it may be appropriate to treat similar types of expenses in dissimilar ways.
2. Prudently incurred fossil fuel-related expenses which are subject to volatile changes should be recovered through an electric utility’s fuel adjustment clause. The volatility of fossil fuel-related costs may be due to a number of factors including, but not necessarily limited to: price, quantity, number of deliveries, and distance. Except as noted below, these volatile fossil fuel-related charges are incurred by the utility for goods obtained or services provided prior to the delivery of fuel to the electric utility’s dedicated storage facilities. (Dedicated storage facilities mean storage facilities which are used solely to serve the affected electric utility.) All other fossil fuel-related costs should be recovered through base rates.<sup>13</sup>

Order 14546 then discussed the parties’ specific applications of the articulated policy, including, for example, the description of “invoiced fuel charges.” It was determined that invoiced fuel charges should include all price revisions and adjustments relating to volume and quality of fuel. After discussing several specific applications of the policy, the parties agreed that our policy on fuel clause recovery should be flexible enough to cover some items that would normally go through base rates, and we approved that position. We discussed this fuel clause exception to base rate recovery as follows:

In addition to stipulating to the foregoing applications of policy, the parties also recommended to the Commission that the policy it adopts be flexible enough to allow for recovery through fuel adjustment clauses of expenses normally recovered through base rates when utilities are in a position to take advantage of a cost-effective transaction, the costs of which were not recognized or anticipated in the level of costs used to establish the utility’s base rates. One example raised was the cost of an unanticipated short-term lease of a terminal to allow a utility to receive a shipment of low cost oil. The parties suggest that this flexibility is appropriate to encourage utilities to take advantage of short-term opportunities not reasonably anticipated or projected for base rate recovery. In these instances, we will require that the affected utility shall bring the matter before the Commission at the first available fuel adjustment hearing and request cost recovery through the fuel adjustment clause on a case by case basis. The Commission shall rule on the

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<sup>12</sup> Order No. 14546, p. 1

<sup>13</sup> Order No. 14546, p. 2

appropriate method of cost recovery based upon the merits of each individual case.<sup>14</sup>

In Order No. 14546 we approved the stipulation of the parties and adopted them as our own. We found that the stipulated provisions (including the fuel clause exception to base rate recovery), were an appropriate extension of the policy established by Order No. 6357.<sup>15</sup> As a result of the policy determinations, we made two lists. One list included charges properly considered in the computation of the average inventory price of fuel. The other list contained items that were more appropriately considered in the determination of base rates. It should be noted that each item on the lists was a shortened reference to the detailed description of the types of costs discussed earlier in the Order.<sup>16</sup>

It is Order No. 14546 that FPL relies upon to contend that the upgrade of the steam turbine (turbine upgrade) at the Plant Scherer Unit 4 coal plant is eligible for recovery through the Fuel Clause. The turbine upgrade will offset the loss in unit output resulting from the installation of required pollution control equipment at the generating unit. Scherer Unit 4's heat rate will also be improved by a rate of more than 400 Btu/kWh as a result of the turbine upgrade, meaning the unit will be able to generate electricity more efficiently in addition to increasing its output. FPL witness T.J. Keith states in FPL's September 1, 2010 testimony, that the turbine upgrade will result in fuel savings of approximately \$240 million on a net present value basis, compared to a cost of about \$7 million to upgrade the steam turbine.

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<sup>14</sup> Order No. 14546, p. 3

<sup>15</sup> In Order No. 6357, we discussed the purpose of the fuel adjustment clause as follows: "A fuel adjustment clause is intended to compensate for day-to-day fluctuations in the cost of fuel which cannot be anticipated in the base rates. It should be constructed and applied so as to reimburse the utility for the increase in the cost of fuel as related to generation. It also operates so as to pass on to the customer any savings realized by the utility from decreased cost of fuel. (Order No. 2515-A, dated April 24, 1959). . . It should be emphasized that a utility does not make a profit on its fuel costs. . . . The charge reflected on a customer's bill each month is designed only to provide for the recovery of fuel costs experienced by the utility in generating the customer's power. Conversely, it can and has resulted in a credit to the customer's bill when the price falls below the base cost of fuel. While some may question the propriety of allowing fuel costs to be recovered through an automatic adjustment clause, recent events underscore the basic reasons why such is done for this particular cost item as opposed to others. First, electric utilities rely largely upon fossil fuels to generate power; only Florida Power and Light Company now has a nuclear unit on the line and in service. Thus, their dependency on purchasing large quantities of fossil fuels will continue to exist for many years. Presently, fuel costs represent a substantial portion of operating costs; in some instances, fuel costs alone comprise more than half of a company's total operating costs. Any fluctuation, then, in fuel costs will have a significant impact on a company's earnings and can work to the detriment of the ratepayer or the utility depending on the direction of the movement unless some means exists to recoup those increased costs or refund those savings as quickly as possible. Rate cases are time consuming and expensive, and do not lend themselves to these objectives. Second, fuel costs are a highly volatile cost item unlike other costs of the utilities, such as wages and maintenance. When the volatility factor is coupled with the magnitude of fuel costs, one can readily conclude that the fuel adjustment clause is both a necessary and proper regulatory tool to insure that both the customer and the utility receive the benefits of responsive recognition to changes in the cost of generating electricity. We do not have the slightest doubt that a type of recovery clause should be retained by the utilities in order to accomplish this goal." Order No. 6357, issued November 26, 1974, in Docket No. 74680-CI, In re: General investigation of fuel adjustment clauses of electric companies.

<sup>16</sup> For instance, the discussion of invoiced fuel charges appears on the approved fuel clause recovery lists as items 1, 2 and 3. The fuel clause exception appears on the list as item number 10.

As Order No. 14546 states, recovery may be allowed for:

Fossil fuel-related costs normally recovered through base rates but which were not recognized or anticipated in the cost levels used to determine current base rates and which, if expended, will result in fuel savings to customers. Recovery of such costs should be made on a case by case basis after Commission approval.

We find that the appropriate interpretation of this section of Order No. 14546 is that capital projects eligible for cost recovery through the Fuel Clause should produce fuel savings based on lowering the delivered price of fossil fuel, or otherwise result in burning lower price fuel at the plant. We note that the order discusses a "cost effective transaction," and gives as an example, "the cost of an unanticipated short-term lease of a terminal, to allow a utility to receive a shipment of low cost oil." (Order No. 14546, p. 3) This example clearly connects fuel savings to a project that lowers the delivered price of fossil fuel (i.e., the input price). Similarly, in Order No. PSC-95-1089-FOF-EI, issued on September 5, 1995,<sup>17</sup> we approved FPL's purchase of 462 high capacity aluminum rail cars for delivery of coal to Plant Scherer, a capital project that lowered the delivered price of fuel. The purchase of the rail cars enabled FPL to obtain favorable transportation rate savings from railroad companies that exceeded the recoverable cost of the purchase. That capital investment provided FPL customers an estimated \$24 million in fuel savings, in the form of reduced fuel costs to FPL's customers, by lowering the delivered price, or input price, of coal. In contrast, the turbine upgrade increases the output and efficiency of the coal plant, resulting perhaps in less fuel burned per kWh, but it has no effect on the delivered price of coal.

As Order No. 14546 states, projects that request recovery of costs through the Fuel Clause should be "fossil fuel related." The turbine upgrade is a capital project that increases output and efficiency but is not specific to fossil fuel. Such an upgrade could as well be made to a nuclear plant's steam turbine. We do not consider the turbine upgrade to be a "fossil fuel-related cost," and therefore we find that it should not be recovered through the Fuel Clause.

In Attachment A to this Order, we have included a complete review of the capital costs that have been recovered through the fuel clause pursuant to Order 14546. As can be seen from that Attachment, all but two of the orders are consistent with our interpretation of Order 14546. One of these orders deals with incremental security costs incurred by utilities at nuclear power plants following the September 11, 2001 terrorist attacks. This was a unique circumstance, however, and we note that those security costs were subsequently removed from the fuel clause and included in the capacity cost recovery clause. FPL argues that the other order, Order No. PSC-96-1172-FOF-EI, issued on September 19, 1996,<sup>18</sup> supports its position that the turbine upgrade should be included in the fuel cost recovery clause. Order No. PSC-96-1172-FOF-EI did approve recovery through the Fuel Clause of costs associated with the thermal power uprate at FPL's Turkey Point nuclear-powered Units 3 and 4, a "non-fossil fuel-related" project. Order No. 14546 states, however, that a cost must be "fossil fuel-related" to be eligible for Fuel Clause

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<sup>18</sup> Docket No. 950001-EI

<sup>18</sup> Docket No. 960001-EI

recovery. Order No. 14546 also states that; "recovery of such costs should be made on a case-by-case basis. . . ." While it is true that we granted recovery of "non-fossil fuel-related" costs through the Fuel Clause in those two discreet instances, we believe that the appropriate policy going forward is to restrict capital project cost recovery through the Fuel Clause to projects that are "fossil fuel-related" and that lower the delivered price, or input price, of fossil fuel. At the same time, we reaffirm our practice of reviewing the eligibility of projects for recovery on a case-by-case basis.

The turbine upgrade appears to be a cost effective project that would benefit FPL and its ratepayers, but for the reasons stated above, we find that it is not eligible for recovery through either the ECRC or the Fuel Clause.

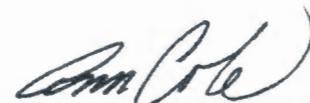
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that for the reasons set out in the body of this Order, the Petition by Florida Power & Light Company to recover Scherer Unit 4 Turbine Upgrade costs through the environmental cost recovery clause or the fuel cost recovery clause is denied. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 31st day of January, 2011.



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ANN COLE  
Commission Clerk

( S E A L )

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on February 21, 2011.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

Docket No. Order No.	Project	Reasons for approval
930001-EI PSC-93-1331-FOF-EI	Martin gas pipeline lateral	Commission has the flexibility to review fossil fuel related costs on a case-by-case basis to determine whether those costs are appropriate for recovery through the fuel clause. Martin gas pipeline lateral has reduced costs, or at the very minimum, not resulted in any increased costs, and the decision was made with the ratepayers' interest in mind, which is to minimize cost. Recognizing the unique facts and circumstances regarding FPL's decision to construct the lateral, to alleviate regulatory lag, and to encourage utilities to take actions to reduce fuel costs to customers, we find that it is appropriate in this case to recover the depreciation and return on investment in the Martin gas pipeline lateral through the fuel recovery clause until FPL's next rate case.
940391-EI PSC-94-1106-FOF-EI	Conversion by FPL of Manatee units to burn orimulsion	By party stipulation and subject to conditions, Commission allowed fuel clause recovery pursuant to Order 14546 of conversion of Manatee Units 1 and 2 to burn orimulsion. The burning of orimulsion represented the most economical alternative to burning oil. The recovery amount was \$72 million with a recovery period of the used and useful life of the assets. <i>*The project was never commenced.</i>
951096-EI PSC-95-1299-NOR-EI	Oil Backout Rule	Was repealed because if a utility justifies a project that will result in fuel savings to its ratepayers, those oil backout costs will generally be recoverable through the fuel clause on a case-by-case basis.
950001 PSC-95-1089-FOF-EI	FPL's recovery of rail cars	By stipulation, Commission granted rail cars. Unanticipated fuel-related costs not included in the computation of base rates when economically beneficial to a utility's ratepayers, the cost of purchasing or leasing rail cars. FPL projects that the \$24,024,000 cost will save ratepayers more than \$24 million above the cost of the cars over a 15 year period. The purchase enabled FPL to obtain favorable transportation rate savings from railroad companies and thus lower the delivered price of fuel.
950001-EI PSC-95-0450-FOF-EI	FPC conversion of Intercession City combustion turbine units P7 and P9 to burn natural gas.	By stipulation. Order No. 14546 . . . allows a utility to recover fossil-fuel related costs that result in fuel savings, even if those costs were not previously addressed in determining base rates. Each oil CT was converted to gas and the conversion resulted in fuel savings. The conversions were to produce an estimated savings of \$2.5 million with a recovery amount of \$20 million over a 5 year recovery period.
950001-EI PSC-95-0450-FOF-EI	FPL modifications to Cape Canaveral Units 1 and 2, Fort Myers Unit 2, Riviera Units 3 and 4, and Sanford Units 3, 4, and 5 to use a more economic grade of residual fuel oil	FPL stated costs would be \$2,754,502, and estimated savings of \$80 million. These fuel savings result from the use of a more economic grade of residual fuel oil. In approving the fuel clause exception to base rates for these conversions, Commission quoted from Order 14546. We recognized that certain unanticipated costs may be appropriate for recovery through the fuel clause. Order 14546 allows fuel related expenditures that are not being recovered through a utility's base rates. . . . "While it is the Commission's intent in this order to establish comprehensive guidelines for the treatment of fossil fuel related costs, it is recognized that certain unanticipated costs may have been overlooked. If any utility incurs, or will incur, a fossil fuel related cost which was not addressed in this order and the utility seeks to recover such cost through its fuel adjustment clause, the utility should present testimony justifying such recovery in an appropriate fuel adjustment hearing." We have allowed in the past, when those expenditures result in significant savings to the utility ratepayers.
960001-EI PSC-96-1172-FOF-EI	FPL's uprate of Turkey Point Units 3 and 4	The thermal power uprate was estimated to produce \$198 million in savings with a recovery amount of \$10 million over 2 years. The savings are due to the difference between low cost nuclear fuel replacing higher cost fossil fuel.
960001-EI PSC-96-0353-FOF-EI	FPC conversion of Intercession city P8 and P10 turbine units to burn natural gas.	By stipulation. Order 14546 allows a utility to recover fossil-fuel related costs that result in fuel savings, even if those costs were not previously addressed in determining base rates. Each oil CT was converted to gas and the conversion resulted in fuel savings. The conversions were to produce an estimated savings of \$16 million with a recovery amount of \$2.6 million over a 5 year recovery period.
970001-EI PSC-97-1045-FOF-EI	FPC's conversion of Debary Unit 9 to burn natural gas	Order 14546 allows a utility to recover fossil-fuel related costs which result in fuel savings when those costs were not previously addressed in determining base rates. The oil CT was converted to gas and the conversion resulted in fuel savings. The conversion was to produce an estimated savings of \$2.1 million with a recovery amount of \$734,000 over a 5 year recovery period.
970001-EI PSC-97-0359-FOF-EI	FPC conversion of Debary 7, Bartow 3 and 4, Suwannee 1 to	By stipulation. Order 14546 allows a utility to recover fossil-fuel related costs which result in fuel savings when those costs were not previously addressed in determining base rates. Each oil CT was converted to gas and the conversion resulted in fuel savings. The conversions were to produce an estimated savings of \$22 million with a recovery amount

Docket No. Order No.	Project	Reasons for approval
	burn natural gas	of \$7.5 million over a 5 year recovery period.
970001-EI PSC-97-0359-FOF-EI	FPL's investment on rail cars	By stipulation. Recover the depreciation expense and return on investment for rail cars purchased to deliver coal to the Scherer Plant. Pursuant to Order 14546 unanticipated fuel-related costs not included in the computation of base rates may be considered for recovery through a utility's fuel clause. When economically beneficial to a utility's ratepayers, the cost of purchasing or leasing rail cars is considered to be a fuel-related expense that should be recovered through the fuel clause.
	FPL's modifications to generating plants and fuel storage facilities to use low gravity fuel oil.	By stipulation. These modifications will allow FPL to operate these plants and using a heavier more economic grade of residual fuel oil. Order 14546 allows a utility to recover fossil-fuel related costs which result in fuel savings when those costs were not previously addressed in determining base rates. The modifications were to produce an estimated savings of \$19 million with a recovery amount of \$2 million over a 3 year recovery period.
980001-EI PSC-98-0412-FOF-EI	FPC's conversion of Suwannee 3 to burn natural gas.	Order 14546 allows a utility to recover fossil-fuel related costs which result in fuel savings when those costs were not previously addressed in determining base rates. The oil CT was converted to gas and the conversion resulted in fuel savings. The conversion was to produce an estimated savings of \$3.25 million with a recovery amount of \$2.45 million over a 5 year recovery period.
980001-EI PSC-98-1715-FOF-EI	FPC's conversion of Debary 8 to burn natural gas	Order 14546 allows a utility to recover fossil-fuel related costs which result in fuel savings when those costs were not previously addressed in determining base rates. The oil CT was converted to gas and the conversion resulted in fuel savings. The conversion was to produce an estimated savings of \$3.4 million with a recovery amount of \$1.8 million over a 5 year recovery period.
010001-EI PSC-01-2516-FOF-EI		By stipulation. Parties restated that regulatory treatment of capital costs that are expected to reduce long-term fuel costs is the treatment prescribed in Order 14546 where we listed the types of costs that are recoverable through the Fuel Cost Recover Clause. . . . Parties also stipulated that the appropriate rate of return on the unamortized balance of capital projects with an in-service date on or after Jan 1, 2002, is the utility's cost of capital based on the midpoint of its authorized return on equity. We approve these stipulations as reasonable.
	Incremental Power Plant Security Costs request by FPL	We find that recovery of this incremental cost through the fuel clause is appropriate in this instance because there is a nexus between protection of FPL's nuclear generation facilities and the fuel cost savings that result from the continued operation of those facilities. Further, we believe that this type of cost is a potentially volatile cost, making it appropriate for recovery through the fuel clause. . . . In addition, we find that recovery of this cost through the fuel clause provides a good match between the timing of the incurrence and recovery of the cost. . . . We believe that approving recovery of this incremental power plant security cost through the fuel clause sends an appropriate message to Florida's investor-owned electric utilities that we encourage them to protect their generation assets in extraordinary, emergency conditions as currently exist. * <i>Incremental Security costs were moved into the capacity clause in Docket No. 020001-EI by Order No. PSC-02-1761-FOF-EI issued on December 13, 2002.</i>
050001-EI PSC-05-1252-FOF-EI	FPL sleeving project at St. Lucie No. 2	By Order 14546 we set forth certain criteria for establishing the types of expenses that are eligible for recovery through the fuel clause. In particular, a utility must show that a cost will not be recognized or is not anticipated to be recovered in current base rates. We believe that FPL knew about the potential to sleeve the tubes when it filed its minimum filing requirements for its most recent rate case. * <i>The FPL sleeving project was denied. The project was anticipated prior to FPL's rate case and should have been requested for recovery in base rates.</i>

and adjacent waters, including adjacent wetlands. Waters in these categories would be jurisdictional “waters of the United States” by rule—no additional analysis would be required. The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and caselaw.

In addition, the agencies propose that “other waters” (those not fitting in any of the above categories) could be determined to be “waters of the United States” through a case-specific showing that, either alone or in combination with similarly situated “other waters” in the region, they have a “significant nexus” to a traditional navigable water, interstate water, or the territorial seas. The rule would also offer a definition of significant nexus and explain how similarly situated “other waters” in the region should be identified.

The agencies acknowledge that there may be more than one way to determine which waters are jurisdictional as “other waters.” To best meet their goals and responsibilities, the agencies request comment on alternate approaches to determining whether “other waters” are similarly situated and have a “significant nexus” to a traditional navigable water, interstate water, or the territorial seas. In the discussion of “other waters” later in the preamble, the agencies seek comment on these other approaches and whether they could better meet the goals of greater predictability and consistency through increased clarity, while simultaneously fulfilling the agencies’ responsibility to the CWA’s objectives and policies to protect water quality, public health, and the environment. Commenters will specifically be asked to comment on whether and how these alternate approaches may be more consistent with the goal of clarity, and the CWA, the best available science, and the caselaw.

In particular, the agencies are interested in comments, scientific and technical data, caselaw, and other information that would further clarify which “other waters” should be considered similarly situated for purposes of a case-specific significant nexus determination. The agencies seek comment on a number of alternative approaches. These alternatives include potentially determining waters in identified ecological regions (ecoregions) or hydrologic-landscape regions are similarly situated for

purposes of evaluating a significant nexus, as well as the basis for determining which ecoregions or hydrologic-landscape regions should be so identified. The agencies also solicit comment on whether the legal, technical and scientific record would support determining limited specific subcategories of waters are similarly situated, or as having a significant nexus sufficient to establish jurisdiction.

Just as the agencies are seeking comment on a variety of approaches, or combination of approaches, as to which waters are jurisdictional, the agencies also request comment on determining which waters should be determined non-jurisdictional. The agencies seek comment on how inconclusiveness of the science relates to the use of case-specific determinations. As the science develops, the agencies could determine that additional categories of “other waters” are similarly situated and have a significant nexus and are jurisdictional by rule, or that as a class they do not have such a significant nexus and might not be jurisdictional.

The agencies pose the questions because of the strong intent to provide as much certainty to the regulated public and the regulators as to which waters are and are not subject to CWA jurisdiction. These comments on alternate approaches will inform the agencies in addition to the comments on the case-specific determination proposed in the rule.

The agencies’ decision on how best to address jurisdiction over “other waters” in the final rule will be informed by the final version of the EPA’s Office of Research and Development synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters (U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (Washington, DC: U.S. Environmental Protection Agency, 2013)) (“Report”) and other available scientific information.

The agencies also propose to exclude specified waters from the definition of “waters of the United States” in section (b) of the proposed rule. The agencies propose no change to the exclusion for waste treatment systems designed consistent with the requirements of the CWA, no change to the exclusion for prior converted cropland,<sup>2</sup> and no

<sup>2</sup> The term “waters of the United States” does not include prior converted cropland, which is currently defined by the U.S. Department of Agriculture (USDA) for purposes of the Agriculture

change to the regulatory status of water transfers. The agencies propose, for the first time, to exclude by regulation certain waters and features over which the agencies have as a policy matter generally not asserted CWA jurisdiction. Codifying these longstanding practices supports the agencies’ goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. Waters and features that are determined to be excluded under section (b) of the proposed rule will not be jurisdictional under any of the categories in the proposed rule under section (a). There is no recapture provision for these excluded waters in the proposal.

In light of the Supreme Court decisions in *SWANCC* and *Rapanos*, the scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. See 40 CFR 122.2 (defining “waters of the United States”).

The rule does not affect longstanding permitting exemptions in the CWA for farming, silviculture, ranching and other specified activities. Where waters would be determined jurisdictional under the proposed rule, applicable exemptions in the CWA would continue to preclude application of CWA permitting requirements.

Finally, the agencies retain the existing regulatory definitions for the terms “adjacent” and “wetlands.” The agencies propose for the first time to define the terms “neighboring,” “riparian area,” “floodplain,” “tributary,” and “significant nexus.”

This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator’s authority under the CWA. CWA section 101(b).

This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State to allocate quantities of water within its jurisdiction and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. CWA section 101(g).

This proposal requests public comment on issues associated with the

Act of 2014 at 7 CFR 122.2. EPA and the Corps use the USDA definition of prior converted cropland for purposes of determining jurisdiction under the CWA.

agencies' proposed regulatory definition of "waters of the United States." Because the agencies do not address the exclusions from the definition of "waters of the United States" for waste treatment systems and prior converted cropland or the existing definition of "wetlands" in this proposed rule the agencies do not seek comment on these existing regulatory provisions. This notice also solicits information and data from the general public, the scientific community, and tribal, state and local resource agencies on the aquatic resource, implementation, and economic implications of a definition of "waters of the United States" as described in the proposal. The goal of the agencies is to ensure the regulatory definition is consistent with the CWA, as interpreted by the Supreme Court, and as supported by science, and to provide maximum clarity to the public, as the agencies work to fulfill the CWA's objectives and policy to protect water quality, public health, and the environment.

#### Table of Contents

- I. General Information
  - A. How can I get copies of this document and related information?
  - B. Under what legal authority is this proposed rule issued?
- II. Background
  - A. Executive Summary
  - B. The Clean Water Act and Regulatory Definition of Waters of the United States
  - C. Background on Scientific Review and Significant Nexus Analysis
    - 1. Scientific Synthesis
    - 2. Summary of Significant Nexus Conclusions
- III. Proposed Definition of Waters of the United States
  - A. Summary of Proposed Rule
  - B. Traditional Navigable Waters
  - C. Interstate Waters
  - D. Territorial Seas
  - E. Impoundments
  - F. Tributaries
  - G. Adjacent Waters
  - H. Other Waters
  - I. Waters That Are Not Waters of the United States
- IV. Related Acts of Congress, Executive Orders, and Agency Initiatives
  - A. Executive Order 12866: Regulatory Planning and Review
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act
  - D. Unfunded Mandates Reform Act
  - E. Executive Order 13132: Federalism
  - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
  - G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
  - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer and Advancement Act
- J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
- K. Environmental Documentation
  - Appendix A. Scientific Evidence
  - Appendix B. Legal Analysis

#### I. General Information

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

1. *Docket.* EPA and the Corps of Engineers have established an official public docket for this action under Docket Id. No. EPA-HQ-OW-2011-0880. The official public docket consists of the document specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202-566-2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "Federal Register" listings at <http://www.regulations.gov>. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.regulations.gov> to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility identified earlier.

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

The authority for this proposed rule is the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*

#### II. Background

##### A. Executive Summary

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) publish for public comment a proposed rule defining the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, and *Rapanos v. United States (Rapanos)*. The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying "waters of the United States" less complicated and more efficient. The rule achieves these goals by increasing CWA program transparency, predictability, and consistency. This rule will result in more effective and efficient CWA permit evaluations with increased certainty and less litigation. This rule provides increased clarity regarding the CWA regulatory definition of "waters of the United States" and associated definitions and concepts.

EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters (U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (Washington, DC: U.S. Environmental Protection Agency, 2013)) ("Report"). The Report is under review by EPA's Science Advisory Board, and the rule will not be finalized until that review and the final Report are complete. This proposal is also supported by a body of peer-reviewed scientific literature on the connectivity of tributaries, wetlands, adjacent open waters, and other open waters to downstream waters and the important effects of these connections on the chemical, physical, and biological integrity of those downstream waters.

Appendix A of this preamble summarizes currently available scientific literature and the Report that are part of the administrative record for this proposal and explains how this scientific information supports the proposed rule. Additional data and information likely will become available during the rulemaking process, including that provided during the public comment process, and by additional research, studies, and investigations that take place before the rulemaking process is concluded. The

agencies are specifically requesting information that would inform the decision on how best to address “other waters.” At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record and determine at that time what, if any, adjustments are appropriate for the final rule.

“Waters of the United States,” which include wetlands, rivers, streams, lakes, ponds and the territorial seas, provide many functions and services critical for our nation’s economic and environmental health.<sup>3</sup> In addition to providing habitat, rivers, lakes, ponds and wetlands cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits. A desire to protect these vital resources led Congress to pass the CWA in 1972 in order to restore and maintain the chemical, physical, and biological integrity of our nation’s waters while recognizing, preserving, and protecting the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution within their borders. Decades of experience implementing the CWA’s programs and existing science provide strong support for the regulatory and policy underpinnings of the proposed rule. The proposed rule was developed with an enhanced understanding of the importance of all aspects of tributary, wetland, and lake and pond systems and the ecological functions and services they provide.

The proposed rule will reduce documentation requirements and the time currently required for making jurisdictional determinations. It will provide needed clarity for regulators, stakeholders and the regulated public for identifying waters as “waters of the United States,” and reduce time and resource demanding case-specific analyses prior to determining jurisdiction and any need for permit or enforcement actions.

The modern Clean Water Act was established by the Federal Water Pollution Control Act Amendments of 1972, which was substantially amended in 1977 and 1987. (The 1972 amendments were to the Federal Water

Pollution Control Act originally enacted in 1948.) As stated in section 101(a), the objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. Prior to the CWA, the Rivers and Harbors Appropriations Act of 1899 protected navigation and protected some waters from discharges of pollution.

The 1899 Act continues in force and applies primarily to the “navigable waters of the United States.” The 1948 Federal Water Pollution Control Act called for programs eliminating or reducing the pollution of interstate waters and tributaries thereof, and improving the sanitary condition of surface and underground waters. The jurisdictional scope of the CWA is “navigable waters,” defined in section 502(7) of the statute as “waters of the United States, including the territorial seas.” Both the legislative history and the caselaw confirm that “waters of the United States” in the CWA are not limited to the traditional navigable waters. It is the CWA definition that is the subject of this proposed rule.

The term “navigable waters” is used in a number of provisions of the CWA, including the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program, the section 311 oil spill prevention and response program,<sup>4</sup> the water quality standards and total maximum daily load programs under section 303, and the section 401 state water quality certification process. However, while there is only one CWA definition of “waters of the United States,” there may be other statutory factors that define the reach of a particular CWA program or provision.<sup>5</sup>

<sup>4</sup> While section 311 uses the phrase “navigable waters of the United States,” EPA has interpreted it to have the same breadth as the phrase “navigable waters” used elsewhere in section 311, and in other sections of the CWA. See *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324–25 (6th Cir. 1974). In 2002, EPA revised its regulatory definition of “waters of the United States” in 40 CFR part 112 to ensure that the actual language of the rule was consistent with the regulatory language of other CWA programs. *Oil Pollution & Response; Non-Transportation-Related Onshore & Offshore Facilities*, 67 FR 47042, July 17, 2002. A district court vacated the rule for failure to comply with the Administrative Procedure Act, and reinstated the prior regulatory language. *American Petroleum Ins. v. Johnson*, 541 F.Supp. 2d 165 (D. DC 2008). However, EPA interprets “navigable waters of the United States” in CWA section 311(b), in the pre-2002 regulations, and in the 2002 rule to have the same meaning as “navigable waters” in CWA section 502(7).

<sup>5</sup> For example, the CWA section 402 (33 U.S.C. § 1342) program regulates discharges of pollutants from “point sources” to “waters of the United States,” whether these pollutants reach jurisdictional waters directly or indirectly. The

The CWA leaves it to EPA and the Corps to define the term “waters of the United States.” Existing regulations (last codified in 1986) define “waters of the United States” as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands. 33 CFR 328.3; 40 CFR 122.2.

The U.S. Supreme Court addressed the scope of “waters of the United States” protected by the CWA in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which involved wetlands adjacent to a traditional navigable water in Michigan. In a unanimous opinion, the Court deferred to the Corps’ judgment that adjacent wetlands are “inseparably bound up” with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.” The Court observed that the broad objective of the CWA to restore the integrity of the nation’s waters “incorporated a broad, systemic view of the goal of maintaining and improving water quality. . . . Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for [w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’ In keeping with these views, Congress chose to define the waters covered by the Act broadly.” *Id.* at 133 (citing Senate Report 92–414).

The issue of CWA regulatory jurisdiction over “waters of the United States” was addressed again by the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). In *SWANCC*, the Court (in a 5–4 opinion) 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 the

plurality opinion in *Rapanos* noted that “there is no reason to suppose that our construction today significantly affects the enforcement of § 1342. . . . The Act does not forbid the ‘addition of any pollutant directly to navigable waters from any point source,’ but rather the ‘addition of any pollutant to navigable waters.’” 547 U.S. at 743. Clean Water Act section 311(b)(1) provides: “[I]t is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States [or] adjoining shorelines . . . or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.” (Emphasis added.) “Discharge” is broadly defined in CWA section 311(a)(2) to include “any spilling, leaking, pumping, pouring, emitting, emptying or dumping,” with certain enumerated exceptions, and is not limited to point source discharges.

<sup>3</sup> The agencies use the term “water” and “waters” in the proposed rule in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems. The agencies use the terms “waters” and “water bodies” interchangeably in this preamble. The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features.

CWA. The Court noted that in the *Riverside* case it had “found that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands ‘inseparably bound up with the ‘waters’ of the United States’” and that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA” in that case. *Id.* at 167.

Five years after *SWANCC*, the Court again addressed the CWA term “waters of the United States” in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. All Members of the Court agreed that the term “waters of the United States” encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality in *Rapanos* interpreted the term “waters of the United States” as covering “relatively permanent, standing or continuously flowing bodies of water. . . .” *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such relatively permanent water bodies, *id.* The *Rapanos* plurality noted that its reference to “relatively permanent” waters did “not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,” or “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months. . . .” *Id.* at 732 n.5 (emphasis in original).

Justice Kennedy’s concurring opinion took a different approach than the plurality’s. Justice Kennedy concluded that the term “waters of the United States” encompasses wetlands that “possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC*, 531 U.S. at 167). He stated that wetlands possess the requisite significant nexus if the wetlands, “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” 547 U.S. at 780. Kennedy’s opinion notes that such a relationship with navigable waters must be more than “speculative or insubstantial.” *Id.* Because Justice Kennedy identified “significant nexus” as the touchstone for CWA jurisdiction, the agencies determined that it is reasonable and

appropriate to apply the “significant nexus” standard for CWA jurisdiction that Justice Kennedy’s opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to “other waters”) to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

The four dissenting Justices in *Rapanos* would have affirmed the court of appeals’ application of the pertinent regulatory provisions, concluding that the term “waters of the United States” encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality’s standard or that of Justice Kennedy. *Id.* at 810 & n.14 (Stevens, J., dissenting). Neither the plurality nor the Kennedy opinion invalidated any of the regulatory provisions defining “waters of the United States.”

The proposed rule would revise the existing definition of “waters of the United States” consistent with the science and the above Supreme Court cases. The proposed rule retains much of the structure of the agencies’ longstanding definition of “waters of the United States,” and many of the existing provisions of that definition where revisions are not required in light of Supreme Court decisions or other bases for revision. As a result of the Supreme Court decisions in *SWANCC* and *Rapanos*, the scope of regulatory jurisdiction of the CWA in this proposed rule is narrower than that under the existing regulations.

The most substantial change is the proposed deletion of the existing regulatory provision that defines “waters of the ‘United States’” as 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: Which are or could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes by industries in interstate commerce. 33 CFR 328.3(a)(3); 40 CFR 122.2. Under the proposed rule, these “other waters” (those which do not fit within the proposed categories of waters jurisdictional by rule) would only be jurisdictional upon a case-specific determination that they have a significant nexus as defined by the proposed rule. Waters in a watershed in which there is no connection to a

traditional navigable water, interstate water or the territorial seas would not be “waters of the United States.” In addition, the proposed rule would for the first time explicitly exclude some features and waters over which the agencies have not generally asserted jurisdiction and in so doing would eliminate the authority of the agencies to determine in case specific circumstances that some such waters are jurisdictional “waters of the United States.”

The agencies propose a rule that is clear and understandable and that protects the nation’s waters, consistent with the law and currently available scientific and technical expertise. Continuity with the existing regulations, where possible, will reduce confusion and will reduce transaction costs for the regulated community and the agencies. To that same end, the agencies also propose, where consistent with the law and their scientific and technical expertise, categories of waters that are and are not jurisdictional, as well as categories of waters and wetlands that require a case-specific significant nexus evaluation to determine whether they are “waters of the United States” and protected by the CWA. Finally, the agencies propose definitions for some of the terms used in the proposed regulation.

This preamble also presents several alternative options for determining the jurisdictional status of certain “other waters” that would rely less, or not at all, on case-specific significant nexus evaluations. The agencies may adopt one or a combination of these options for the final rule, after considering public comment and the evolving scientific literature on connectivity of waters. This preamble also seeks comment on a number of other ways that the agencies might provide even greater clarity, certainty, and predictability in determining which “other waters” are and are not subject to CWA jurisdiction. The agencies evaluated extensive peer reviewed science in making their determination in the proposed rule. However, the agencies also seek additional information that would enhance the predictability and accuracy of its jurisdictional determinations. The agencies request the type of information on the evolving scientific literature on connectivity of waters that could allow the agencies to rely less on case-specific significant nexus evaluations.

Under the proposed first section of the regulation, section (a), the agencies propose to define the “waters of the United States” for all sections

(including sections 301, 311, 401, 402, 404) of the CWA to mean:

- 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;

- All interstate waters, including interstate wetlands;

- The territorial seas;

- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;

- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;

- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and

- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

As discussed in further detail below, the rule would not change the following provisions of the existing rule (although some provisions have been renumbered): Traditional navigable waters; interstate waters; the territorial seas; and impoundments of "waters of the United States." In paragraph (a)(5) of the proposed rule, the agencies propose that all tributaries as defined in the proposed rule are "waters of the United States." While tributaries are "waters of the United States" under the existing regulation, the rule would for the first time include a regulatory definition of "tributary."

With this proposed rule, the agencies conclude, based on existing science and the law, that a significant nexus exists between tributaries (as defined in the proposed rule) and the traditional navigable waters, interstate waters, and the territorial seas into which they flow; and between adjacent water bodies (as defined in the proposed rule) and traditional navigable waters, interstate waters, and the territorial seas, respectively. Consequently, this rule establishes as "waters of the United States," all tributaries (as defined in the proposal), of the traditional navigable waters, interstate waters, and the territorial seas, as well as all adjacent waters (including wetlands). This will eliminate the need to make a case-specific significant nexus determination for tributaries or for their adjacent waters because it has been determined that as a category, these waters have a

significant nexus and thus are "waters of the United States."

In paragraph (a)(6) of the proposed rule, the rule would clarify that adjacent waters, rather than simply adjacent wetlands, are "waters of the United States." The rule would further clarify the meaning of "adjacent" by defining one of its elements, "neighboring." The related terms of "riparian area" and "floodplain" are also defined in the proposed rule.

The rule states that on a case-specific basis "other waters" that have a significant nexus to a traditional navigable water, interstate water or the territorial seas are "waters of the United States." Unlike the categories of waters in paragraphs (a)(1) through (6), which would be jurisdictional by definition, these "other waters" would not be "waters of the United States" by definition; rather, these "other waters" would only be jurisdictional provided that they have been determined on a case-specific basis to have a significant nexus to a paragraph (a)(1) through (a)(3) water. Therefore, the rule also includes a definition of "significant nexus."

"Significant nexus" is not itself a scientific term. The relationship that waters can have to each other and connections downstream that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas is not an all or nothing situation. The existence of a connection, a nexus, does not by itself establish that it is a "significant nexus." There is a gradient in the relation of waters to each other, and this is documented in the Report. The agencies propose a case-specific analysis in establishing jurisdiction over these "other waters" as consistent with the current science, the CWA, and the caselaw. A case-specific analysis allows for a determination of jurisdiction at the point on the gradient in the relationship that constitutes a "significant nexus." In the proposed regulation the rule defines the following terms: adjacent, neighboring, riparian area, floodplain, tributary, wetlands, and significant nexus. However, the agencies also recognize that relying on a case-specific analysis provides less certainty to the regulated public on the jurisdictional status of other waters and is considering other approaches, as discussed later in this preamble.

The proposed section (b) excludes specified waters and features from the definition of "waters of the United States." Waters and features that are determined to be excluded under section (b) of the proposed rule will not be jurisdictional under any of the

categories in the proposed rule under section (a), even if they would otherwise satisfy the regulatory definition. Those waters and features that would not be "waters of the United States" are:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

- 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.

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water.

- The following features:

- Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

- artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

- artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

- small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

- water-filled depressions created incidental to construction activity;

- groundwater, including groundwater drained through subsurface drainage systems; and

- gullies and rills and non-wetland swales.

The rule does not affect longstanding exemptions in the CWA for farming, silviculture, ranching and other activities, does not change regulatory exclusions for waste treatment systems and prior converted cropland, and does not change the regulatory status of water transfers. Where waters would be determined jurisdictional under the proposed rule, applicable exemptions of the CWA would continue to preclude application of CWA permitting requirements. For example, if "other waters" are aggregated as similarly situated in the region and determined to be jurisdictional, any exempt activities that include a discharge to those waters would remain outside the regulatory requirements of the CWA. Exempted discharges are established under CWA sections 402, 502, and 404 and include:

Agricultural stormwater discharges; return flows from irrigated agriculture; normal farming, silvicultural, and ranching activities; upland soil and water conservation practices; construction or maintenance of farm or stock ponds or irrigation ditches; maintenance of drainage ditches; and construction or maintenance of farm, forest, and temporary mining roads.

To provide additional clarity to farmers, the agencies are today also issuing an interpretive rule clarifying the applicability of the permitting exemption provided under section 404(f)(1)(A) of the CWA to discharges of dredged or fill material associated with certain agricultural conservation practices based on the Natural Resources Conservation Service conservation practice standards and that are designed and implemented to protect and enhance water quality. This interpretive rule was developed in coordination with the U.S. Department of Agriculture, was signed by EPA and the Army, and became effective immediately. The agencies recognize, however, the value of receiving public comment on the interpretive rule and are publishing it by separate notice in the **Federal Register**. The public is encouraged to provide their comments on the interpretive rule to the docket on the interpretive rule, Docket Id. No. EPA-HQ-OW-2013-0820, and not to this docket. The interpretive rule and the request for comments can be found at <http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm> and at <http://www.regulations.gov> via Docket Id. No. EPA-HQ-OW-2013-0820.

The proposed rule is expected to reduce documentation requirements and the time it takes to make approved jurisdictional determinations by decreasing the number of jurisdictional determinations that require case-specific significant nexus analysis evaluations. It will improve clarity for regulators, stakeholders and the regulated public by defining certain categories of waters as "waters of the United States" that previously required case-specific analyses prior to establishing CWA jurisdiction through the approved jurisdictional determination procedures. A comprehensive review of a growing body of scientific literature, as well as the agencies' growing body of scientific and technical knowledge and field expertise, led the agencies to conclude that it is reasonable to establish certain categories of waters that are jurisdictional by rule as they have a significant nexus to an (a)(1) through (a)(3) water, specifically tributaries to traditional navigable waters, interstate

waters, or the territorial seas, and their adjacent waters and wetlands. Case-specific jurisdictional determinations would still be required for the "other waters" category in paragraph (a)(7) of the proposed rule. Under the alternate approaches affecting "other waters" described later in the preamble, the agencies request comment on the case-specific analysis.

A review of the scientific literature, including the Report of the peer-reviewed science, shows that tributaries and adjacent waters play an important role in maintaining the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas—and of other jurisdictional waters—because of their hydrological and ecological connections to and interactions with those waters. Therefore, it is appropriate to protect all tributaries and adjacent waters, because the tributaries, adjacent waters, and the downstream traditional navigable waters, interstate waters, and the territorial seas function as an integrated system. Water flows through tributaries to downstream traditional navigable waters, interstate waters, and the territorial seas, and that water carries pollutants that affect the chemical, physical, and biological integrity of the (a)(1) through (a)(3) waters, including water quality, fisheries, recreation, and other ecological services.

In discussing the significant nexus standard, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters. . .'" 547 U.S. at 779. To protect the integrity of the waters subject to the CWA, the significant nexus standard must be implemented in a manner that restores and maintains any of these three attributes of traditional navigable waters, interstate waters, or the territorial seas. Waters adjacent to tributaries also provide ecological functions that, in conjunction with the functions provided by the tributaries they are adjacent to, have a significant influence on the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas.

Examples of the important functions provided by adjacent waters are the sequestering or transformation of pollutants to reduce inputs to tributaries and subsequently to downstream (a)(1) through (a)(3) waters, water storage, and sediment trapping. Thus, in some instances, the significance of adjacent

waters is to prevent or delay a hydrological connection with downstream waters and store water and/or pollutants. Given the large scale systematic interactions that occur, and the substantial effects that result, among tributaries, adjacent waters, and the downstream traditional navigable waters, interstate waters, or the territorial seas, a significant nexus exists that warrants making those categories of waters jurisdictional by rule.

States and tribes play a vital role in the implementation and enforcement of the CWA. Section 101(b) of the CWA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA.

Of particular importance, states and tribes may be authorized by the EPA to administer the permitting programs of sections 402 and 404. Forty-six states and the Virgin Islands are authorized to administer the NPDES program under section 402, while two states administer the section 404 program. Additional CWA programs that utilize the definition of "waters of the United States" and are of importance to the states and tribes include the section 311 oil spill prevention and response program, the water quality standards and total maximum daily load programs under section 303, and the section 401 state water quality certification process.

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly or more fully protect the waters in their state. Under section 510 of the Act, unless expressly stated in the CWA, nothing in the Act precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, protect groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in this proposed rule would limit or impede any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes that have authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis, leaving them with more resources to protect their waters.

This proposal also recognizes the unique role of states related to water quantity and as stated in the CWA. The proposal does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each state to allocate quantities of water within its jurisdiction and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. CWA section 101(g).

While a principal goal of this rulemaking is to improve clarity for determining jurisdiction under the CWA in light of the two most recent Supreme Court cases with the dual benefits of improving certainty and greater efficiency for determining whether waters are covered, there are other tools and approaches underway to increase efficiency as well. For example, to improve efficiencies, the EPA and the Corps are working in partnership with states to develop new tools and resources that have the potential to improve precision of desk based jurisdictional determinations at lower cost and improved speed than the existing primarily field-based approaches. In the normal course of making jurisdictional determinations, information derived from field observation is not always required in cases where a "desktop" analysis furnishes sufficient information to make the requisite findings. However, for more complex or difficult jurisdictional determinations, it may be helpful to supplement such information with field observation.

EPA and the Corps are very interested in identifying other emerging technologies or approaches that would save time and money and improve efficiency for regulators and the regulated community in determining which waters are subject to CWA jurisdiction. The agencies specifically invite comment on this topic.

The proposed rule will benefit the nation by helping to protect the services and functions these important water bodies provide consistent with the overarching objective of the CWA.

#### *B. The Clean Water Act and Regulatory Definition of "Waters of the United States"*

The Federal Water Pollution Control Act Amendments, now known as the Clean Water Act, were enacted in 1972. The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. CWA section 101(a). Its specific provisions were designed to improve

the protection of the nation's waters provided under earlier statutory schemes such as certain sections of the Rivers and Harbors Appropriations Act of 1899 ("RHA") (33 U.S.C. 03, 407, 411) and the Federal Water Pollution Control Act of 1948 (62 Stat. 1155) and its subsequent amendments through 1970. The jurisdictional scope of the CWA is "navigable waters," defined in the statute as "waters of the United States, including the territorial seas." CWA section 502(7). The CWA leaves it to the agencies to define the term "waters of the United States." Existing agency regulations define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands. 33 CFR 328.3; 40 CFR 230.3(s). Counterpart and substantively similar regulatory definitions appear at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300 App. E, 302.3 and 401.11.

The current regulatory definition of "waters of the United States" provides two specific exclusions from "waters of the United States." Waste treatment systems designed to meet the requirements of the CWA and prior converted cropland are not "waters of the United States" under the agencies' current regulations. Under the regulations for 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. 33 CFR 328.3(a)(8).

#### *C. Background on Scientific Review and Significant Nexus Analysis*

##### 1. Scientific Synthesis

EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters (U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (Washington, DC: U.S. Environmental Protection Agency, 2013), (the "Report"). The draft Report provides a review and synthesis of the scientific information pertaining to chemical, physical, and biological connections from streams, wetlands, and open waters such as oxbow lakes, to downstream larger water bodies such

as rivers, lakes, and estuaries in watersheds across the United States and the strength of those connections. While the scientific literature does not use the term "significant nexus," there is a substantial body of scientific literature on the chemical, physical, and biological connections between tributaries and adjacent waters and "other waters" and the downstream larger waters, and on the strength and the effect of these connections.

Connectivity is a foundational concept in hydrology and freshwater ecology. Connectivity is the degree to which components of a system are joined, or connected, by various transport mechanisms and is determined by the characteristics of both the physical landscape and the biota of the specific system. The structure and function of downstream waters are highly dependent on the constituent materials contributed by and transported through waters located elsewhere in the watershed. Connectivity for purposes of interpreting the scope of "waters of the United States" under the CWA serves to demonstrate the "nexus" between upstream water bodies and the downstream traditional navigable water, interstate water, or the territorial sea. Based on the literature, the Office of Research and Development was able to assess the types of connections between the tributaries and adjacent waters and the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, and the territorial seas.

However, as Justice Kennedy found in *Rapanos*, a mere hydrologic connection may not suffice in all cases to establish CWA jurisdiction and there needs to be "some measure of the significance of the connection for downstream water quality." 547 U.S. at 784-785 ("mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood"). The literature does not use the term "significant" but does provide information on the strength of the effects on the chemical, physical, and biological functioning of the downstream water bodies from the connections among tributaries and adjacent waters and "other waters" and those downstream waters.

While "strength" of connections to and effects on the integrity of downstream waters and the "significance" of the nexus to the integrity of downstream waters are clearly related inquiries, "significant" is not a scientific term but rather a

determination of the agencies in light of the law and science. The relative strength of downstream effects informs the agencies' conclusions about the significance of those effects for purposes of interpreting the CWA. The data and conclusions in the Report concerning the strength of the relevant connections and effects of certain types of waters on downstream waters provide a foundation for the agencies' determinations that certain waters have effects on the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the territorial seas that are "significant" and thus constitute a significant nexus. As clarified in the proposed definition of "significant nexus" and consistent with Justice Kennedy's guidance, for an effect to be significant it must be more than speculative or insubstantial.

The Office of Research and Development's review and synthesis of more than a thousand publications from peer-reviewed scientific literature focuses on evidence of those connections from various categories of waters, evaluated singly or in aggregate, which affect downstream waters and the strength of that effect. Much of the scientific literature relied on does not use the terms traditional navigable waters, interstate waters, or the territorial seas. However, evidence of strong chemical, physical, and biological connections to larger rivers, estuaries and lakes applies to that subset of rivers, estuaries and lakes that are traditional navigable waters, interstate waters, or the territorial seas. The objectives of the Report are (1) to provide a context for considering the evidence of connections between downstream waters and their tributary waters, and (2) to summarize current understanding about these connections, the factors that influence them, and the mechanisms by which the connections affect the function or condition of downstream waters. The connections and mechanisms discussed in the Report include transport of physical materials and chemicals such as water, wood, sediment, nutrients, pesticides, and mercury; functions that adjacent waters perform, such as storing and cleansing water; movement of organisms or their seeds and eggs; and hydrologic and biogeochemical interactions occurring in and among surface and groundwater flows, including hyporheic zones and alluvial aquifers.

The Report concludes that the scientific literature clearly demonstrates that streams, regardless of their size or how frequently they flow, strongly influence how downstream waters function. Streams supply most of the

water in rivers, transport sediment and organic matter, provide habitat for many species, and take up or change nutrients that could otherwise impair downstream waters. The Report also concludes that wetlands and open waters in floodplains of streams and rivers and in riparian areas (transition areas between terrestrial and aquatic ecosystems) have a strong influence on downstream waters. Such waters act as the most effective buffer to protect downstream waters from nonpoint source pollution (such as nitrogen and phosphorus), provide habitat for breeding fish and aquatic insects that also live in streams, and retain floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters.

Regarding wetlands and open waters located outside of floodplains and riparian areas, the Report finds that they provide many benefits to rivers, lakes, and other downstream waters. If the wetland or open water has a surface or shallow subsurface water connection to the river network, it affects the condition of downstream waters. Where the wetland or open water is not connected to the river network through surface or shallow subsurface water, the type and degree of connectivity varies geographically, topographically, and ecologically, such that the significance of the connection is difficult to generalize across the entire group of waters.

Lastly, the Report concludes that to understand the health, behavior, and sustainability of downstream waters, the effects of small water bodies in a watershed need to be considered in aggregate. The contribution of material by, or an important water-retention function of, a particular stream, other open water, or wetland might be small, but the aggregate contribution by an entire class of streams, other open waters, and wetlands (e.g., all ephemeral streams in the river network) can be substantial.

In the proposed rule, the agencies interpreted the scope of "waters of the United States" in the CWA based on the information and conclusions in the Report, other relevant scientific literature, the agencies' technical expertise, and the objectives and requirements of the Clean Water Act. In light of this information, the agencies made judgments about the nexus between the relevant waters and the significance of that nexus and concluded that tributaries and adjacent waters, each as defined by the proposed rule, have a significant nexus such that

they are appropriately jurisdictional by rule.

The Report is currently undergoing peer review by EPA's Scientific Advisory Board (SAB) and is available at [http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr\\_activites/Watershed%20Connectivity%20Report?OpenDocument](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report?OpenDocument). A previous version of the Report dated October 11, 2011 underwent an independent peer review organized by the Eastern Research Group, Inc. (ERG). The purpose of the ERG-organized peer review was to determine whether the review and interpretation of the scientific literature was complete and correct, and if the conclusions in the Report were supported by the evidence. ERG was responsible for identifying and selecting the expert reviewers, managing the review, organizing and facilitating a one-day peer review meeting, and preparing the peer review summary report. ERG provided the reviewers with a letter of instruction and the technical charge, which asked for their comments on the various aspects of the draft report.

ERG convened the one-day meeting on January 31, 2012, in Washington, DC. The meeting was closed to the public and considered an internal EPA deliberative process. Observers from EPA and the Corps attended to listen to the discussions. At the close of the meeting, the reviewers developed some brief highlights of their discussions, which were provided with written post-meeting comments from individual reviewers in a report from ERG titled "*Peer Review Meeting of EPA's Draft Report: Connectivity of Streams and Wetlands to Downstream Waters—A Review and Synthesis of the Scientific Evidence, Post-Meeting Comments*," dated February 16, 2012. The Office of Research and Development revised its Report in response to the peer review comments and submitted the Report to the SAB for peer review and a public process. This peer review report is available in the docket for the proposed rule.

The agencies have identified key aspects of the Report throughout this preamble and in Appendix A. The Report summarizes and assesses much of the currently available scientific literature that is part of the administrative record for this proposal, and informs the agencies during this rulemaking. Additional data and information will become available during the rulemaking process, including that provided during the public comment process, and by additional research, studies, and investigations that take place before the

rulemaking process is concluded. The agencies have relied on the best available scientific data and information—peer-reviewed literature—and would find, to the extent possible, additional peer-reviewed literature to be the most useful submissions. At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record, including the final Report reflecting SAB review, and make any adjustments to the final rule that are appropriate based on this record. As noted below, the agencies particularly intend to review the rule provisions related to “other waters” in light of this record, and are soliciting comment on several alternative approaches to applying the science and the law for determining whether “other waters” are similarly situated and have a “significant nexus” to a traditional navigable water, interstate water, or the territorial seas.

## 2. Summary of Significant Nexus Conclusions

As the agencies developed this proposed definition of “waters of the United States,” the agencies carefully considered available scientific literature and propose a rule consistent with their conclusions that a particular category of waters either alone or in combination with similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

As discussed in this preamble and Appendix A, tributaries as proposed to be defined perform the requisite functions for them to be considered “waters of the United States” by rule. Tributary streams exert a strong influence on the character and functioning of downstream traditional navigable waters, interstate waters, and the territorial seas, either individually or cumulatively. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically and chemically connected to downstream traditional navigable waters, interstate waters, and the territorial seas via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Headwater streams (which can be ephemeral, intermittent or perennial), in particular, supply most of the water to downstream traditional navigable waters, interstate waters, and the territorial seas and are the most abundant stream-type in most river networks. In addition to water, tributary streams supply sediment, wood, organic matter, nutrients, chemical

contaminants, and many of the organisms found in downstream traditional navigable waters, interstate waters, and the territorial seas. Tributary streams are biologically connected to downstream traditional navigable waters, interstate waters, and the territorial seas by dispersal and migration of aquatic and semi-aquatic organisms, including fish, amphibians, plants, and invertebrates, that use both upstream and downstream habitats during one or more stages of their life cycles, or provide food resources to downstream communities. Chemical, physical, and biological connections between tributary streams and downstream traditional navigable waters, interstate waters, and the territorial seas interact via processes such as nutrient spiraling, in which tributary stream communities assimilate and chemically transform large quantities of nitrogen that would otherwise increase nutrient loading downstream.

As discussed in this preamble and Appendix A, adjacent waters, as defined in this proposal, perform the requisite functions for them to be considered “waters of the United States” by rule. Adjacent waters are either directly chemically, physically, or biologically connected with traditional navigable waters, interstate waters, and the territorial seas they are adjacent to, or they are connected to such waters through tributaries. These chemical, physical, and biological connections affect the integrity of downstream traditional navigable waters, interstate waters, and the territorial seas through the export of channel-forming sediment and woody debris, storage of local groundwater sources of baseflow for downstream waters and their tributaries, and transport of organic matter. Wetlands and open waters located in riparian and floodplain areas remove and transform nutrients such as nitrogen and phosphorus. They provide nursery habitat for fish, and colonization opportunities for stream invertebrates. Adjacent waters, including those located in riparian and floodplain areas, serve an important role in the integrity of traditional navigable waters, interstate waters, and the territorial seas because they also act as sinks for water, sediment, nutrients, and contaminants that could otherwise negatively impact traditional navigable waters, interstate waters, and the territorial seas.

Finally, some non-adjacent waters may have, in certain circumstances, a significant nexus to traditional navigable waters, interstate waters, and the territorial seas, but at this time the agencies are not proposing that a

category of such “other waters” is jurisdictional by rule. These “other waters” may provide numerous functions of potential benefit to traditional navigable waters, interstate waters, and the territorial seas, including storage of floodwater; retention of nutrients, metals, and pesticides; and re-charge of groundwater sources of river baseflow. The functions of these “other waters” may affect downstream traditional navigable waters, interstate waters, and the territorial seas, depending on the characteristics of the connection to the river network. For “other waters,” connectivity varies within a watershed and over time, making it difficult to generalize about their connections to, or isolation from, traditional navigable waters, interstate waters, and the territorial seas. These “other waters” would be evaluated on a case-specific basis under the proposed rule.

Under the existing regulations, “other waters” (such as intrastate rivers, lakes and wetlands that are not otherwise jurisdictional under other sections of the rule) could be determined to be jurisdictional if the use, degradation or destruction of the water could affect interstate or foreign commerce. Jurisdictional decisions for these waters are being made on a case-specific basis. As a practical matter in the past, the agencies generally relied on the presence of migratory birds to indicate an effect on interstate commerce. In 2001, the Supreme Court in *SWANCC* rejected the use of migratory birds as a sole basis to establish jurisdiction over such “isolated” intrastate nonnavigable waters.

The proposed rule provides that “other waters” can be jurisdictional where there is a case-specific showing of a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. “Significant nexus” is not itself a scientific term. The science of connections and effects on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas informs an analysis of the facts and circumstances of the waters being considered under a “significant nexus” analysis.

Scientific literature establishes that “other waters” can have a relationship to each other and connections downstream that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. This relationship is not an all or nothing situation. The existence of a connection, a nexus, does not by itself establish that it is a “significant nexus.” There is a

gradient in the relation of waters to each other, and this is documented in the Report. The agencies propose a case-specific analysis in establishing jurisdiction over these "other waters" as consistent with the current science, the CWA, and the caselaw. A case-specific analysis allows for a determination of jurisdiction at the point on the gradient in the relationship that constitutes a "significant nexus."

The support for a determination that the nexus is significant will be based on a record that documents the scientific basis for concluding which functions are provided by the waters and why their effects on a traditional navigable water, interstate water, or the territorial seas are significant, including that they are more than speculative or insubstantial. The agencies considered multiple options for determining how best to balance the science and the policy options available to address "other waters." Those options ranged from establishing jurisdiction over all "other waters" with a nexus to traditionally navigable waters, interstate waters, or the territorial seas, with the agencies determining categorically the nexus to be significant, to declining to assert jurisdiction over any "other waters."

The agencies did not adopt the all in or the all out approach to "other waters." Based on the information currently available in the scientific literature, applicable caselaw, and the agencies' policy judgment about how best to provide clarity and certainty to the public regarding the jurisdictional status of "other waters" the agencies today propose the case-specific significant nexus analysis presented in this rule and explained in the preamble.

In addition to the proposed "other waters" approach in this rule, the agencies are requesting comment on a range of alternate approaches to inform their decision on how best to address "other waters." The agencies will consider the full administrative record, including comments requested and received, and the final Report, as revised in response to the SAB review, when developing the final rule, and may adopt one of the alternative approaches or combination of approaches and the proposal.

The agencies solicit comment on identifying subcategories of "other waters" that have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas and could be jurisdictional by rule, and subcategories of "other waters" where a significant nexus or its absence could not be determined as a class and could be subject to a case-specific analysis

under the rule. The Report indicates that there is evidence of very strong connections in some subcategories that are not included as jurisdictional by rule. The agencies solicit comment on making such subcategories of waters with very strong connections jurisdictional by rule as well as on making subcategories of waters that do not have such connections subject to a case-specific analysis or categorically non-jurisdictional under the rule. Such comment should explain with supporting documentation why a particular subcategory of "other waters" might or might not have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas.

The agencies do not propose absolute standards such as flow rates, surface acres, or a minimum number of functions for "other waters" to establish a significant nexus. A determination of the relationship of "other waters" to traditional navigable waters, interstate waters, and the territorial seas, and consequently the significance to these waters, requires sufficient flexibility to account for the variability of conditions across the country and the varied functions that different waters provide. The case-specific analysis called for in the proposed rule recognizes geographic and hydrologic variability in determining whether an "other water" or group of "other waters" possesses a "significant nexus" with traditional navigable waters, interstate waters, or the territorial seas.

### III. Proposed Definition of "Waters of the United States"

#### A. Summary of Proposed Rule

This proposed rule retains much of the structure of the agencies' longstanding definition of "waters of the United States," and many of the existing provisions of that definition where revisions are not warranted. The agencies' goal is to promulgate a rule that is clear and understandable and protects the nation's waters, supported by science and consistent with the law. Continuity with the existing regulations, where possible, will minimize confusion and will reduce transaction costs for the regulated community and the agencies. To that same end, the agencies also propose, where supported by scientific literature and consistent with the law, bright line categories of waters that are and are not jurisdictional. Waters in the "other waters" category are not a *per se* jurisdictional category. While the agencies considered multiple options for addressing jurisdiction over "other waters," the agencies concluded that

they could not determine that all "other waters" were jurisdictional, or that all "other waters" were not jurisdictional. Therefore, the proposed rule requires a case-specific significant nexus evaluation to determine if such "other waters" are subject to CWA jurisdiction and the agencies are requesting comment on several alternate approaches, including approaches that would not include case-specific analysis, to inform the final rule. Finally, the agencies are for the first time proposing definitions for some of the terms used in the proposed regulation.

Under section (a) the agencies propose to define the "waters of the United States" for all sections of the CWA to mean:

- 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;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

As discussed in further detail below, the agencies do not propose to change the following provisions (although some provisions have been renumbered): Traditional navigable waters ((a)(1), see Section III.B of this preamble); interstate waters ((a)(2), see Section III.C of this preamble); the territorial seas ((a)(3), see Section III.D of this preamble); and impoundments of "waters of the United States" ((a)(4), see Section III.E of this preamble). In paragraph (a)(5), the agencies are proposing that tributaries to waters identified in paragraphs (a)(1) through (a)(4) are "waters of the United States." While tributaries are "waters of the United States" under the existing regulation, the agencies propose for the first time a regulatory definition of "tributary" and propose that only those waters that meet the definition and flow

directly or indirectly to an (a)(1) through (a)(3) water are “waters of the United States” (see Section III.F of this preamble). In paragraph (a)(6), the agencies propose that adjacent waters, rather than simply adjacent wetlands, are “waters of the United States.” The agencies also propose for the first time to define an aspect of adjacency—“neighboring”—and related terms (see Section III.G of this preamble). Finally, the agencies propose to define “waters of the United States” to include on a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3). Unlike the *per se* jurisdictional categories in paragraphs (a)(1) through (6) of this section, such “other waters” are not *per se* jurisdictional under (a)(7); rather, these “other waters” are only jurisdictional provided that they have a significant nexus to (a)(1) through (a)(3) waters. Therefore, the agencies are providing a definition of “significant nexus” (see Section III.H of this preamble).

The second section of the proposed regulation, section (b), excludes specified waters from the definition of “waters of the United States.” Those waters and features would not be “waters of the United States” even if they would otherwise be included within the categories in (a)(1) through (a)(7) above. They are:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

- 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.

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.

- The following features:

- artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

- artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as

stock watering, irrigation, settling basins, or rice growing;

- artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

- small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

- water-filled depressions created incidental to construction activity;

- groundwater, including groundwater drained through subsurface drainage systems; and

- gullies and rills and non-wetland swales.

The agencies do not propose any changes to the existing exclusions for waste treatment systems designed consistent with the requirements of the CWA and for prior converted cropland. The CWA and current regulations also provide a number of exemptions from permitting for discharges associated with specific activities. The rule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, silviculture, and ranching activities. CWA section 404(f); 40 CFR 232.3; 33 CFR 323.4. The rule also does not affect either the existing statutory and regulatory exemptions from NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers. CWA section 402(l)(1); CWA section 402(l)(2); CWA section 502(14); 40 CFR 122.3(f); 40 CFR 122.2. The agencies propose for the first time to exclude by rule in section (b) certain waters and features over which the agencies have as a policy matter generally not asserted jurisdiction (see Section III.I of this preamble).

Finally, in section (c) of the proposed rule the agencies define a number of terms, of which “adjacent” and “wetlands” are unchanged from existing definitions. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters.” The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the

ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3). 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 man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4).

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.

The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3)),<sup>6</sup> significantly affects

<sup>6</sup>The terms “in the region” and “watershed” are used interchangeably in this document. The agencies have interpreted “in the region” to mean the watershed that drains to the nearest water identified in paragraphs (a)(1) through (a)(3), which we refer to as the single point of entry watershed.

the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3). For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3).

#### B. Traditional Navigable Waters

EPA and the Corps' existing regulations include within the definition of "waters of the United States" all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. *See, e.g.*, 33 CFR 328.3(a)(1); 40 CFR 230.3(s)(1); 40 CFR 122.2 ("waters of the U.S."). This section of the regulation encompasses those waters that are often referred to as "traditional navigable waters." The agencies do not propose to make any changes to this section of the regulation. *See*, Appendix B, Legal Analysis.

For purposes of CWA jurisdiction, waters will be considered traditional navigable waters, and thus (a)(1) waters under the proposed rule, if:

- They are subject to section 9 or 10 of the Rivers and Harbors Appropriations Act of 1899;
- A Federal court has determined that the water body is navigable-in-fact under Federal law;
- They are waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments);
- They have historically been used for commercial navigation, including commercial waterborne recreation; or
- They are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation. Susceptibility for future use may be determined by examining a number of factors, including the physical characteristics and the capacity of the water to be used in commercial navigation, including commercial recreational navigation (for example, size, depth, and flow velocity), and the likelihood of future commercial navigation, including commercial waterborne recreation. While a traditional navigable water need not be capable of supporting navigation at all

times, the frequency, volume, and duration of flow are relevant considerations for determining if a water body has the physical characteristics suitable for navigation. A likelihood of future commercial navigation, including commercial waterborne recreation, can be demonstrated by current boating or canoe trips for recreation or other purposes. A determination that a water is susceptible to future commercial navigation, including commercial waterborne recreation, must be supported by evidence.

This proposal does not affect the scope of waters subject to state assumption of the section 404 regulatory program under section 404(g) of the CWA. *See* CWA section 404(g). The scope of waters that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language in CWA section 404. States administer approved CWA section 404 programs for "waters of the United States" within the state, except those waters remaining under Corps jurisdiction pursuant to CWA section 404(g)(1) as identified in a Memorandum of Agreement<sup>7</sup> between the state and the Corps. 40 CFR 233.14; 40 CFR 233.70(c)(2); 40 CFR 233.71(d)(2). Clarification of waters that are subject to assumption by states or tribes or retention by the Corps could be made through a separate process under section 404(g).

#### C. Interstate Waters

The existing EPA and Corps regulations define "waters of the United States" to include interstate waters, including interstate wetlands and the agencies' proposal today does not change that provision of the regulations. Interstate waters would continue to be "waters of the United States" even if they are not navigable for purposes of Federal regulation under (a)(1) and do not connect to such waters. Moreover, because interstate waters are "waters of the United States" under the CWA, the agencies are proposing to continue to include as jurisdictional tributaries to interstate waters, waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and "other waters" that have a significant nexus to interstate waters.

As discussed in more detail in Appendix B to this preamble, the language of the CWA indicates that Congress intended the term "navigable

waters" to include interstate waters without imposing a requirement that they be traditional navigable waters themselves or be connected to traditional navigable waters. The precursor statutes to the CWA always subjected interstate waters and their tributaries to Federal jurisdiction. The text of the CWA, specifically CWA section 303 that establishes ongoing requirements for interstate waters, in conjunction with the definition of navigable waters, provides clear indication of Congress' intent to protect interstate waters that were previously subject to Federal regulation. Other provisions of the statute provide additional textual evidence of the scope of the primary jurisdictional term of the CWA.

While congressional intent is clear, the agencies also have a longstanding regulatory interpretation that interstate waters fall within the scope of CWA jurisdiction. The agencies' interpretation was promulgated contemporaneously with the passage of the CWA and is consistent with the statutory and legislative history of the CWA. Furthermore, the Supreme Court has never addressed the CWA's coverage of interstate waters, and it is not reasonable to read its decisions in *SWANCC* and *Rapanos* to question the jurisdictional status of interstate waters or to impose additional jurisdictional requirements on interstate waters.

It is reasonable to assert jurisdiction over tributaries, adjacent wetlands and "other waters" that have a significant nexus to interstate waters consistent with the framework established by Justice Kennedy in *Rapanos* for establishing jurisdiction over waters with a significant nexus to traditional navigable waters. Justice Kennedy's standard seeks to ensure that waters Congress intended to subject to Federal jurisdiction are indeed protected, both by recognizing that waters and wetlands with a significant nexus to traditional navigable waters and interstate waters have important beneficial effects on those waters, and by recognizing that polluting or destroying waters with a significant nexus can harm downstream jurisdictional waters. As Congress intended to protect interstate waters, the agencies propose to also protect interstate waters by defining "waters of the United States" to include tributaries to interstate waters, waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and "other waters" that have a significant nexus to interstate waters. For additional discussion of the agencies' interpretation of the CWA with respect

<sup>7</sup> Link to Michigan's and New Jersey's Memorandum of Agreement with the Army Corps of Engineers identifying which waters of the US remain under the Corps' jurisdiction. [http://water.epa.gov/type/wetlands/initiative\\_index.cfm](http://water.epa.gov/type/wetlands/initiative_index.cfm).

to interstate waters, see Appendix B to this preamble.

#### D. Territorial Seas

The CWA and its existing regulations include “the territorial seas” as a “water of the United States.” The agencies propose to make no changes to that provision of the regulation other than to move the provision to earlier in the regulation. The CWA defines “navigable waters” to include the territorial seas at section 502(7). The CWA goes on to define the “territorial seas” as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.” The territorial seas establish the seaward limit of “waters of the United States.” As the territorial seas are also clearly protected by the CWA (they are also traditional navigable waters), it is reasonable to use for protecting the territorial seas Justice Kennedy’s significant nexus framework that protects traditional navigable waters. The proposed rule reflects that.

#### E. Impoundments

The agencies do not propose to make any substantive changes to the existing regulatory language with respect to impoundments of waters otherwise defined as “waters of the United States” under this definition. The changes proposed are clarifying.

Impoundments are jurisdictional because as a legal matter an impoundment of a “water of the United States” remains a “water of the United States” and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream waters traditional navigable waters, interstate waters, or the territorial seas. The Supreme Court has confirmed that damming or impounding a “water of the United States” does not make the water non-jurisdictional. *See S. D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 379 n.5 (2006) (“[N]or can we agree that one can denationalize national waters by exerting private control over them.”). Similarly, when presented with a tributary to the Snake River which flows only about two months per year because of an irrigation diversion structure installed upstream, the Ninth Circuit has opined “it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern.” *U.S. v. Moses*, 496 F.3d 984

(9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008). As a matter of policy and law, impoundments do not de-federalize a water, even where there is no longer flow below the impoundment. Where flow continues below the impoundment, it is straightforward to analyze the stream network, above and below the impoundment, for connection to downstream traditional navigable waters, interstate waters, or the territorial seas.

The agencies also note that an impoundment of a water that is not a “water of the United States” can become jurisdictional if, for example, the impounded waters become navigable-in-fact and covered under paragraph (a)(1) of the rule.

The existing agency regulations provide that impoundments of “waters of the United States” remain “waters of the United States” and the agencies do not propose any substantive revisions to that component of the regulation. In addition, tributaries to an impoundment of a “water of the United States” are “waters of the United States” under this proposed rule. As a matter of law and science, an impoundment does not cut off a connection between upstream tributaries and a downstream (a)(1) through (a)(3) water, so tributaries above the impoundment are still considered tributary to a downstream (a)(1) through (a)(3) water even where the flow of water is impeded due to the impoundment. Scientific literature, as well as the agencies’ scientific and technical expertise, and practical knowledge confirm that impoundments have chemical, physical, and biological effects on downstream waters (see Appendix A, Scientific Evidence).

Appendix A discusses the conclusion that it is reasonable to maintain jurisdiction over impoundments of “waters of the United States” not only as a legal matter, but because impoundments do not sever the effects the impounded “waters of the United States” have on the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters.

#### F. Tributaries

Under this proposal, the agencies provide a definition of “tributary” supported by the scientific literature. The agencies also propose that all waters that meet the proposed definition of tributary are “waters of the United States” by rule, unless excluded under section (b), because tributaries and the ecological functions they provide, alone or in combination with other tributaries in the watershed, significantly affect the chemical, physical, and biological

integrity of traditional navigable waters, interstate waters, and the territorial seas.

With today’s proposed regulation, the agencies confirm that these tributary waters have a significant nexus to a traditional navigable water, interstate water, or territorial sea such that they are “waters of the United States” without the need for a separate, case-specific significant nexus analysis. In practice, under this proposal any water that meets the definition of tributary (and is not excluded under section (b) of the proposed rule) is a “water of the United States,” and the agencies would only need to determine that a water meets the definition of “tributary.” *See* Appendix A, Scientific Evidence (Part I, Discussion of Major Conclusions 2.A; Part II, i); and Appendix B, Legal Analysis.

Tributaries have a significant impact on the chemical, physical, and biological integrity of waters into which they eventually flow—including traditional navigable waters, interstate waters, and the territorial seas—and they have a significant nexus and thus are jurisdictional as a category. The great majority of tributaries are headwater streams, and whether they are perennial, intermittent, or ephemeral, they play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream environments. Tributaries serve to store water, thereby reducing flooding, provide biogeochemical functions that help maintain water quality, trap and transport sediments, transport, store and modify pollutants, provide habitat for plants and animals, and sustain the biological productivity of downstream rivers, lakes and estuaries.

1. What is a “tributary” for purposes of the proposed regulation?

The proposed rule defines “tributary” as a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3). 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 man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of

or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4).

While the agencies have not defined tributary in any previous regulation, this proposed definition is consistent with long-standing practice and historical implementation of CWA programs. It is important to note that today's proposed definition also is based on best available science and the intent of the CWA.

To meet this definition, a water need not contribute flow directly to an (a)(1) through (a)(4) water. As the definition makes clear, the water may contribute flow directly or may contribute flow to another water or waters which eventually flow into an (a)(1) through (a)(4) water. Essentially, the water must be part of a tributary system that drains to an (a)(1) through (a)(4) water. Under the proposed definition, to be a "tributary," in addition to requiring that a water contribute flow to a traditional navigable water, interstate water or the territorial sea, the water must also have a bed and banks and ordinary high water mark (except where a wetland is a tributary), because these features generally are physical indicators of flow. The agencies identified these tributary characteristics as indicative that the water is the type of hydrologic feature protected under the CWA because, for example, of a tributary's ability to transport pollutants to downstream traditional navigable waters, interstate waters, and the territorial seas, and thereby have a significant effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(4).

The flow in the tributary may be ephemeral, intermittent or perennial, but the tributary must drain, or be part of a network of tributaries that drain, into an (a)(1) through (a)(4) water under today's proposed rule. When considering whether the tributary being evaluated eventually flows to an (a)(1) through (a)(4) water, the tributary connection may be traced using direct observation or U.S. Geological Survey maps, aerial photography or other reliable remote sensing information, or other appropriate information. A bed and banks and ordinary high water mark (OHWM) generally are physical indicators of water flow. These physical

indicators can be created by ephemeral, intermittent, and perennial flows.

The agencies' proposed definition of "tributary" includes waters such as rivers, streams, lakes, impoundments, wetlands, canals, and ditches not excluded in section (b) that, either directly or through other tributaries, convey water to traditional navigable waters, interstate waters, or the territorial seas. A tributary is a longitudinal surface feature that results from directional surface water movement and sediment dynamics demonstrated by the presence of bed and banks, bottom and lateral boundaries, or other indicators of OHWM. The movement of water through a tributary can transport pollutants to downstream (a)(1) through (a)(4) waters, as either chemicals dissolved or suspended in the water column or adsorbed to sediment particles.

The existing Corps regulations define OHWM as 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 banks, 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 CFR 328.3(e). That definition is not changed by today's proposed rule. In many tributaries, the bed is that part of the channel below the OHWM, and the banks often extend above the OHWM. Indicators of an OHWM may vary from region to region across the country.

Under the proposed definition of tributary, the upper limit of a tributary is established where the channel begins. Note that wetlands can be providing flow into a tributary at the upper limit of the channel and these would also be jurisdictional. The OHWM generally defines the lateral limits of a water, and its absence generally determines whether a tributary's channel or bed and banks has ended such that the upper limit of the jurisdictional tributary is identified. However, a natural or man-made break in bed and banks or OHWM does not constitute the upper limit of a tributary where bed and banks or OHWM can be found farther upstream, as discussed below.

In many tributaries, there are often natural or man-made breaks in the presence of a bed and banks or ordinary high water mark while hydrologic connectivity remains. For example, in some regions of the country where there is a very low gradient, the banks of a tributary may be very low or may even disappear at times. Also, in many

intermittent and ephemeral tributaries, including dry-land systems in the arid and semi-arid west, OHWM indicators can be discontinuous within an individual tributary due to the variability in hydrologic and climatic influences. The agencies proposed definition of "tributary" addresses these circumstances and states that waters that meet the definition of tributary remain tributaries even if such breaks occur. A water that otherwise qualifies as a tributary under the proposed definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as debris piles, boulder fields, or a stream segment that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. The presence of a bed and banks and an ordinary high water mark upstream of the break generally demonstrates that the tributary continues upstream of the break.

Waters that meet the definition of tributary under the proposed rule are jurisdictional even if there is an impoundment at some point along the connection from the tributary to the (a)(1) through (a)(3) water.

Longstanding agency practice has identified tributaries as including "natural, man-altered or manmade" water bodies. Natural, man-altered, and manmade tributaries provide many of the same functions, especially as conduits for the movement of water and pollutants to other tributaries or directly to traditional navigable waters, interstate waters, or the territorial seas. The discharge of a pollutant into a tributary generally has the same effect downstream whether the tributary waterway is natural or manmade (see further discussion below and Appendix A). Given the extensive human modification of watercourses and hydrologic systems throughout the country, it is often difficult to distinguish between natural watercourses and watercourses that are wholly or partly manmade or man-altered. For example, tributaries that have been channelized in concrete or otherwise have been human-altered, may still meet the definition of tributaries under the agencies' proposed regulation so long as they still contribute flow to an (a)(1) through (a)(4) water. The agencies' proposed definition of tributary provides a non-exclusive list of the types of waters, natural, man-altered and man-made, that may be tributaries: Wetlands, rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in

paragraph (b)(3) or (4) of the proposed rule.

Under the agencies' proposal, when a tributary flows through a wetland into another tributary (e.g., a run-of-stream wetland), losing its OHWM through the wetland, it remains a tributary, and the wetland itself is considered a tributary. Wetlands may contribute flow to a stream or river through channelized flow or diffuse flow, and sometimes both. Wetlands may also serve as water sources at the upper limit of headwater streams where the channel begins. In light of their potential to be important contributors of flow to tributaries to traditional navigable waters, interstate waters, or the territorial seas, the agencies propose a definition of tributary which includes such wetlands. In other instances, wetlands may serve as the connection between a tributary and another tributary or even a traditional navigable water, interstate water, or the territorial seas. For wetland tributaries, water may flow through braided channels that also include wetlands or through a run-of-stream wetland that does not have a bed and banks and OHWM.

It is the agencies' intent that the definitions in this proposed rule provide as much clarity and regulatory certainty as possible. While it is important to include wetlands that connect upstream and downstream portions of a tributary as jurisdictional waters because they have a significant nexus to downstream (a)(1) through (a)(4) waters, the agencies recognize that it may add an element of uncertainty to the definition of tributary to include features as tributaries which do not have a bed and bank and OHWM. An alternate approach would be to clarify that wetlands that connect tributary segments are adjacent wetlands, and as such are jurisdictional waters of the United States under (a)(6). In this approach, a tributary would be defined as having a bed and bank and OHWM, and the upper limit of the tributary would be defined by the point where these features cease to be identifiable. (Note that natural or manmade breaks would still not sever jurisdiction if a tributary segment with a bed and bank and OHWM could be identified upstream of the break.) Wetlands would not be considered tributaries, but would remain jurisdictional as adjacent waters. Wetlands that contribute flow, for example at the upper reaches of the tributary system, would be considered adjacent waters. The agencies request comment on this alternate approach, as well as any other suggestions commenters may have on how to clarify the definition of tributaries and provide

a clear explanation of their lateral and upstream extent.

Tidal ditches subject to the ebb and flow of the tide are not evaluated as tributaries, but are jurisdictional under paragraph (a)(1) of the proposed regulation as they are under the current regulation.

The agencies are proposing to clearly exclude from the definition of "waters of the United States" two types of ditches that might otherwise be evaluated as tributaries: Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; and ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). The proposed rule for the first time excludes certain ditches by rule rather than simply through preamble and guidance. Even before the decisions in *SWANCC* and *Rapanos*, the agencies excluded certain ditches from jurisdiction because they either are not part of the tributary system or because they are excavated wholly in uplands, drain only uplands, and are dry for much of the year, i.e. upland ditches. The agencies are proposing to continue this exclusion and, to provide improved consistency and clarity, further define flow characteristics of upland ditches that are and are not jurisdictional. The proposed rule would exclude from jurisdiction upland ditches with less than perennial flow. The scientific concept of perennial flow is a widely accepted and well understood hydrologic characteristic of tributaries. Perennial flow means that water is present in a tributary year round when rainfall is normal or above normal. Identifying upland ditches with perennial flow is straightforward and will provide for consistent, predictable, and technically accurate determinations at any time of year. The agencies specifically seek comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be included in the exclusion of paragraph (b)(3). In particular, the agencies seek comment on whether the flow regime in such ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow as proposed.

Only those ditches not excluded by the proposed regulation and that meet the proposed definition of tributary are "waters of the United States." Ditches that are excluded from the definition of "waters of the United States" under (b)(3) and (b)(4) cannot be recaptured and considered jurisdictional under any of the jurisdictional categories in section (a) of the proposed rule, such as a ditch

that crosses a state line. This is true for all other features excluded under section (b) as well. Ditches not excluded under paragraphs (b)(3) and (4) of the proposed regulation meet the definition of tributary where they have a bed and banks and ordinary high water mark and they contribute flow directly or indirectly through another water to (a)(1) through (a)(4) waters. Such jurisdictional ditches may include, but are not limited to, the following:

- Natural streams that have been altered (e.g., channelized, straightened or relocated);
- ditches that have been excavated in "waters of the United States," including jurisdictional wetlands;
- ditches that have perennial flow; and
- ditches that connect two or more "waters of the United States."

In an effort to distinguish ditches that are not "waters of the United States" from those that are "waters of the United States," the proposal states that ditches with less than perennial flow that are excavated in uplands, rather than in wetlands or other types of waters, for their entire length are not tributaries and are not "waters of the United States" under the proposed rule. Ditches that are perennial generally have water present year round when rainfall is normal or above normal. Under this exclusion, water that only stands or pools in a ditch is not considered perennial flow and, therefore, any such upland ditch would not be subject to regulation. In addition, ditches that do not contribute flow to the tributary system of a traditional navigable water, interstate water or the territorial seas are not "waters of the United States," even if the ditch has perennial flow.

Historical evidence, such as photographs, prior delineations, or topographic maps, may be used to determine whether a water body was excavated wholly in uplands and drains only uplands, and has less than perennial flow. Site characteristics may also be present to inform the determination of whether the water body is a ditch, such as shape, sinuosity, flow indications, etc., as ditches are often created in a linear fashion with little sinuosity and may not connect to another "water of the United States." Ditches created by altering natural waters would be considered "waters of the United States," so long as they contribute flow to another jurisdictional water. Ditches may have been created for a number of purposes, such as irrigation, water management or treatment, and roadside drains. In order to be excluded,

however, the ditch must be excavated wholly in uplands, drain only uplands, and have less than perennial flow. Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) are not "waters of the United States."

## 2. What is not a tributary for purposes of this proposal?

Waters that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of the proposed regulation are not considered jurisdictional as tributaries under the CWA. However, even if such waters are not "tributaries," they may be jurisdictional under other paragraphs of the proposed rule. Note that waters specifically listed under the proposed section (b), including ditches as defined in paragraphs (b)(3) and (b)(4), would not be considered "waters of the United States" in any case. In addition, ephemeral features located on agricultural lands that do not possess a bed and bank are not tributaries. The defined bed and bank no longer exists due to past normal farming practices such as plowing or discing (see section 404(f)(1)(A)),<sup>8</sup> and these farming practices often pre-date the CWA. Such farm field features are not tributaries even though they may contribute flow during some rain events or snowmelt.

Section J below discusses in more detail the agencies' proposed rule excluding specific waters and features from the definition of "waters of the United States." Of importance with respect to tributaries is the exclusion of gullies, rills, non-wetland swales, and certain ditches. These features are not considered tributaries under this proposed rule, even though rills and gullies and non-wetland swales (as described in Section J), may contribute flow to a tributary in systems with steep side slopes.

Non-jurisdictional geographic features (e.g., non-wetland swales, ephemeral upland ditches) may still serve as a confined surface hydrologic connection between an adjacent wetland or water and a traditional navigable water, interstate water or the territorial sea, provided there is an actual exchange of water between those waters, and the water is not lost to deep groundwater through infiltration (i.e., transmission losses). In addition, these geographic features may function as "point sources," such that discharges of

pollutants to waters through these features could be subject to other CWA authorities (e.g., CWA section 402 and its implementing regulations).

The agencies request comment on all aspects of the proposed definition of tributaries and in particular on whether and how this definition can be revised to provide increased clarity as to the distinction between jurisdictional tributaries, as defined, and non-jurisdictional features such as gullies, rills and non-wetland swales. The agencies seek comments on how to provide greater regulatory certainty as to which specific aquatic features are jurisdictional tributaries, and which are not. Commenters should explain how any suggestions are consistent with the Clean Water Act, applicable caselaw, and the scientific literature regarding connectivity of aquatic features.

## 3. Why do the agencies conclude all tributaries are "waters of the United States"?

Assertion of jurisdiction over tributaries as defined in this proposed rule is appropriate under *Rapanos* both as a legal matter and as a scientific matter based on available science and the agencies' professional judgment and field expertise. The agencies conclude based on their scientific and technical expertise that tributaries, as defined in the proposed rule, in a watershed are similarly situated and have a significant nexus alone or in combination with other tributaries because they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

### a. Legal Basis for Defining All Tributaries as "Waters of the United States"

In *Rapanos*, both the plurality opinion and Justice Kennedy's opinion discussed the Court's prior opinion in *Riverside Bayview* to begin their analysis of the scope of the CWA. Justice Scalia stated, "In *Riverside Bayview*, we stated that the phrase ['waters of the United States'] in the Act referred primarily to 'rivers, streams, and other hydrographic features more conventionally identifiable as 'waters'' than the wetlands adjacent to such features. 474 U.S., at 131 (emphasis added)." *Rapanos*, 547 U.S. at 734. Justice Kennedy began, "As the plurality points out, and as *Riverside Bayview* holds, in enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense. *Ante* at 12; *Riverside Bayview*, 474 U.S. at 133; see also *SWANCC*, *supra*, at 167."

*Id* at 780. This conclusion is supported by "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." *Riverside Bayview*, *supra*, at 133; see also *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (describing the Act as "an all-encompassing program of water pollution regulation"). In *Rapanos*, Justice Kennedy established a standard for determining whether wetlands should be considered to possess the requisite nexus in the context of assessing whether wetlands are jurisdictional: "if the wetlands, either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. While Justice Kennedy focused on adjacent wetlands in light of the facts of the cases before him, it is reasonable to utilize the same standard for tributaries. As discussed in this preamble, based on a detailed examination of the scientific literature, the agencies conclude that tributaries as they propose to define them perform the requisite functions identified by Justice Kennedy for them to be considered, as a category, to be "waters of the United States." Assertion of jurisdiction over tributaries with a bed and banks and OHWM is also consistent with *Rapanos* because five Justices did not reject the current regulations that assert jurisdiction over non-navigable tributaries of traditional navigable waters and interstate waters.

The agencies analyzed the Report and other scientific literature to determine whether tributaries to traditional navigable waters, interstate waters, or the territorial seas have a significant nexus to constitute "waters of the United States" under the Act such that it is reasonable to assert CWA jurisdiction over all such tributaries as a category by rule. The agencies' analysis of the available scientific literature, including the Report, demonstrates through an ecological rationale that tributaries draining to a traditional navigable water, interstate water, or the territorial seas have a significant nexus to such waters, especially because of their ability to transport pollutants to such waters that would impair their chemical, physical, or biological integrity.

One of the primary purposes and functions of the CWA is to prevent the discharge of petroleum wastes and other chemical wastes, biological and medical wastes, sediments, nutrients and all other forms of pollutants into the "waters of the United States," because such pollutants endanger the nation's

<sup>8</sup> A discharge of dredged or fill material into an existing tributary which converts a "water of the U.S." into a non-jurisdictional water requires authorization under section 404 of the CWA.

public health, drinking water supplies, shellfish, fin fish, recreation areas, etc. Because the entire tributary system of the traditional navigable, interstate waters or the territorial seas is interconnected, pollutants that are dumped into any part of the tributary system eventually are washed downstream to traditional navigable waters, interstate waters, or the territorial seas where those pollutants endanger public health and the environment.

The CWA regulates and controls pollution at its source, in part because most pollutants do not remain at the site of the discharge, but instead flow and are washed downstream through the tributary system to endanger drinking water supplies, fisheries, and recreation areas. These fundamental facts about the movement of pollutants and the interconnected nature of the tributary system demonstrate why all tributaries of traditional navigable waters, interstate waters, and the territorial seas, alone or in combination with other tributaries in a watershed have a significant nexus with those downstream waters. The significant nexus relating to pollution transport (or prevention of such transport) from all tributaries of traditional navigable waters, interstate waters, and the territorial seas to their downstream waters in and of itself justifies the assertion of CWA jurisdiction over all tributaries by rule.

**b. The Agencies Conclude That Tributaries, as Defined in the Proposed Rule, Have a Significant Nexus**

The finding of significant nexus is based on the chemical, physical, and biological interrelationship between a water, the tributary network, and traditional navigable waters, interstate waters, and the territorial seas. Based on their scientific and technical expertise, the agencies conclude that tributaries, as defined in today's proposed rule, have a significant nexus and are appropriately identified as jurisdictional by rule. *Rapanos*, 547 U.S. at 781–82 (J. Kennedy). (For more discussion, see Appendix A).

**(1) Tributaries Significantly Affect the Physical Integrity of (a)(1) Through (a)(3) Waters**

Physical connections between tributaries and traditional navigable waters, interstate waters, and the territorial seas result from the hydrologic transport of numerous materials, including water, sediment and organic matter (e.g., leaves, wood) from tributaries to downstream waters. This transport affects the physical

characteristics of downstream waters. Tributaries, even when seasonally dry, are the dominant source of water in most rivers, rather than direct precipitation or groundwater input to main stem river segments.

One of the primary functions of tributaries is transporting sediment to downstream waters. Tributaries, particularly headwaters, shape and maintain river channels by accumulating and gradually or episodically releasing sediment and large woody debris into river channels. Sediment transport is also provided by ephemeral streams. Effects of the releases of sediment and large woody debris are especially evident at tributary-river confluences, where discontinuities in flow regime and temperature demonstrate physical alteration of river structure and function by headwater streams.

Tributaries have vitally important effects on the physical integrity of (a)(1) through (a)(3) waters, contributing not only the majority of the flow in these waters but affecting the structure of the waters. These effects occur even when the tributaries flow infrequently (such as ephemeral tributaries) and even when the tributaries are significant distances from the (a)(1) through (a)(3) water (such as some headwater tributaries). Tributaries provide flow to downstream rivers necessary to support navigation. The agencies conclude that the tributaries alone or together with other tributaries in a watershed have a significant effect on the physical integrity of downstream waters.

**(2) Tributaries Significantly Affect the Chemical Integrity of (a)(1) Through (a)(3) Waters**

Tributaries also influence the chemical composition of downstream waters, through the transport and removal of chemical elements and compounds, such as nutrients, ions, dissolved and particulate organic matter, pollutants, and contaminants. Ecosystem processes in tributaries transform, remove, and transport these substances to downstream waters. In turn, these chemical compounds can influence water quality, sediment deposition, nutrient availability, and biotic functions in rivers. Because water flow is the primary mechanism by which chemical substances are transported downstream, chemical effects are closely related to hydrological connectivity. Long-distance movement of contaminants provides another line of evidence for chemical connectivity between tributaries and traditional navigable waters, interstate waters, and the

territorial seas and significantly affects these waters.

Within tributaries, there are processes that occur that transform and export nutrients and carbon to downstream waters, serving important source functions that influence the chemical integrity of downstream waters. Organic carbon, in both dissolved and particulate forms, exported from tributaries is consumed by downstream organisms. The organic carbon that is exported downstream thus supports biological activity (including metabolism) throughout the river network.

Tributaries have important effects on the chemical integrity of (a)(1) through (a)(3) waters, acting as both sinks and sources of chemical substances. They provide sink functions by trapping chemicals through absorption to sediments in the stream substrate (e.g., phosphorous adsorption to clay particles). They provide source functions by transporting chemicals to downstream (a)(1) through (a)(3) waters as chemicals dissolved in the waters or as chemicals attached to suspended sediments. Thus the tributaries of a watershed, alone or in combination, significantly affect the chemical integrity of downstream waters.

**(3) Tributaries Significantly Affect the Biological Integrity of (a)(1) Through (a)(3) Waters**

Tributaries, including intermittent and ephemeral streams, are critical in the life cycles of many organisms capable of moving throughout river networks. In fact, many organisms, such as anadromous salmon, have complex life cycles which involve migration through the river network, from headwaters to downstream rivers and oceans and back, over the course of their lives. Anadromous fish spend the majority of their life cycles in saltwater, but migrate upstream to inland freshwater systems in order to spawn and reproduce. More generally, in addition to providing critical habitat for complex life cycle completion, tributaries provide refuge from predators and adverse physical conditions in rivers, and they are reservoirs of genetic- and species-level diversity. These connections between tributaries and (a)(1) through (a)(3) waters significantly influence the biologic integrity of these waters.

Tributaries have important effects on the biological integrity of (a)(1) through (a)(3) waters, contributing materials to downstream food networks and supporting populations for aquatic species, including economically important species such as salmon, etc.,

and other essential habitat needs for species that utilize both tributaries and downstream (a)(1) through (a)(3) waters. These effects occur even when the tributaries flow infrequently (such as ephemeral tributaries) and even when the tributaries are large distances from the (a)(1) through (a)(3) water (such as some headwater tributaries). When all the tributaries in a watershed are considered together, these effects are significant.

**(4) Small, Intermittent, and Ephemeral Tributaries Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters**

As discussed above, the agencies conclude that tributaries, including headwaters, intermittent, and ephemeral streams, and especially when all tributaries in a watershed are considered in combination, have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas based on their contribution to the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters. Tributaries, including headwater streams, within a watershed draining to a traditional navigable water, interstate water, or the territorial seas collectively shape the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters.

Tributaries that are small, flow infrequently, or are a substantial distance from the nearest (a)(1) through (a)(3) water (e.g., headwater perennial, intermittent, and ephemeral tributaries) are essential components of the tributary network and have important effects on the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters, contributing many of the same functions downstream as larger streams. When their functional contributions to the chemical, physical, and biological conditions of downstream waters are considered at a watershed scale, the scientific evidence supports a legal determination that they meet the "significant nexus" standard articulated by Justice Kennedy in *Rapanos*.

**(5) Tributary Lakes, Ponds, and Wetlands Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters**

Although the above discussion refers primarily to stream tributaries, lake, pond and wetland tributaries also have the same or similar connections and functions that significantly affect (a)(1) through (a)(3) waters. Lakes and ponds that contribute surface water to downstream (a)(1) through (a)(3) waters satisfy the agencies' definition of

tributary. They may be at the headwaters of the tributary network (e.g., a lake with no stream inlets that has an outlet to the tributary network) or located outside of the headwaters, or farther downstream from the headwaters (e.g., a lake with both a stream inlet and a stream outlet to the tributary network). Similarly, wetland tributaries are wetlands that are located within the stream channel itself or that form the start of the stream channel, such as channel-origin wetlands that are part of the headwaters of the tributary network.

As noted above, while these wetlands may function as part of the "tributary network," the agencies are seeking comment on whether it would provide greater regulatory clarity to exclude such wetlands from the definition of "tributary" because they generally lack a defined bed, bank and OHWM. These features are well understood by the public and agency field staff and have traditionally been the defining characteristics of tributaries. Rather, wetlands in headwaters or connecting tributaries would remain jurisdictional as adjacent waters under the definition of "adjacent" and its supporting terms (e.g., neighboring, floodplain, and riparian area) in this proposal.

Tributary lakes and ponds serve many important functions that affect the chemical, physical, and biological conditions downstream. Lakes can store floodwaters, sediment, and nutrients, as these materials have the opportunity to settle out, at least temporarily, as water moves through the lake downstream. Lakes, as with other tributaries, can also contribute flow, nutrients, sediment, and other materials downstream.

**(6) Man-Made or Man-Altered Tributaries Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters**

This proposal expressly states that a tributary, including wetlands, can be a natural, man-altered, or man-made water body and includes waters such as rivers, streams, lakes, impoundments, canals, and ditches that meet the definition of tributary and are not excluded from the definition of "waters of the United States" by paragraphs (b)(3) and (b)(4) of the proposed rule. The agencies' proposed rule clarifies that man-made and man-altered tributaries are "waters of the United States" because man-made and man-altered tributaries perform many of the same functions as natural tributaries, especially the conveyance of water that carries nutrients, pollutants, and other substances to traditional navigable waters, interstate waters, or the territorial seas. Man-made and man-

altered tributaries also provide corridors for movement of organisms between headwaters and traditional navigable waters, interstate waters, or the territorial seas. The significant nexus between a tributary and a traditional navigable water, interstate water, or the territorial seas is not broken where the tributary flows through a culvert or other structure. The scientific literature recognizes that features that convey water, whether they are natural, man-made, or man-altered, provide the connectivity between streams and downstream rivers.

Tributary ditches and other man-made or man-altered waters, if they meet the definition of "tributary," have a significant nexus to (a)(1) through (a)(3) waters due to their effects on the chemical, physical, or biological integrity of those downstream waters. As described above, tributaries of all flow regimes have a significant nexus to downstream (a)(1) through (a)(3) waters. Due to the often straightened and channelized nature of ditches, these tributaries quickly move water downstream to (a)(1) through (a)(3) waters. Ditches and canals, like other tributaries, export sediment, nutrients, and other materials downstream. Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream. It is the agencies' position that ditches that meet the definition of tributary (which does not include ditches excluded under paragraphs (b)(3) and (b)(4)) provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the proposed rule.

**G. Adjacent Waters**

The agencies propose to revise the existing jurisdictional category of "adjacent wetlands," which currently limits consideration to only wetlands, to include "adjacent waters." The proposed "adjacent waters" category would replace "adjacent wetlands" and would include wetlands and other waterbodies that meet the proposed definition of adjacent, including "neighboring." To be jurisdictional, it would be necessary to determine that a wetland or other waterbody meets the definition of "adjacent" water under proposed paragraph (a)(6). Adjacent waters are integrally linked to the chemical, physical, or biological functions of the (a)(1) through (a)(5) waterbodies to which they are adjacent. Waters adjacent to (a)(1) through (a)(3) waters have a significant nexus to those (a)(1) through (a)(3) waters. Waters adjacent to impoundments, (a)(4) and tributaries, (a)(5), are integrally linked to

the chemical, physical, or biological functions of the impoundments or tributaries and, through those waters, are integrally linked to the chemical, physical or biological functions of traditional navigable waters, interstate waters or the territorial seas. As such, where waterbodies are adjacent to (a)(4) or (a)(5) waters, they also have a significant nexus to (a)(1) through (a)(3) waters. See Appendix A, Scientific Evidence (Part I, Discussion of Major Conclusions 2.B–C; Part II, ii) and Appendix B, Legal Analysis.

The proposed rule proposes to change “adjacent wetlands” to “adjacent waters” so that water bodies such as ponds and oxbow lakes, as well as wetlands, adjacent to jurisdictional waters are “waters of the United States” by rule. Second, the proposed rule adds a definition of the term “neighboring,” a term which appears in the existing definition of “adjacent.” The agencies propose a definition for “neighboring” to identify those adjacent waters that the agencies concluded have a significant nexus to (a)(1) through (a)(3) waters. To bring greater clarity to the meaning of “neighboring,” the proposed rule adds scientifically-based definitions for the terms “riparian area” and “floodplain” to define the lateral reach of the term “neighboring.” Under the proposed rule, all waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5); would be “waters of the United States.” The term adjacent means bordering, contiguous or neighboring. Waters, including 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 waters.” The term neighboring, for purposes of the term “adjacent,” includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems. Finally, the term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is

inundated during periods of moderate to high water flows.

1. What are “adjacent waters” under the proposed rule?

“Adjacent waters” are wetlands, ponds, lakes and similar water bodies that provide similar functions which have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas. These include waters and wetlands that are adjacent to traditional navigable waters, interstate waters, and the territorial seas as well as waters and wetlands adjacent to other jurisdictional waters such as tributaries and impoundments. The inclusion of adjacent waters in this category is supported by the Report, the collective body of scientific literature, the agencies’ growing body of scientific and technical knowledge and practical expertise addressing the connectivity and ecological interactions of these waters on (a)(1) through (a)(3) waters, and by the determination made in this rulemaking that all adjacent waters in a watershed have a significant nexus with their traditional navigable waters, interstate waters or the territorial seas.

Under the existing rule, only wetlands adjacent to “waters of the United States” are defined as “waters of the United States.” As noted in *San Francisco Baykeeper v. Cargill Salt*, 481 F.3d 700 (9th Cir. 2007), this provision of the agencies’ regulations only defines adjacent wetlands, not adjacent ponds, as “waters of the United States.” Prior to SWANCC, adjacent non-wetland waters were often jurisdictional under the “other waters,” or “(a)(3)” provision of the existing regulations which the agencies are proposing to eliminate. Waters, including wetlands, that meet the proposed definition of adjacency, including the new proposed definition of neighboring, have a significant nexus to (a)(1) through (a)(3) waters, and this proposed rule would include all adjacent waters, including wetlands, as “waters of the United States” by rule.

The existing definition of “adjacent” would be generally retained under today’s proposal, with a clarification with respect to an existing provision addressing wetlands adjacent to other wetlands. The proposed rule states that the term adjacent means bordering, contiguous or neighboring. Waters, including 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 waters.” Within the definition of “adjacent,” the terms bordering and contiguous are well understood, and for continuity and clarity the agencies would continue to

interpret and implement those terms consistent with existing policy and practice.

The proposed rule also contains for the first time a definition of the term “neighboring.” The term “neighboring” has generally been interpreted broadly in practice. The agencies provide a regulatory definition of “neighboring” that captures those waters that in practice the agencies have identified as having a significant effect on the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the territorial seas. “Neighboring” is defined as including waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a confined surface or shallow subsurface hydrologic connection to such a jurisdictional water.

The terms “riparian area” and “floodplain” are also defined to further clarify how the agencies interpret the term “neighboring.” Those new terms are found at paragraphs (c)(1) through (c)(4) of the proposed rule. The agencies emphasize that these terms help to identify waters, including wetlands, that may be “adjacent” and would, therefore, be “waters of the United States” under this proposed rule. Absolutely no uplands located in “riparian areas” and “floodplains” can ever be “waters of the United States” subject to jurisdiction of the CWA.

Most waters, including wetlands, that are neighboring to a water body are found within its riparian zone or floodplain. However, there are some neighboring waters that might be located outside of the riparian zone or floodplain, such as wetlands immediately next to a highly incised and manipulated stream that no longer has a riparian area or a floodplain. Waters, including wetlands, determined to have a shallow subsurface hydrologic connection or confined surface hydrologic connection to an (a)(1) through (a)(5) water would also be “waters of the United States” by rule as adjacent waters falling within the definition of “neighboring.”

In circumstances where a particular water body is outside of the floodplain and riparian area of a tributary, but is connected by a shallow subsurface hydrologic connection or confined surface hydrologic connection with such tributary, the agencies will also assess the distance between the water body and tributary in determining whether or not the water body is adjacent. “Adjacent” as defined in the agencies’ regulations has always included an element of reasonable proximity. See *Riverside Bayview*, 474 at

133–34 (“Following the lead of the Environmental Protection Agency, see 38 FR 10834 (1973), the Corps has determined that wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality: . . . For this reason, the landward limit of Federal jurisdiction under Section 404 must include wetlands that are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.”) quoting 42 FR 37128, July 19, 1977). Therefore, the determination of whether a particular water meets the definition of “neighboring” because the water is connected by a shallow subsurface or confined surface hydrologic connection is made in the context of the terms “neighboring” and “adjacent” as used in the regulation.

The element of reasonable proximity is informed by the scientific literature, supplemented by agency practice, which leads to a recognition of the role of hydrologic connections in supporting a significant chemical, physical, and biological relationship between water bodies, but this relationship can be reduced as the distance between water bodies increases. The agencies recognize that in specific circumstances, the distance between water bodies may be sufficiently far that even the presence of a hydrologic connection may not support an adjacency determination.

While the agencies’ best professional judgment has always been a factor in determining whether a particular wetland is “adjacent” under the existing definition, the agencies recognize that this may result in some uncertainty as to whether a particular water connected through confined surface or shallow subsurface hydrology is an “adjacent” water. The agencies therefore request comment on whether there are other reasonable options for providing clarity for jurisdiction over waters with these types of connections.

Options could include asserting jurisdiction over all waters connected through a shallow subsurface hydrologic connection or confined surface hydrologic connection regardless of distance; asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian zone of a jurisdictional water; considering only confined surface connections but not shallow subsurface connections for purposes of determining adjacency; or establishing specific geographic limits for using shallow subsurface or confined surface hydrologic connections as a basis for determining adjacency, including, for example, distance limitations based on ratios compared to

the bank-to-bank width of the water to which the water is adjacent. The agencies note that under the proposed rule any waters not fitting within (a)(1) through (a)(6) categories would instead be treated as “other waters.”

Both confined surface and shallow subsurface connections are forms of direct hydrologic connections between adjacent waters and (a)(1) through (a)(5) waters. For purposes of this rule, confined surface connections consist of permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches. In some cases, these connections will be a result of “fill and spill” hydrology. A directional flowpath is a path where water flows repeatedly from the wetland or open water to the nearby “water of the United States” that at times contains water originating in the adjacent wetland or open water as opposed to just directly from precipitation.

For the purposes of this rule, “fill and spill” describes situations where wetlands or open waters fill to capacity during intense precipitation events or high cumulative precipitation over time and then spill to the downstream jurisdictional water. Report at 5–62 (citing T.C. Winter and D.O. Rosenberry, “Hydrology of Prairie Pothole Wetlands during Drought and Deluge: A 17-year Study of the Cottonwood Lake Wetland Complex in North Dakota in the Perspective of Longer Term Measured and Proxy Hydrological Records,” *Climatic Change* 40:189–209 (1998); S.G. Leibowitz, and K.C. Vining, “Temporal connectivity in a prairie pothole complex,” *Wetlands* 23:13–25 (2003)). Water connected through such flows originates from the adjacent wetland or open water, travels to the downstream jurisdictional water, and is connected to those downstream waters by swales or other directional flowpaths on the surface. Surface hydrologic connections via physical features or discrete features described above allow for confined, direct hydrologic flows between an adjacent water and the (a)(1) through (a)(5) water that it neighbors.

A shallow subsurface hydrologic connection is lateral water flow through a shallow subsurface layer, such as can be found, for example, in steeply sloping forested areas with shallow soils, or in soils with a restrictive layer that impedes the vertical flow of water, or in karst systems, especially karst pans. K.J. Devito, *et al.*, “Groundwater-Surface Water Interactions in Headwater Forested Wetlands of the Canadian Shield,” *Journal of Hydrology* 181:127–47 (1996); M.A. O’Driscoll, and R.R. Parizek, “The Hydrologic Catchment

Area of a Chain of Karst Wetlands in Central Pennsylvania, USA,” *Wetlands* 23:171–79 (2003); B.J. Cook, and F.R. Hauer, “Effects of Hydrologic Connectivity on Water Chemistry, Soils, and Vegetation Structure and Function in an Intermontane Depressional Wetland Landscape,” *Wetlands* 27:719–38 (2007).

A shallow subsurface connection also exists, for example, when the adjacent water and neighboring (a)(1) through (a)(5) water are in contact with the same shallow aquifer. Shallow subsurface connections may be found both within the ordinary root zone and below the ordinary root zone (below 12 inches), where other wetland delineation factors may not be present. A combination of physical factors may reflect the presence of a shallow subsurface connection, including (but not limited to) stream hydrograph (for example, when the hydrograph indicates an increase in flow in an area where no tributaries are entering the stream), soil surveys (for example, exhibiting indicators of high transmissivity over an impermeable layer), and information indicating the water table in the stream is lower than in the shallow subsurface.

Shallow subsurface connections are distinct from deeper groundwater connections, which do not satisfy the requirement for adjacency, in that the former exhibit a direct connection to the water found on the surface in wetlands and open waters. Water does not have to be continuously present in the confined surface or shallow subsurface hydrologic connection and the flow between the adjacent water and the jurisdictional water may move in one or both directions. While they may provide the connection establishing jurisdiction, these shallow subsurface flows are not “waters of the United States.”

For waters outside of the riparian area or floodplain, confined surface hydrologic connections (as described above) are the only types of surface hydrologic connections that satisfy the requirements for adjacency. Waters outside of the riparian area or floodplain that lack a shallow subsurface hydrologic connection or a confined surface hydrologic connection would be analyzed as “other waters” under paragraph (a)(7) of the proposed rule.

Application of the terms “riparian area,” “floodplain,” and “hydrologic connection” would be based in part on best professional judgment and experience applied to the definitions contained in this rule. The new definitions of riparian area and floodplain are designed to provide greater consistency, clarity, and certainty in determining the

circumstances under which a particular water meets the definition of the term adjacent. The addition of these two terms to the definition of “neighboring” is based on the scientific literature and agencies’ knowledge of and expertise on river systems, which shows that water bodies such as wetlands, ponds, and oxbow lakes located within the riparian areas and floodplains of (a)(1) through (a)(5) waters generally have substantial hydrologic and ecologic connections with the waters that they neighbor.

These proposed definitions are adapted from scientific definitions using the concepts that are most relevant and useful in the context of the CWA. Use of the floodplain in characterizing the term “neighboring” is intended to provide greater clarity and predictability in the determination of when waters are adjacent. The scientific literature clearly demonstrates the enhanced hydrologic connectivity that is present between a tributary and waters within the floodplain of that tributary. There is, however, variability in the size of the floodplain, which is dependent on factors such as the flooding frequency being considered, size of the tributary, and topography. As a general matter, large tributaries in low gradient topography will generally have large floodplains (e.g., the lower Mississippi Delta) whereas small headwater streams located in steep gradients will have the smallest floodplains. It may thus be appropriate for the agencies to consider a floodplain associated with a lower frequency flood when determining adjacency for a smaller stream, and to consider a floodplain associated with a higher frequency flood when determining adjacency for a larger stream. When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which flood interval to use (for example, 10 to 20 year flood interval zone). The agencies request comment on whether the rule text should provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water.

As noted above, the agencies retain the general existing definition of adjacency and have never interpreted the term to include wetlands that are a great distance from a jurisdictional water. The agencies intend to similarly interpret the new definition of “neighboring.” This new definition is designed to provide greater clarity by identifying specific areas and characteristics for jurisdictional adjacent waters, but the agencies request comment for additional clarification. Commenters should support where

possible from scientific literature any suggestions for additional clarification of current explicit limits on adjacency, such as a specific distance or a specific floodplain interval.

The agencies seek comment on specific options for establishing additional precision in the definition of “neighboring” through: explicit language in the definition that waters connected by shallow subsurface hydrologic or confined surface hydrologic connections to an (a)(1) through (a)(5) water must be geographically proximate to the adjacent water; circumstances under which waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate; support for or against placing geographic limits on what waters outside the floodplain or riparian zone are jurisdictional; determining that only waters within the floodplain, only waters within the riparian area, or only waters within the floodplain and riparian area (but not waters outside these areas with a shallow subsurface or confined surface hydrologic connection) are adjacent; identification of particular floodplain intervals within which waters would be considered adjacent; and any other scientifically valid criteria, guidelines or parameters that would increase clarity with respect to neighboring waters.

Finally, the agencies are also proposing to delete the parenthetical from the existing “adjacent wetlands” regulatory provision. The phrase “other than waters that are themselves wetlands” was intended to preclude asserting CWA jurisdiction over wetlands that were simply adjacent to another wetland (such as an “isolated” wetland, as opposed to a wetland adjacent to a tributary). However, in practice some wetlands that were indeed adjacent to a tributary were found to not meet the definition of “adjacent” simply because another adjacent wetland was located between the adjacent wetland and the tributary. With this proposed change, the agencies intend to ensure that all waters that meet the proposed definition of “adjacent” are “waters of the United States,” regardless of whether or not another adjacent water is located between those waters and the tributary.

If, for example, one wetland is in the riparian area of a “tributary” as defined in today’s proposed rule, and a different wetland is in the floodplain of that tributary, both wetlands would meet the definition of “adjacent” and be “waters of the United States,” even if the riparian wetland is located between the floodplain wetland and the tributary. Waters located near an adjacent water

but which are not themselves (independently) adjacent to an (a)(1) through (a)(5) water would, under the proposed rule, not be regulated under (a)(6). However, waters, including wetlands, that are adjacent to a wetland that meets the definition of a tributary would be considered adjacent waters.

2. Why do the agencies conclude that adjacent waters are “waters of the United States?”

a. Legal Basis for Defining All Adjacent Waters as “Waters of the United States”

For those wetlands adjacent to traditional navigable waters, Justice Kennedy stated in *Rapanos* that the agencies’ existing regulation “rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.” 547 U.S. at 780. For all other adjacent waters, including adjacent wetlands, Justice Kennedy has provided a framework for establishing categories of waters which are *per se* “waters of the United States.” First, he provided that wetlands are jurisdictional if they “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” 547 U.S. at 780. While the issue was not before the Supreme Court, it 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 the touchstone for CWA jurisdiction. Justice Kennedy also stated that the agencies could through regulation or adjudication identify categories of waters that “are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.” 547 U.S. at 780–81.

Adjacent waters as defined in today’s proposed rule, alone or in combination with other adjacent waters in a watershed that drain to a traditional navigable water, interstate water or the territorial seas, significantly affect the chemical, physical, or biological integrity of those waters. Waters that are adjacent to (a)(1) through (a)(5) waters, including wetlands, oxbow lakes and adjacent ponds, are integral parts of stream networks because of their ecological functions and how they interact with each other, and with downstream traditional navigable waters, interstate waters, or the territorial seas. In other words, tributaries and their adjacent waters, and the traditional navigable waters,

interstate waters, and territorial seas to which those waters flow, are an integrated ecological system, and discharges of pollutants, including discharges of dredged or fill material, into these components of that ecological system, must be regulated under the CWA to restore and maintain the chemical, physical, and biological integrity of these waters.

The agencies' proposed rule is consistent with the statute, the Supreme Court's decisions, the best available science, and scientific and technical expertise. See both Appendices A and B.

**b. Adjacent Waters Under This Proposed Rule Have a Significant Nexus to (a)(1) Through (a)(3) Waters**

The agencies' proposal to determine "adjacent waters" to be jurisdictional by rule is supported by the substantial chemical, physical, and biological relationship between adjacent waters, alone or in combination with similarly situated waters, and (a)(1) through (a)(5) waters. Adjacent wetlands and other adjacent waters such as ponds and oxbow lakes perform important functions for the nearby streams and lakes, and these functions are significant for the chemical, physical, and biological integrity of adjacent and downstream waters. See Appendix A.

One reason why the agencies propose in this rulemaking that all adjacent waters have a significant nexus with their traditional navigable waters, interstate waters, or the territorial seas is closely related to a primary reason (explained above) why all tributaries of navigable and interstate waters have a significant nexus with those waters. That is, all adjacent waters should be jurisdictional by rule because the discharge of many pollutants (such as nutrients, petroleum wastes and other toxic pollutants) into adjacent waters often flow into and thereby pollute the traditional navigable waters, interstate waters, and the territorial seas.

Based on science and agency expertise, the agencies conclude that adjacent waters, as defined in the proposed rule, "are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Rapanos*, 547 U.S. at 781–82. The agencies identified the characteristics of adjacent waters that as a class have a significant nexus to (a)(1) through (a)(3) waters: They are waters that are bordering to or are contiguous with (a)(1) through (a)(5) waters, including wetlands; they are waters that lie within the riparian area or floodplain of (a)(1) through (a)(5) waters; or they are waters

that have a shallow subsurface or confined surface hydrologic connection with (a)(1) through (a)(5) waters. These characteristics ensure that the adjacent waters are part of "an aquatic system incorporating navigable waters," 547 U.S. at 781–82; and that they perform important functions to maintain the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters.

In showing chemical, physical, and biological connections between adjacent waters and other jurisdictional waters, adjacent waters, including wetlands, may be separated by land or other features not regulated under the CWA, but those intervening uplands do not eliminate or impede the functional interactions between (a)(1) through (a)(5) waters and the waters, including wetlands, that are adjacent to them. For instance, two waters may be separated by upland but be connected through surface or shallow subsurface connections with water and chemicals readily exchanging between them. Similarly, uplands separating two waters may not act as a barrier to species that rely on and that regularly move between the two waters.

Therefore, the proposed rule reflects an understanding that adjacent waters affect the chemical, physical, and biological integrity of waters to which they are adjacent and to (a)(1) through (a)(3) waters even where the two waters may be separated by features that are not jurisdictional, such as uplands, berms, roads, levees, and similar features. The presence of these features does not extinguish jurisdiction, a conclusion contained in the agencies' existing regulation at 33 CFR 328.3(c).

**(1) Riparian and Floodplain Waters Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters**

Riparian and floodplain waters, including wetlands, that are adjacent to (a)(1) through (a)(3) waters play an integral role in maintaining the chemical, physical, and biological integrity of those waters. In addition, riparian and floodplain waters, including wetlands, that are adjacent to (a)(4) and (a)(5) waters provide an important role in maintaining the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Among the ways in which riparian and floodplain waters, including wetlands, that are adjacent to (a)(4) and (a)(5) waters significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas is by significantly affecting the chemical,

physical, and biological integrity of the (a)(4) and (a)(5) waters to which they are adjacent, and those waters in turn significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

**(2) Waters, Including Wetlands, Determined To Have a Confined Surface or a Shallow Subsurface Hydrologic Connection Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters.**

The proposed rule includes as adjacent those waters that are "neighboring" because they possess a shallow subsurface or confined surface hydrologic connection to a jurisdictional water, and therefore can exchange water, along with chemicals and organisms within that water, with an (a)(1) through (a)(5) water, and subsequently have a significant effect, particularly in combination with other adjacent waters in the watershed, on the chemical, physical, or biological integrity of a downstream traditional navigable water, interstate water, and the territorial seas.

Confined surface connections that provide a discrete pathway for water to be exchanged between the potentially adjacent wetland or water and an (a)(1) through (a)(5) water present the clearest evidence of a hydrologic connection. Shallow subsurface connections are also relevant, yet are more difficult to identify and document. Evidence shows that waters, including wetlands, located outside of the riparian area or floodplain, but which still have a shallow subsurface or confined surface hydrologic connection to an (a)(1) through (a)(5) water, will have a significant nexus to downstream (a)(1) through (a)(3) waters. Note that nothing under the proposed rule would cause the shallow subsurface connections themselves to become jurisdictional.

Examples of confined surface water hydrologic connections that demonstrate adjacency are swales, gullies, and rills. The frequency, duration, and volume of flow associated with these confined surface connections can vary greatly depending largely on factors such as precipitation, snowmelt, landforms, soil types, and water table elevation. It is the presence of this hydrologic connection which provides the opportunity for neighboring waters to influence the chemical, physical, or biological integrity of (a)(1) through (a)(5) waters.

In circumstances where a particular water is outside of the floodplain and riparian area of a jurisdictional water, a connection can be established by confined surface or shallow subsurface

hydrology that makes the water neighboring, and thus adjacent. The scientific literature recognizes the role of hydrologic connections in supporting a substantial chemical, physical, or biological relationship between water bodies, but this relationship can be reduced as the distance between water bodies increases because of various factors, such as soil characteristics, geology, climate, precipitation patterns, etc. The distance between water bodies may be sufficiently great that even the presence of an apparent hydrologic connection may not support an adjacency determination. The greater the distance, the less likelihood that there is an actual shallow subsurface or confined surface hydrologic connection, because of the greater potential for the water to infiltrate the soil to deeper groundwater, or for transmission losses in any gully or swale (for example) that may appear to be hydrologic connections. Within a watershed, wetlands and open waters that are closer to tributaries will have a higher probability of being hydrologically connected and of being determined adjacent than more distant waters, assuming that conditions governing type and quantity of flows (e.g., slope, soil, and aquifer permeability) are similar. Report at 5–2. A determination of adjacency based on shallow subsurface or confined surface hydrologic connection outside the riparian area or floodplain requires clear documentation.

#### H. “Other Waters”

The “other waters” paragraph of the proposed rule is at (a)(7). To be clear, these “other waters” are not jurisdictional as a single category; rather, as the proposed rule language states, “other waters” are jurisdictional provided that they are found, on a case-specific basis, to have a significant nexus to an (a)(1) through (a)(3) water. Thus, the introductory phrase “on a case-specific basis” is designed to signal clearly that this provision of the definition of “waters of the United States” does not mean “other waters” are “waters of the United States” by definition in the same way as those defined as jurisdictional in proposed paragraphs (a)(1) through (a)(6).

“Other waters” will be evaluated either individually, or as a group of waters where they are determined to be similarly situated in the region. Waters are similarly situated where they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water. How these “other waters” are aggregated for a case-

specific significant nexus analysis depends on the functions they perform and their spatial arrangement within the “region” or watershed. For other waters that perform similar functions, their landscape position within the watershed (i.e., the “region”) relative to each other or to a jurisdictional water is generally the determinative factor for aggregating waters in a significant nexus analysis, which will focus on the degree to which the functions provided by those “other waters” affect the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters and whether such effects are significant. See Appendix A, Scientific Evidence (Part I, Discussion of Major Conclusions 2.C; Part II, iii) and Appendix B, Legal Analysis.

Significant nexus is proposed to be defined to mean that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (a)(3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3).

Other waters with a significant nexus can be found to be jurisdictional on a case-specific basis where these waters do not fit within the definition of another of the proposed categories of “waters of the United States” under paragraphs (a)(1) through (a)(6) and are not excluded from the definition of “waters of the United States” under proposed section (b).

A significant nexus analysis may be based on a particular water alone or based on the effect that the water has in combination with other similarly situated waters in the region. Where effects will be analyzed in combination, the agencies will aggregate those effects. The agencies propose to interpret the “region” within which similarly situated waters would be aggregated as the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas.

For purposes of analyzing whether an “other water” has a significant nexus,

the agencies are proposing that “other waters” are similarly situated if they perform similar functions and they are either (1) located sufficiently close together so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3), or (2) located sufficiently close to a “water of the United States” for such an evaluation of their effect. These criteria are explained in a subsequent section.

Consistent with Justice Kennedy’s opinion in *Rapanos*, the agencies propose today and are soliciting comment on establishing a case-specific analysis of whether “other waters,” including wetlands, that do not meet the criteria for any of the proposed jurisdictional categories in (a)(1) through (a)(6) and are not proposed to be excluded by rule under section (b), are susceptible to a case-specific analysis of whether they alone, or in combination with other similarly situated waters, have a significant nexus to a traditional navigable water, an interstate water, or the territorial seas, and therefore are “waters of the United States.”

#### 1. Significant Nexus Analysis for “Other Waters”

##### a. “Other Waters”

“Other waters” are those waters, including wetlands, that are subject to a case-specific significant nexus determination, and do not meet the criteria of any of the categories of waters in (a)(1) through (a)(6), and also are not one of the waters and features excluded from the definition of “waters of the United States” in section (b). In the existing regulation, there is a non-exclusive list of the types of “other waters” which may be found to be “waters of the United States.” The agencies do not propose to re-promulgate this list of “other waters” because it is unnecessary and has led to confusion where it has been incorrectly read as an exclusive list.

Of additional concern was that the existing descriptive list of types of “other waters” includes some waters that would be jurisdictional under one of the proposed categories of “waters of the United States” that would be jurisdictional by rule, such as tributary streams. The agencies want to avoid questions of whether an intermittent stream that meets the definition of tributary also needs a separate significant nexus analysis. Under the proposed rule, that tributary stream does not require the significant nexus analysis. Removing the list of water

types does not imply that any of the waters listed in the existing regulation are never jurisdictional under the proposed rule. When one of the waters on the current enumerated list does not fall under a proposed category for jurisdiction (for example, adjacent waters under (a)(6) or tributaries under (a)(5)), those waters would be jurisdictional if found to have a significant nexus under proposed paragraph (a)(7) on a case-specific basis.

#### b. Significant Nexus

The agencies recognize that Supreme Court decisions in *SWANCC* and *Rapanos* placed limits on the scope of “other waters” that may be determined to be jurisdictional. Therefore, the agencies’ proposal today provides that waters not determined to be jurisdictional as a category are jurisdictional only if they are determined on a case-specific basis to have a significant nexus to a traditional navigable water, an interstate water, or the territorial seas. The agencies also request comment and information below on how the science could support other approaches that could provide greater regulatory certainty regarding the jurisdictional status of “other waters”, including expanding the list of waters jurisdictional by rule, expanding the list of waters not jurisdictional by rule, and narrowing the “other waters” subject to a case-specific analysis, including eliminating the case-specific analysis where the science does not support it. The agencies will review the administrative record, including comments received, the scientific literature, and the final Report, in determining how to address “other waters” in the final rule.

Justice Kennedy explained the *SWANCC* decision in his concurring opinion in *Rapanos*: “In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held, under the circumstances presented there, 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.” 547 U.S. at 759. The agencies interpret the significant nexus standard to apply to the “other waters” portion of the existing regulation since the Court in *SWANCC* was considering the validity of the Corps’ assertion of jurisdiction over ponds and mudflats under (a)(3) of the Corps’ regulations (33 CFR 328.3).

To comport with the *SWANCC* and *Rapanos* decisions, the agencies propose to delete the requirement that

an “other water” be one the use, degradation or destruction of which could affect interstate or foreign commerce and to replace it with the requirement that the “other water” meet Justice Kennedy’s significant nexus standard. The current regulations assert jurisdiction more broadly than what is proposed today. With this proposed regulation, the agencies would limit jurisdiction over “other waters” to only those that are determined on a case-specific basis to have a significant nexus to an (a)(1) through (a)(3) water.

For purposes of assessing whether a particular water is a “water of the United States” because it, alone or in combination with other similarly situated waters, has a significant nexus to an (a)(1) through (a)(3) water, the agencies are proposing to define “significant nexus” plus each of the key elements used in the definition of “significant nexus.”

#### i. In the Region

The agencies propose to interpret the phrase “in the region” to mean the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry. That concept is reflected in the definition of “significant nexus” at (c)(7). Since Justice Kennedy did not define the “region,” the agencies determined that because the movement of water from watershed drainage basins to river networks and lakes shapes the development and function of these systems in a way that is critical to their long term health, the watershed is a reasonable and technically appropriate extent on which to identify waters that together may have an effect on the chemical, physical, or biological integrity of a particular (a)(1), through (a)(3) water. See Appendix A, Scientific Evidence (Part I, Background; Part II, 4, iii, A).

The agencies choose to use the single point of entry watershed as the appropriate scale for the region. A single point of entry watershed is the drainage basin within whose boundaries all precipitation ultimately flows to the nearest single traditional navigable water, interstate water, or the territorial sea. There will likely be other traditional navigable waters, interstate waters, and ultimately the territorial seas further downstream from the “nearest” such water, and these further downstream waters would likely have larger watersheds, but the agencies determined that a reasonable interpretation of “in the region” is the watershed that drains to the nearest (i.e. first downstream) such water. Any nexus between other waters and an

(a)(1) through (a)(3) water will be strongest with this nearest such water, and its drainage area is likely to be of a size commonly understood as a “region.”

The agencies generally use available mapping tools that are based on the National Hydrography Dataset (NHD) to demarcate boundaries of the single point of entry watershed. This point of entry approach identifies a group of waters that flow to a single location and represents the scientifically appropriate sized area for conducting a significant nexus evaluation in most cases. In the arid West, the agencies recognize there may be situations where the single point of entry watershed is very large, and it may be resource intensive to demarcate watershed boundaries and all relevant waters in the watershed. Under those circumstances, for practical administrative purposes the agencies could use the NHD mapping tool to demarcate catchments surrounding the water to be evaluated that, in combination, are roughly the size of the typical nearby 10-digit hydrologic unit code (HUC-10) watershed. This combination of catchments would be used for conducting a significant nexus evaluation. Such an approach can help resolve some practical concerns about using available mapping tools on very large single point of entry watersheds in the arid West.

The watershed includes all lands, streams, wetlands, lakes, and other waters within its boundaries. Only waters within the watershed that meet standards set out in (a)(1) through (a)(7) of the proposed rule would be considered “waters of the United States.” In light of the scientific literature, the longstanding approach of the agencies to implementation of the CWA, and the statutory goals underpinning Justice Kennedy’s significant nexus framework, the watershed draining to the nearest (a)(1) through (a)(3) water is the appropriate “region” for a significant nexus analysis.

#### ii. Similarly Situated

Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water “alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” 547 U.S. at 780. The proposed rule adopts the concept of the “alone or in combination with similarly situated waters” test.

The proposed regulation in the definition of “significant nexus” at (c)(7) clarifies that other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a ‘water of the United States’ so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3). This combination of functionality and proximity to each other or to a “water of the United States” meets the standard provided by Justice Kennedy. Examining both functionality and proximity also limits the “other waters” that can be aggregated for purposes of determining jurisdiction.

It is appropriate to analyze the chemical, physical, or biological effects “other waters” perform individually or together with all similarly situated “other waters” in the region under Justice Kennedy’s standard. Today, the agencies are proposing to identify factors to apply in the determination of when “other waters” should be considered either individually or as a single landscape unit for purposes of a significant nexus analysis. The agencies propose that “similarly situated” requires an evaluation of either a single water or group of waters (i.e., a single landscape unit) in the region that can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas.

In addition, the agencies propose that “other waters” located close to a jurisdictional water are more likely to influence such waters and therefore, to affect the integrity of downstream (a)(1) through (a)(3) waters. These “other waters,” which do not meet the proposed definition of adjacent waters, may be assessed together when determining on a case-specific basis whether a significant nexus exists, because of their similar functions and similar location in the landscape.

Similarly situated waters may be identified as sufficiently close together for purposes of this paragraph of the proposed regulation when they are within a contiguous area of land with relatively homogeneous soils, vegetation and landform (e.g., plain, mountain, valley, etc.). As a general matter, it would be inappropriate, for example, to consider “other waters” as “similarly situated” if these “other waters” are located in different landforms, have different elevation profiles, or have

different soil and vegetation characteristics, unless the “other waters” perform similar functions and are located sufficiently close to a “water of the United States” to allow them to consistently and collectively function together to affect an (a)(1) through (a)(3) water. In determining whether other waters are sufficiently close to each other or to a water of the United States, the agencies would also consider hydrologic connectivity to each other or a jurisdictional water.

In determining whether groups of other waters perform “similar functions” the agencies would also consider functions such as habitat, water storage, sediment retention, and pollution sequestration. These and other relevant considerations would be used by the agencies to document the hydrologic, geomorphic and ecological characteristics and circumstances of the waters. Examples include: documentation of chemical, physical, and biological interactions of the similarly situated “other waters;” aerial photography; topographical or terrain maps and information; other available geographic information systems (GIS) data; National Wetlands Inventory Maps; and state and local information. The evaluation would use any available site information and pertinent field observations where available, relevant scientific studies or data, or other relevant jurisdictional determinations that have been completed in the region.

Under the proposed rule, the agencies would assess the combined effects of similarly situated “other waters” in the region on the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters in conducting a significant nexus analysis. The factors identified above would be used by the agencies in determining “other waters” in the region that are similarly situated and should, therefore, be considered together in conducting a significant nexus analysis. The agencies recognize that consideration of these factors will often limit aggregation of “other waters” for purposes of assessing significant nexus or will require that “other waters” be considered individually with no aggregation.

### iii. Significant Nexus

The agencies propose to define the term “significant nexus” consistent with language in *SWANCC* and *Rapanos*. The proposed definition recognizes that not all waters have this requisite connection to traditional navigable waters, interstate waters, or the territorial seas sufficient to be determined jurisdictional. Justice Kennedy was clear that waters with a significant

nexus must significantly affect the chemical, physical, or biological integrity of a downstream navigable water and that the requisite nexus must be more than “speculative or insubstantial,” *Rapanos*, at 780, and the agencies propose to define significant nexus in precisely those terms.

It is important to note that in *Rapanos*, Justice Kennedy did not conclude that the wetlands adjacent to tributaries in the cases before the Court were not “waters of the United States.” Rather, Justice Kennedy concluded that the proper inquiry to determine their jurisdictional status—whether or not the wetlands had a “significant nexus”—had not been made by the Corps or the courts below. Justice Kennedy stated that in both the consolidated cases before the Court the record contained the types of evidence relevant to the determination of a significant nexus according to the principles he identified. Justice Kennedy stated “[m]uch the same evidence should permit the establishment of a significant nexus with navigable-in-fact waters, particularly if supplemented by further evidence about the significance of the tributaries to which the wetlands are connected.” *Id.* Thus, Justice Kennedy concluded that “the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps’ assertion of jurisdiction is valid.” See Appendix B, Legal Analysis.

The agencies will determine whether the water they are evaluating, in combination with other similarly situated waters in the region, has a significant nexus to the nearest traditional navigable water, interstate water or the territorial seas. Functions of waters that might demonstrate a significant nexus include sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, export of organic matter, export of food resources, and provision of aquatic habitat. A hydrologic connection is not necessary to establish a significant nexus, because, as Justice Kennedy stated, in some cases the lack of a hydrologic connection would be a sign of the water’s function in relationship to the traditional navigable water, interstate water or the territorial seas. These functional relationships include retention of flood waters or pollutants that would otherwise flow downstream to the traditional navigable water, interstate water or the territorial seas. See 547 U.S. at 775 (citations omitted) (J. Kennedy) (“it may be the absence of an interchange of waters prior to the dredge and fill activity that

makes protection of the wetlands critical to the statutory scheme"). For example, a report that reviewed the results of multiple scientific studies concluded that depressional wetlands lacking a surface outlet functioned together to significantly reduce or attenuate flooding. Report at 5–26 (citing A. Bullock and M. Acreman, "The Role of Wetlands in the Hydrological Cycle," *Hydrology and Earth System Sciences* 7:358–389 (2003)).

When evaluating an "other water" individually or cumulatively for the presence of a significant nexus to an (a)(1) through (a)(3) water, there are a variety of factors that can be considered that will influence the chemical, physical, or biological connections the "other water" has with the downstream (a)(1) through (a)(3) water. The likelihood of a significant connection is greater with increasing size and decreasing distance from the identified (a)(1) through (a)(3) water, as well as with increased density of the "other waters" for "other waters" that can be considered in combination with similarly situated waters.

Evidence of chemical connectivity and the effect on waters can be found by identifying: Whether the properties of the water in question are similar or dissimilar to an identified (a)(1) through (a)(3) water; signs of retention, release, or transformation of nutrients or pollutants; and the effect of landscape position on the strength of the connection to the nearest "water of the United States," and through it to an (a)(1) through (a)(3) water. In addition, relevant factors influencing chemical connectivity include hydrologic connectivity (see physical factors, below), surrounding land use and land cover, the landscape setting, and deposition of chemical constituents (e.g. acidic deposition).

Evidence of physical connectivity and the effect on (a)(1) through (a)(3) waters can be found by identifying evidence of physical connections, such as flood water or sediment retention (flood prevention). Presence of indicators of hydrologic connections between the other water and jurisdictional water are also indicators of a physical connection. Factors influencing physical connectivity include rain intensity, duration of rain events or wet season, soil permeability, and distance of hydrologic connection between the "other water" and the (a)(1) through (a)(3) water, depth from surface to water table, and any preferential flowpaths.

Evidence of biological connectivity and the effect on waters can be found by identifying: resident aquatic or semi-

aquatic species present in the "other water" and the tributary system (e.g., amphibians, aquatic and semi-aquatic reptiles, aquatic birds); whether those species show life-cycle dependency on the identified aquatic resources (foraging, feeding, nesting, breeding, spawning, use as a nursery area, etc.); and whether there is reason to expect presence or dispersal around the "other water," and if so whether such dispersal extends to the tributary system or beyond or from the tributary system to the "other water." Factors influencing biological connectivity include species' life history traits, species' behavioral traits, dispersal range, population size, timing of dispersal, distance between "other water" and an (a)(1) through (a)(3) water, the presence of habitat corridors or barriers, and the number, area, and spatial distribution of habitats. Non-aquatic species or species such as non-resident migratory birds that are not demonstrating a life cycle dependency on the identified aquatic resources are not evidence of biological connectivity for purposes of this rule.

When making a jurisdictional determination for an "other water," the administrative record will include available information supporting the determination. In addition to location and other descriptive information regarding the water at issue, the record will include a clear explanation of the rationale for the jurisdictional conclusion and a description of the information used to determine whether the "other water" has a significant nexus. Information relevant to a finding that an "other water" alone or in combination with similarly situated "other waters" in the region can come from many sources. Such information need not always be specific to the water whose jurisdictional status is being evaluated. Regional and national studies of the same type of water or similarly situated waters can help to inform a significant nexus analysis as long as they are applicable to the water being evaluated. Information derived from field observation is not required in cases where a "desktop" analysis can provide sufficient information to make the requisite findings. However, for more complex or difficult jurisdictional determinations, it may be helpful to supplement such information with field observation.

The agencies solicit comment regarding this approach to "other waters," recognizing that a case-specific analysis of significant nexus is resource-intensive for the regulating agencies and the regulated community alike. In addition, the agencies solicit comment on additional scientific research and

data that might further inform decisions about "other waters." In particular the agencies solicit information about whether current scientific research and data regarding particular types of waters are sufficient to support the inclusion of subcategories of types of "other waters," either alone or in combination with similarly situated waters, that can appropriately be identified as always lacking or always having a significant nexus.

#### iv. Additional Request for Public Comment on "Other Waters"

As stated above, significant goals of the agencies in developing this proposed rule are to provide greater clarity, certainty, and predictability to the public as to what waters are and are not subject to the jurisdiction of the CWA. The agencies will achieve these goals consistent with the CWA, as interpreted by the Supreme Court, and as supported by the best available science. The agencies also will fulfill their responsibility to the CWA's objectives and policies to protect water quality, public health, and the environment.

The agencies acknowledge that there may be more than one way to determine which waters are jurisdictional as "other waters." This proposal is for a case-specific analysis of whether "other waters," including wetlands, alone, or in combination with other similarly situated waters located in the same region, have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. The agencies make this proposal based on an analysis of the current state of the science available to them. In this proposal, the agencies continue to solicit additional science (peer-reviewed whenever possible) that could lead to greater clarity, certainty, and predictability of which waters are and are not within the jurisdiction of the CWA.

To best meet their goals and responsibilities, the agencies solicit comment and information on the state of the science, and its relation to the CWA and the caselaw, to determine if there are opportunities to provide greater clarity, certainty, and predictability for establishing jurisdiction over "other waters." This includes the possibility of determining that additional waters should be jurisdictional by rule such as in paragraphs (a)(1) through (a)(6), and the possibility that additional waters should be excluded from jurisdiction by rule such as in section (b). The agencies' decision on how best to address jurisdiction over "other waters" in the

final rule will be informed by the final version of the Report and other available scientific information.

The agencies request public comment on whether these alternative approaches present options for determining the jurisdictional status of "other waters" that could rely less, or not at all, on case-specific analysis of whether waters are similarly situated for conducting a significant nexus analysis. Possible alternative options to the case-specific determination in the "other waters" proposal are described below. The agencies might adopt any combination of today's "other waters" proposal and the alternative options for the final rule, after considering public comment and the evolving scientific literature on connectivity of waters.

The agencies solicit comment on how the agencies propose to find "other waters" to be similarly situated in this proposed rule, whether other methods of identifying similarly situated "other waters" would be reasonable, and whether no "other waters" should be determined to be similarly situated. In each instance, the comments should address how the actions of the agencies would be consistent with the science, including any science not currently before the agencies, the CWA, and the caselaw.

The agencies considered multiple approaches and options for how best to address whether "other waters" were jurisdictional under the CWA. In addition to the case-specific analysis in the proposal, the agencies seek comment on the following alternatives:

1. Determine by rule that "other waters" are similarly situated in certain areas of the country.

The case-specific analysis in the proposed rule approaches the question of what "other waters" are similarly situated for purposes of aggregation in the same manner throughout the U.S. The agencies could determine by rule that "other waters" are similarly situated in only certain areas of the country, and not in other areas. Under this option, the agencies would identify ecological regions (ecoregions) which contain "other waters" that are "similarly situated" as provided in the proposed rule. Where waters are determined to be similarly situated, those waters are aggregated for evaluation of whether they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. The agencies expect that determining all "other waters" within an ecoregion to be similarly situated would result in these "other waters" being determined to have a significant nexus and being found jurisdictional.

Waters not located in these identified ecoregions or other specified areas would be determined to not be similarly situated and their effects would not be aggregated for purposes of a significant nexus determination. The result of not finding waters to be similarly situated would most likely be a finding of no significant nexus and no jurisdiction. The agencies particularly seek comment on whether the science supports differing approaches with respect to which "other waters" are similarly situated in certain areas of the U.S based on distinguishing factors in those areas.

The agencies also request comment on factors that could lead "other waters" to be aggregated in some areas but analyzed individually in other areas for purposes of informing a case-specific significant nexus analysis. The agencies request comment on whether some resource types are more or less likely to be similarly situated than others, and if there are ways to identify regions within which aggregation of "other waters" would be routinely applied rather than a case-specific determination. The agencies also request comment about whether "other waters" that are not found in identifiable mapped regions should be analyzed individually on a case-specific basis for a significant nexus, aggregated in some other way for a significant nexus analysis, or categorically excluded from jurisdiction.

An ecoregion is an area within the United States that includes generally similar ecosystems and that has similar types, qualities, and quantities of environmental resources. (J.M. Omernik, "Perspectives on the Nature and Definition of Ecological Regions," *Environmental Management* 34(Supplement 1):S27-S38 (2004)). Ecoregions cover relatively large areas of land or water, and contain characteristic, geographically distinct assemblages of natural communities and species. The biodiversity of flora, fauna and ecosystems that characterize an ecoregion tends to be distinct from that of other ecoregions. (*Id.*)

Level III ecoregions are the second most detailed level of ecoregions nationally, with 105 Level III ecoregions in the conterminous United States, and have been refined over the years in several state-level projects conducted in collaboration with the EPA and other Federal and State agencies. U.S. Environmental Protection Agency, "Level III Ecoregions of the Continental United States," map scale 1:7,500,000 (Corvallis, OR: U.S. EPA—National Health and Environmental Effects Research Laboratory, 2013), available at [http://www.epa.gov/wed/pages/ecoregions/level\\_iii\\_iv.htm](http://www.epa.gov/wed/pages/ecoregions/level_iii_iv.htm). For this

reason, the agencies consider Level III ecoregions to be the most appropriate level for analysis. The "other waters" in these ecoregions are within a contiguous area of land with relatively homogeneous soils, vegetation and landform (e.g., plain, mountain, valley, etc.), and generally provide similar functions to the downstream traditional navigable waters, interstate waters, or the territorial seas. A possible list of Level III ecoregions where waters are similarly situated and aggregation could be used include:

1. Coast Range
4. Cascades
6. Central California Foothills and Coastal Mountains
7. Central California Valley
8. Southern California Mountains
9. Eastern Cascades Slopes and Foothills
10. Columbia Plateau
27. Central Great Plains
34. Western Gulf Coastal Plain
42. Northwestern Glaciated Plains
44. Nebraska Sand Hills
46. Northern Glaciated Plains
47. Western Corn Belt Plains
48. Lake Agassiz Plain
50. Northern Lakes and Forests
51. North Central Hardwood Forests
59. Northeastern Coastal Zone
63. Middle Atlantic Coastal Plain
65. Southeastern Plains
75. Southern Coastal Plain
78. Klamath Mountains/California High North Coast Range
81. Sonoran Basin and Range
83. Eastern Great Lakes Lowlands
84. Atlantic Coastal Pine Barrens
85. Southern California/Northern Baja Coast

See Map A in docket.

The agencies would consider the "other waters" in a single point of entry watershed in these identified ecoregions as similarly situated for purposes of aggregation for a significant nexus analysis. The agencies expect that this approach would lead to all similarly situated other waters within single point of entry watersheds within an ecoregion being found jurisdictional through case-specific analysis of significant nexus. Alternately, the agencies could determine that the similarly situated waters within each ecoregion have a significant nexus and are jurisdictional by rule and therefore do not require a case-specific significant nexus analysis.

The agencies request comment on the list of ecoregions above and whether this list is appropriate, and whether there are other ecoregions or distinct areas that should be included or excluded from this list. This list does not include regions in Alaska or Hawaii and the agencies request comment on

appropriate regions to use to analyze "other waters" in those states. The agencies also request comment on whether using Level III ecoregions is appropriate or whether a finer gradation of ecoregions would be more appropriate.

The factors the agencies used in developing the list above are:

a. Density of "other waters" such that there can be periodic surface hydrologic connections among the waters, for example in West Coast vernal pools.

b. Soil permeability and surface or shallow subsurface flow such that the "other waters" can be considered hydrologically connected, such as many Texas coastal prairie wetlands.

c. Water chemistry which indicates that the "other waters" are part of the same system and influenced by the same processes.

d. Physical capacity of "other waters" to provide flood and sediment retention; this is a case where several small wetlands together may have a different effect than a single large wetland providing the same function, for example prairie potholes in the Missouri Coteau.

e. Co-location of waters to each other or similarly to the tributary system such that their cumulative and additive effects on pollutant removal through parallel, serial, or sequential processing are apparent, such as the role of pocosins in maintaining water quality in estuaries.

f. "Other waters" that are sufficiently near each other or the tributary system and thus function as an integrated habitat that can support the life cycle of a species or more broadly provide habitat to a large number of a single species.

The agencies request comment on the factors above and whether this list of factors is appropriate, and whether there are other factors that should be included or excluded from this list. Comments should address the science that supports each comment.

In addition to ecoregions, another method of mapping boundaries where waters could be considered to be similarly situated for a significant nexus analysis would be to rely on hydrologic-landscape regions. Hydrologic-landscape regions are groups of watersheds that are clustered together on the basis of similarities in land-surface form, geologic texture, and climate characteristics. (D.M. Wolock, *et al.* "Delineation and Evaluation of Hydrologic-Landscape Regions in the United States Using Geographic Information System Tools and Multivariate Statistical Analyses," *Environmental Management*

34(Supplement 1):S71–S88 (2004)).

Hydrologic-landscape regions are based on a concept that reflects fundamental hydrologic processes that are expected to affect water quality and other environmental characteristics.

The agencies seek comment on the technical bases for using ecoregions and hydrologic-landscape regions under this option. Commenters may also address whether some other method or combination of methods (certain ecoregions and hydrologic-landscape regions, for example) of mapping geographic boundaries is better supported by the science. Comments should also address whether and how this option is consistent with the science and the caselaw.

If the agencies choose to determine by rule that "other waters" in certain ecoregions or other geographic boundaries are similarly situated, the agencies could also determine that waters not located in identified ecoregions or otherwise specifically identified areas are not similarly situated for purposes of establishing a significant nexus and jurisdiction. The agencies also request comment on whether "other waters" that are not found in identifiable mapped ecoregions or other areas should be analyzed individually on a case-specific basis for determining a significant nexus, and on whether or not case-specific analysis of whether there are similarly situated "other waters" in the area is advisable.

2. Determine by rule that certain additional subcategories of waters would be jurisdictional rather than addressed with a case-specific analysis, and that other subcategories of waters would be non-jurisdictional.

The agencies could choose to determine that there is science available to determine by rule that certain additional subcategories of "other waters" are similarly situated and have a significant nexus and are jurisdictional by rule rather than addressed with a case-specific significant nexus analysis under paragraph (a)(7). Such an approach would lead to certain subcategories of "other waters" being determined jurisdictional in the same way that waters under paragraphs (a)(1) through (a)(6) are jurisdictional without a case-specific significant nexus analysis. Under this option the agencies could determine that waters such as prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, western vernal pools, and perhaps other categories of waters, either alone or in combination with other waters of the same type in a single point of entry watershed, have a

significant nexus and are jurisdictional by rule. *See* Appendix A, Part II, iii.C(1). These waters would not require a case-specific significant nexus analysis to determine jurisdiction.

In addition, the agencies could determine that other subcategories of waters are not jurisdictional and lack a significant nexus to an (a)(1) through (a)(3) water. Under this option the agencies could conclude that "other waters" such as playa lakes in the Great Plains, even in combination with other playa lakes in a single point of entry watershed, lack a significant nexus and therefore are not jurisdictional. *See* Appendix A, Part II, iii.C(1).

Under this approach, where a playa lake, or other excluded category of water, would be within a category established by paragraphs (a)(1) through (a)(6) of the proposed rule (*e.g.*, the playa is an interstate water or the playa is adjacent to an (a)(1) through (a)(5) water), the playas would be jurisdictional. (*See* R.W. Tiner, "Geographically Isolated Wetlands of the United States," *Wetlands* 23(3):494–516 (2003); M.G. Forbes, *et al.*, "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," *Wetlands* 32(4):705–715 (2012)).

The agencies seek comment on how they should categorize the remaining "other waters." The agencies seek comment on whether these remaining "other waters" should be non-jurisdictional because they would lack a significant nexus to a traditional navigable water, interstate water, or the territorial seas.

There is substantial value to the regulated public and all other stakeholders in providing increased certainty regarding which "other waters" are jurisdictional and which are not. By expanding the categories of waters determined jurisdictional and expanding the categories of waters not categorized as jurisdictional, the agencies can better address the clarity, certainty, and predictability goals of this rule. However, the agencies acknowledge that the science may not be sufficient today to conclusively determine whether all categories of other waters significantly affect the chemical, physical and biological integrity of (a)(1) through (a)(3) waters. The agencies seek comment on the science used in support of the proposed rule, plus any additional science they should consider when determining jurisdiction. The agencies also seek comment on how inconclusiveness of the science relates to the use of case-specific determinations. As the science develops, the agencies could determine

that additional categories of "other waters" are similarly situated and have a significant nexus and are jurisdictional by rule, or that as a class they do not have such a significant nexus and might not be jurisdictional.

If waters are categorized as non-jurisdictional because of a lack of science available today, the agencies request comment on how to best accommodate evolving science in the future that could indicate a significant nexus for these "other waters." Specifically, the agencies request comment as to whether this should be done through subsequent rulemaking, or through some other approach, such as through a process established in this rulemaking.

The agencies also seek comment on how the science supports retaining the case-specific determination for the remaining "other waters" that are neither specifically included nor excluded from jurisdiction. Retaining the case-specific analysis for these other waters would not enhance clarity of jurisdiction for these other waters, but it would retain the ability for a jurisdictional determination consistent with the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the nation's waters. In the alternative, the agencies seek comment on whether it would be appropriate to categorize remaining "other waters" as not jurisdictional. The agencies specifically seek comment on how these "other waters" should be considered.

### 3. Additional "other waters" approaches.

The agencies request comment on additional "other waters" approaches considered, but not proposed by the agencies.

The agencies could determine that no "other waters" are similarly situated, and all significant nexus analyses would be made on a case-specific basis for each individual "other water." The agencies expect that this likely would result in few if any other waters being found jurisdictional. The agencies recognize that if they determine there are no similarly situated "other waters," there are issues about consistency with existing scientific information and studies regarding the functional relationship of "other waters" of the same type, and their contribution to the chemical, physical, or biological integrity of streams, rivers, lakes, and similar waters. There are also questions of how finding no "other waters" to be similarly situated reconciles with the portion of Justice Kennedy's opinion discussing "similarly situated" waters in the region that "significantly affect"

the chemical, physical, or biological integrity of waters more traditionally understood as navigable. While the agencies do not propose to determine that no "other waters" are similarly situated and aggregated, the agencies specifically seek comment on whether and how choosing to find no "other waters" similarly situated would be consistent with the science, the CWA, and the caselaw.

The agencies also considered and seek comment on all "other waters" in a single point of entry watershed being evaluated as a single landscape unit with regard to their effect on traditional navigable waters, interstate waters, and the territorial seas.

The agencies seek comment that would inform a decision that these "other waters" in a single point of entry watershed perform similar functions and are located sufficiently close together or to a paragraph (a)(1) through (a)(5) water so that they can be aggregated and evaluated as a single landscape unit with regard to their effects on the nearest (a)(1) through (a)(3) water. Generally, the agencies anticipate that if the other waters in a single point of entry watershed are aggregated as a single unit, these waters would be determined to have a significant nexus and be jurisdictional.

The agencies recognize that if they choose to aggregate all other waters in a single point of entry watershed, there likely is insufficient existing scientific information to support the determination that all "other waters" in watersheds across the nation are similarly situated as provided in this rule and described in the caselaw. There are also questions of how determining "other waters" in a single point of entry watershed to be similarly situated reconciles with the portion of Justice Kennedy's opinion discussing "similarly situated" waters in the region that "significantly affect" the chemical, physical, or biological integrity of waters more traditionally understood as navigable. While the agencies do not propose to determine that "other waters" in a single point of entry watershed are similarly situated and aggregated, the agencies seek comment on whether and how choosing to find such "other waters" similarly situated would be consistent with the science, the CWA, and the caselaw.

The agencies' determination will be informed by the final version of the Report and other available scientific information.

### I. Waters That Are Not "Waters of the United States"

The agencies' longstanding regulations exclude waste treatment systems designed to meet the requirements of the CWA and prior converted cropland from the definition of "waters of the United States." The agencies propose no changes to these exclusions and therefore they would continue as a part of this rulemaking. The agencies also propose to codify for the first time longstanding practices that have generally considered certain features and types of waters not to be "waters of the United States." Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. Under today's proposal, the waters identified in section (b) as excluded would not be "waters of the United States," even if they would otherwise fall within one of the categories in (a)(1) through (a)(7).

The agencies propose ministerial actions with respect to the placement of the two existing exemptions for waste treatment systems and prior converted cropland. They will be in proposed new section (b). For the waste treatment systems exclusion, the agencies propose to delete a cross-reference in the current language to an EPA regulation that is no longer in the Code of Federal Regulations. The parenthetical to be deleted states: "(other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition)." The agencies do not consider this deletion to be a substantive change to the waste treatment systems exclusion or how it is applied. In fact, the agencies do not propose to make conforming changes to ensure that each of the existing definitions of the "waters of the United States" for the various CWA programs have the exact same language with respect to the waste treatment system exclusion. The regulations implementing the various CWA programs were promulgated and amended at different times and therefore there are some differences in language. For example, compare EPA's regulations for the section 402 program, 40 CFR 122.2 with the Corps' regulations for the 404 program, 33 CFR 328.3. The agencies do not propose to address the substance of the waste treatment system exclusion and thus will leave each regulation as is with the exception of deleting the cross-reference.

In addition, this regulation does not address or change in any way the many

statutory exemptions from CWA permitting requirements. The proposed rule does not affect any of the exemptions provided by CWA section 404(f), including those for normal farming, silviculture, and ranching activities. CWA section 404(f); 40 CFR 232.3; 33 CFR 323.4. The proposed rule also does not address or change the statutory and regulatory exemptions from NPDES permitting requirements such as those for agricultural stormwater discharges, return flows from irrigated agriculture, or the status of water transfers. CWA section 402(l)(1) (exempting discharges composed entirely of return flows from irrigated agriculture from section 402 permit requirements); CWA section 502(14) (excluding agricultural stormwater discharges and return flows from irrigated agriculture from the term point source.); 40 CFR 122.3(f) (excluding return flows from irrigated agriculture from the NPDES program); 40 CFR 122.2 (excluding return flows from irrigated agriculture or agricultural storm water runoff from the term point source.).

Finally, in new paragraphs (b)(3) through (5), the agencies propose, for the first time by rule, to exclude some waters and features that the agencies have by longstanding practice generally considered not to be "waters of the United States." Specifically, the agencies propose that the following are not "waters of the United States" notwithstanding whether they would otherwise be jurisdictional under section (a):

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or impoundment.
- The following features:
  - Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
  - Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
  - Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
  - Water-filled depressions created incidental to construction activity;

- Groundwater, including groundwater drained through subsurface drainage systems; and
- Gullies and rills and non-wetland swales.

Most of these features and waters have been identified by the agencies as generally not "waters of the United States" in previous preambles or guidance documents. The agencies' have always preserved the authority to determine in a particular case that any of these waters are a "water of the United States." One of the agencies' goals in this proposed rule is to increase clarity and certainty about the scope of "waters of the United States." To that end, the agencies propose not simply that these features and waters are "generally" not "waters of the United States," but that they are expressly not "waters of the United States" by rule. The agencies would not retain the authority to determine that any of these waters was a "water of the United States" because it would otherwise be jurisdictional under section (a). For example, the agencies could not find that a water had a significant nexus and was an "other waters" under paragraph (a)(7), or that it was an interstate water under paragraph (a)(2). These waters would not be jurisdictional by rule.

In determining that these features and waters are not "waters of the United States," the agencies are by the decisions of the Supreme Court. In *Riverside Bayview*, the Supreme Court deferred to the agencies' regulations and noted the difficulty of drawing lines identifying where waters end. The plurality opinion in *Rapanos* also noted that there were certain features that were not primarily the focus of the CWA. See 547 U.S. at 734. In this section of the proposed rule, the agencies are drawing lines and concluding that certain waters and features are not subject to the jurisdiction of the Clean Water Act.

A similar list of waters and features not generally "waters of the United States" was provided by the Corps in a 1986 preamble to the existing rule defining "waters of the United States" (51 FR 41206, 41217, November 13, 1986) and by the EPA in a 1988 preamble (53 FR 20764, June 6, 1988). In today's proposed rule, the agencies have clarified and added to the list in order to provide a full description of the waters that will not be "waters of the United States" by rule. The agencies have never interpreted "waters of the United States" to include groundwater and the proposed rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems.

In clarifying the list of waters not subject to CWA jurisdiction, the agencies did not include "puddles" from the lists of waters generally not considered jurisdictional in previous preambles or guidance documents. This is not because puddles are considered jurisdictional, it is because "puddles" is not a sufficiently precise hydrologic term or a hydrologic feature capable of being easily understood. Because of the lack of common understanding and precision inherent in the term "puddles," the agencies determined that adding puddles would be contrary to the agencies' stated goals of increased clarity, predictability, and certainty. In addition, one commonly understood meaning for the term "puddle" is a relatively small, temporary pool of water that forms on pavement or uplands immediately after a rainstorm, snow melt, or similar event. Such a puddle cannot reasonably be considered a water body or aquatic feature at all, because usually it exists for only a brief period of time before the water in the puddle evaporates or sinks into the ground. Puddles of this sort obviously are not, and have never been thought to be, waters of the United States subject to CWA jurisdiction. Listing puddles also could have created the misapprehension that anything larger than a puddle was jurisdictional. That is not the agencies' intent.

Gullies are relatively deep channels that are ordinarily formed on valley sides and floors where no channel previously existed. They are commonly found in areas with low-density vegetative cover or with soils that are highly erodible. See, e.g., N.C. Brady and R.R. Weil, *The Nature and Properties of Soils*, 13th Edition (Upper Saddle River, NJ: Prentice Hall, 2002). Rills are formed by overland water flows eroding the soil surface during rain storms. See, e.g., L.B. Leopold, *A View of the River* (Cambridge: Harvard University Press, 1994). Rills are less permanent on the landscape than streams and typically lack an OHWM, whereas gullies are younger than streams in geologic age and also typically lack an OHWM; time has shaped streams into geographic features distinct from gullies and rills. See, e.g., American Society of Civil Engineers, Task Committee on Hydrology Handbook, *Hydrology Handbook* (ASCE Publications, 1996).

The two main processes that result in the formation of gullies are downcutting and headcutting, which are forms of longitudinal (incising) erosion. These actions ordinarily result in erosional cuts that are often deeper than they are wide, with very steep banks, often small

beds, and typically only carry water during precipitation events. The principal erosional processes that modify streams are also downcutting and headcutting. In streams, however, lateral erosion is also very important. The result is that streams, except on steep slopes or where soils are highly erodible, are characterized by the presence of bed and banks and an OHWM as compared to typical erosional features that are more deeply incised. It should be noted that some ephemeral streams are called "gullies" or the like when they are not "gullies" in the technical sense; such streams where they are tributaries under the proposed definition would be considered "waters of the United States," regardless of the name they are given locally. The agencies request comment on how they could provide greater clarity on how to distinguish between erosional features such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional.

Non-wetland natural and man-made swales would not be "waters of the United States" under this proposal. In certain circumstances, however, swales include areas that meet the regulatory definition of "wetlands." Swales generally are considered wetlands when they meet the applicable criteria in the *Corps of Engineers Wetland Delineation Manual* and the appropriate regional supplement to that *Wetland Delineation Manual*. Wetland swales would be evaluated as adjacent waters under proposed (a)(6) or as "other waters" under proposed (a)(7) depending upon whether they meet the proposed definition of adjacent. Swales are distinct from streams in that they are non-channelized, shallow trough-like depressions that carry water mainly during rainstorms or snowmelt. Report at A-19. Swales typically lack the OHWM that is characteristic of jurisdictional streams. The agencies request comment on how they could provide greater clarity on how to distinguish swales, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional.

Finally, under paragraphs (b)(3) and (b)(4), the agencies propose to clearly exempt from the definition of "waters of the United States" two types of ditches: (1) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, and (2) ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4).

The agencies have long distinguished between ditches that are "waters of the United States" and ditches that are not "waters of the United States." In a 1986 Corps preamble and a 1988 EPA preamble, the agencies each stated that they generally do not consider non-tidal drainage and irrigation ditches excavated on dry land to be "waters of the United States." 51 FR 41217, November 13, 1986, 53 FR 20764, June 6, 1988. More recently, the agencies have stated that they generally would not assert jurisdiction over "Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water." "Clean Water Act Jurisdiction Following the Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*" (Dec. 2, 2008) at 1, 12 (2008 *Rapanos* guidance).

The agencies recognize that there have been inconsistencies in practice implementing agency policy with respect to ditches and this proposed rule is designed to improve clarity, predictability, and consistency. With this proposal, the agencies would no longer rely on "generally not" jurisdictional but would clearly establish that specific types of ditches are not "waters of the United States" by rule. Other ditches not excluded under paragraphs (b)(3) or (b)(4), if they meet the new proposed definition of "tributary" would continue to be "waters of the United States," as they have been under the longstanding implementation of the statute and regulations by the agencies.

The first type of ditch that is excluded needs to meet all three criteria: (1) It is excavated wholly in uplands; (2) it drains only uplands, and (3) it has less than perennial flow. Ditches that are excavated wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water). Members of the public should consider whether a wetland is jurisdictional before constructing a ditch that would drain the wetland and connect either directly or through other waters to an (a)(1) through (a)(3) water. The ditch must also contain less than perennial flow to be excluded under this proposed provision. Perennial flow means that the flow in the ditch occurs year-round under normal circumstances; therefore, excluded ditches must be dug only in uplands, drain only uplands, and have ephemeral or intermittent flow. As noted above, the 2008 *Rapanos* guidance stated that the agencies generally would not assert jurisdiction over "ditches (including roadside

ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water." The agencies recognize that the term "relatively permanent" does not align with more commonly understood technical descriptions of flow regime. The agencies therefore believe it is appropriate to clarify the extent of this exclusion using the flow regime terms that are familiar to the public and agency field personnel. The agencies request comment on this formulation of the ditch exclusion. The agencies specifically seek comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be covered by the exclusion in paragraph (b)(3). In particular, the agencies seek comment on whether the flow regime in such ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow as proposed.

The other type of ditch that would not be a "water of the United States" is a ditch that does not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). Essentially, ditches that do not contribute flow to the tributary system of a traditional navigable water, interstate water or territorial sea would not be "waters of the United States."

It is important to note, however, that even when not jurisdictional waters, these non-wetland swales, gullies, rills and specific types of ditches may still be a surface hydrologic connection for purposes of the proposed definition of adjacent under paragraph (a)(6) or for purposes of a significant nexus analysis under paragraph (a)(7). For example, a wetland may be a "water of the United States," meeting the proposed definition of "neighboring" because it is connected to such a tributary by a non-jurisdictional ditch that does not meet the definition of a "tributary." In addition, these geographic features may function as "point sources" under CWA section 502(14), such that discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA section 402).

#### IV. Related Acts of Congress, Executive Orders, and Agency Initiatives

##### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." Accordingly, the EPA and the Corps submitted this action to the Office of

Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, the EPA and the Corps of Engineers prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in "Economic Analysis of Proposed Revised Definition of Waters of the United States." A copy of the analysis is available in the docket for this action.

#### B. Paperwork Reduction Act

This action does not impose any information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's CWA section 402 program may be found at 40 CFR 9.1. (OMB Control No. 2040-0004, EPA ICR No. 0229.19). For the CWA section 404 regulatory program, the current OMB approval number for information requirements is maintained by the Corps of Engineers (OMB approval number 0710-0003). However, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR).

#### C. Regulatory Flexibility Act

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

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

is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities. See, e.g., *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001); *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); *Am. Trucking Ass'n v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999); *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985).

Under the RFA, the impact of concern is any significant adverse economic impact on small entities, because the primary purpose of the initial regulatory flexibility analysis is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603. The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. See 40 CFR 122.2 (defining "waters of the United States"). Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

The proposed rule contemplated here is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction will be informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos v. United States*, 547 U.S. 715 (2006), which are not factors readily informed by the RFA.

Nevertheless, the scope of the term "waters of the United States" is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, the EPA and the Corps determined to seek early and wide input from representatives of small entities while formulating a proposed definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. Such outreach,

although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, at a very preliminary stage, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have also prepared a report summarizing their small entity outreach to date, the results of this outreach, and how these results have informed the development of this proposed rule. This report is available in the docket for this proposed rule (cite).

#### D. Unfunded Mandates Reform Act

This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local, or tribal governments or the private sector. This proposed rule does not directly regulate or affect any entity and, therefore, is not subject to the requirements of sections 202 and 205 of UMRA.

The agencies determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. Moreover, the proposed definition of "waters of the United States" applies broadly to CWA programs and the subsequently affected entities, which are not uniquely applicable to small governments. Thus, this proposed rule is not subject to the requirements of section 203 of UMRA.

#### E. Executive Order 13132: Federalism

This proposed rule seeks to clarify the definition of the extent of CWA jurisdiction established by statute. State and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. Forty-six states and the Virgin Islands have been authorized to administer the NPDES program under section 402, while two states administer the section 404 program. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus, Executive Order 13132 (64 FR 43255,

August 10, 1999) does not apply to this action. Consistent with EPA and Corps policy to promote communications between the agencies and state and local governments, and in recognition of the vital role states play in implementation of the CWA, EPA voluntarily undertook federalism consultation for this effort and met the terms of E.O. 13132 and EPA guidance for implementing the Order. EPA held a series of meetings and outreach calls with state and local governments and their representatives soliciting input on a potential rule to define “waters of the United States.”

As part of this consultation, early in the rulemaking process, EPA held three in-person meetings and two phone calls in the fall and winter of 2011. Organizations involved include the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of States. In addition, the National Association of Clean Water Agencies (NACWA) and the Association of Clean Water Administrators (ACWA) were invited to participate. As part of the consultation 12 counties, 8 associations and various state agencies and offices from five states (Alaska, Wyoming, Kansas, Tennessee, and Texas) submitted written comments. In addition, EPA held numerous outreach calls with state and local government agencies seeking their technical input. More than 400 people from a variety of state and local agencies and associations, including the Western Governors’ Association, the Western States Water Council and the Association of State Wetland Managers participated in various calls and meetings.

The agencies engaged in voluntary federalism consultation on this rule and we will continue to work closely with the states with respect to development of a final rule. Additionally, EPA and the Corps are specifically soliciting comments on this proposed action from state and local officials. The agencies will include a detailed narrative of intergovernmental concerns raised during the course of the rule’s development and a description of the agencies’ efforts to address them with the final rule.

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

Subject to the Executive Order (E.O.) 13175 (65 FR 67249, November 9, 2000) Agencies may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the Agencies consult with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement. This action does not have tribal implications as specified in E.O. 13175.

In compliance with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), EPA consulted with tribal officials to gain an understanding of and, where appropriate, to address the tribal implications of the proposed rule. In the course of this consultation EPA coordinated with the Corps, and the Corps jointly participated in aspects of the consultation process. In the fall of 2011 EPA sent a Tribal Consultation Notification letter to all federally-recognized tribal leaders, via mail and email, inviting tribal officials to participate in outreach and consultation events and provide comments to EPA in coordination with the Corps. Close to 200 tribal representatives and more than 40 tribes participated in the consultation process, which included multiple webinars and national teleconferences and face-to-face meetings. In addition, EPA received written comments from 3 tribes during the consultation period. In the spirit of E.O. 13175, and consistent with EPA and Corps policy to promote communications between the agencies and tribal governments, the agencies specifically solicit additional comment on this proposed action from tribal officials.

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

This action is not subject to E.O. 13045 because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

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

This action is not a “significant energy action” as defined in Executive

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

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs Federal agencies to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs Federal agencies to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, the agencies are not considering the use of any voluntary consensus standards.

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

Executive Order (E.O.) 12898 (59 FR 7629, Feb. 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The agencies have determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations. The proposed rule defines the scope of waters protected under the CWA. The increased clarity regarding the definition of “waters of the United States” will be of benefit to all regulators, stakeholders, and interested parties. However, in the spirit of Executive Order 12898, we specifically request comment regarding potential environmental justice issues raised by the proposed rule, and will fully consider those comments when preparing the final rule.

### K. Environmental Documentation

The U.S. Army Corps of Engineers has prepared a draft environmental assessment in accordance with the National Environmental Policy Act (NEPA). The Corps has made a preliminary determination that the section 404 aspects of today's proposed rule do not constitute a major Federal action significantly affecting the quality of the human environment, and thus preparation of an Environmental Impact Statement (EIS) will not be required. The proposed rule will increase and make more efficient the protection of the aquatic environment. Additionally, the Corps complies with NEPA programmatically for general permits, and specifically for each and every standard individual permit application before making final permit decisions.

The implementation of the procedures prescribed in this proposed regulation would not authorize anyone (e.g., any landowner or permit applicant) to perform any work involving regulated activities in "waters of the United States" without first seeking and obtaining an appropriate CWA authorization, which concurrently documents compliance with all applicable environmental laws.

### Appendix A

#### Scientific Evidence

#### Overview of Scientific Literature on Aquatic Resource Connectivity and Downstream Effects

In preparation for this proposal, more than a thousand peer-reviewed scientific papers and other data that address connectivity of aquatic resources and effects on downstream waters were reviewed and considered. EPA's Office of Research and Development (ORD) has prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of tributaries and wetlands on downstream waters (U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (Washington, DC: U.S. Environmental Protection Agency, 2013), hereinafter, "Report"). This draft Report similarly has been considered in the development of this proposal. The Report is currently undergoing peer review led by EPA's Scientific Advisory Board (SAB) and is available at [http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr\\_activites/Watershed%20Connectivity%20Report?OpenDocument](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report?OpenDocument). The Report also underwent an earlier peer review, and the results of this peer review are available in the docket for this proposed rule. The Report summarizes and assesses much of the currently available scientific literature that is part of the administrative record for this proposal. The agencies anticipate that additional data and information will become available during the

rulemaking process, including that provided during the public comment process, and by additional research, studies, and investigations that take place before the rulemaking process is concluded. At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record, including the final Report reflecting SAB review, and will make any adjustments to the final rule deemed to be appropriate at that time. The Report is under review by the Science Advisory Board, and the rule will not be finalized until that review and the final report are complete. Part I of this Appendix provides the conclusions of the review and synthesis. Part II provides additional detail of the scientific literature and the agencies' reasoning in support of this proposal.

#### Part I: Synthesis of Peer-Reviewed Scientific Literature

##### Background

The draft Report prepared by ORD reviews and synthesizes the peer-reviewed scientific literature on the connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans. The purpose of the review and synthesis is to summarize current understanding about these connections, the factors that influence them, and the mechanisms by which connected waters, singly or in aggregate, affect the function or condition of downstream waters. The focus of the Report is on surface and shallow subsurface connections from small or temporary streams, non-tidal wetlands, and certain open waters. Specific types of connections considered in the Report include transport of physical materials and chemicals such as water, wood, and sediment, nutrients, pesticides, and mercury; movement of organisms or their seeds or eggs; and hydrologic and biogeochemical interactions occurring in surface and groundwater flows, including hyporheic zones and alluvial aquifers.

The draft Report prepared by ORD consists of six chapters. Following an executive summary and an introduction to the Report, chapter 3 presents a conceptual framework describing the hydrologic elements of a watershed, the types of chemical, physical, and biological connections that link them, and watershed and climatic factors that influence connectivity at various temporal and spatial scales. It also provides background on the structure and function of streams and wetlands viewed from an integrated watershed perspective. In a discussion of connectivity, the watershed scale is the appropriate context for interpreting technical evidence about individual watershed components, reviewed in subsequent chapters. Chapter 4 surveys the literature on stream networks (lotic systems) in terms of chemical, physical, and biological connections between upstream and downstream habitats. Two case studies from the literature examine in greater detail longitudinal connectivity and downstream effects in prairie streams and arid streams of the Southwest. Chapter 5 reviews the literature on connectivity and effects of non-tidal wetlands and certain open waters

(lentic systems) on downstream waters. This chapter is further subdivided into two broad categories of landscape settings based on directionality of hydrologic flows: *Bidirectional settings*, in which wetlands and open waters can have two-way hydrologic exchanges with other water bodies (e.g., riparian and floodplain wetlands and open waters), and *unidirectional settings*, in which water flows only from the wetland or open water towards the downstream water (e.g., most wetlands and open waters outside of riparian areas and floodplains). Directionality of hydrologic flow was selected as an organizational principle for this section because it has a dominant role in determining the types of connectivity and downstream effects (if any) of wetlands. However, the use of these landscape settings for hydrologic directionality should not be construed as suggesting directionality of geochemical or biological flows. Also, the terms "unidirectional" and "bidirectional" describe the landscape setting in which wetlands and open waters occur, and do not refer to wetland type or class. Four case studies from the literature examine evidence pertaining to connectivity and downstream effects of oxbow lakes, Carolina and Delmarva bays, prairie potholes, and vernal pools in greater detail.

Chapter 6 presents and discusses key findings and major conclusions of the review, which also are included at the end of each review section and in this executive summary.

##### Summary of Major Conclusions

Based on the review and synthesis of more than a thousand publications from the peer-reviewed scientific literature, the available evidence supports three major conclusions:

1. The scientific literature demonstrates that streams, individually and cumulatively, exert a strong influence on the character and functioning of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Headwater streams (headwaters) are the most abundant stream-type in most river networks, and supply most of the water in rivers. In addition to water, streams supply sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in rivers. Streams are biologically connected to downstream waters by the dispersal and migration of aquatic and semi-aquatic organisms, including fish, amphibians, plants, microorganisms, and invertebrates, that use both up- and downstream habitats during one or more stages of their life cycles, or provide food resources to downstream communities. Chemical, physical, and biological connections between streams and downstream waters interact via processes such as nutrient spiraling, in which stream communities assimilate and chemically transform large quantities of nitrogen and other nutrients that would otherwise increase nutrient loading downstream.

2. Wetlands and open waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers (e.g., wetlands and open waters in riparian areas and floodplains) are chemically, physically, and biologically connected with rivers via the export of channel-forming sediment and woody debris, temporary storage of local groundwater that supports baseflow in rivers, and transport of stored organic matter. They remove and transform excess nutrients such as nitrogen and phosphorus. They provide nursery habitat for breeding fish, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Moreover, wetlands in this landscape setting serve an important role in the integrity of downstream waters because they also act as sinks by retaining floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters.

3. Wetlands and open waters in landscape settings that lack bidirectional hydrologic exchanges with downstream waters (e.g., many prairie potholes, vernal pools, and playa lakes) provide numerous functions that can benefit downstream water quality and integrity. These functions include storage of floodwater; retention and transformation of nutrients, metals, and pesticides; and recharge of groundwater sources of river baseflow. The functions and effects of this diverse group of wetlands, which the Report refers to as “unidirectional wetlands,” affect the condition of downstream waters if there is a surface or shallow subsurface water connection to the river network. In unidirectional wetlands that are not connected to the river network through surface or shallow subsurface water, the type and degree of connectivity varies geographically within a watershed and over time. Because such wetlands occur on a gradient of connectivity, it is difficult to generalize about their effects on downstream waters. Generalization for this class is further complicated because, for certain functions (e.g., sediment removal and water storage), downstream effects are due to wetland isolation, rather than connectivity. The literature reviewed does not provide sufficient information to evaluate or generalize about the degree of connectivity (absolute or relative) or the downstream effects of wetlands in unidirectional landscape settings. However, evaluations of individual geographically isolated wetlands or groups of geographically isolated wetlands could be possible through case-by-case analysis. Further, while the review did not specifically address other unidirectional water bodies, the conclusions apply to these water bodies (e.g., ponds and lakes that lack surface water inlets) as well, since the same principles govern hydrologic connectivity between these water bodies and downstream waters.

Section 3 below provides an overview of the conceptual framework, with further discussion of the key findings for streams, riparian and floodplain areas, and unidirectional wetlands.

## 1. Conceptual Framework Overview

Connectivity is a foundational concept in hydrology and freshwater ecology. The structure and function of downstream waters are highly dependent on the constituent materials contributed by and transported through water bodies located elsewhere in the watershed. Most of the materials in a river, including water, sediment, wood, organic matter, nutrients, chemical contaminants, and certain organisms, originate outside of the river, from upstream tributaries, wetlands, or other components of the river system, and are transported to the river by water movement, wind, or other means. Therefore, streams and wetlands fundamentally affect river structure and function by altering transport of various types of materials to the river. This alteration of material transport depends on two key factors: (1) Connectivity (or isolation) between streams, wetlands and rivers that enables (or prevents) the movement of materials between the system components; and (2) functions within streams and wetlands that supply, remove, transform, provide refuge for, or delay transport of materials.

The ORD Report defines connectivity as the degree to which components of a system are joined, or connected, by various transport mechanisms. Connectivity is determined by the characteristics of both the physical landscape and the biota of the specific system. Isolation is the opposite of connectivity; or the degree to which system components are not joined. Both connectivity and isolation have important effects on downstream waters. For example, stream channels convey water and channel-forming sediment to rivers, whereas wetlands that lack output channels can reduce flooding and store excess sediment. Materials transport connects different ecosystem types, at multiple spatial and temporal scales. For example, streams flowing into and out of wetlands or between lakes form continuous or seasonal connections across ecosystem boundaries. Similarly, aquatic food webs connect terrestrial ecosystems, streams, wetlands, and downstream waters.

Water movement through the river system is the primary, but certainly not the only, mechanism providing physical connectivity within river networks. It provides a “hydraulic highway” that transports chemical, physical, and biological materials associated with the water (e.g., sediment, woody debris, contaminants, and organisms). Because the movement of water is fundamental to understanding watershed connectivity, Chapter 3 begins with a review and an explanation of the hydrologic foundation of river systems, and terms and concepts used throughout the Report are defined.

Numerous factors influence watershed connectivity. Climate, watershed topography, soil and aquifer permeability, the number and types of contributing waters, their spatial distribution in the watershed, interactions among aquatic organisms, and human alteration of watershed features, among other things, can act individually or in concert to influence stream and wetland connectivity to, and effects on, downstream waters. For

example, all else being equal, materials traveling shorter distances could enter the river with less transformation or dilution, thus increasing a beneficial or harmful effect. In other cases, sequential transformations such as nutrient spiraling (defined and discussed below) connect distant water bodies and produce beneficial effects on downstream waters. Infrequent events that temporarily connect nearby or distant streams or wetlands to rivers also can have large, long-lasting effects. Most of the major changes in sediment load and river channel structure that are critical to maintaining river health—including meanders of rivers in floodplains and creation of oxbow lakes—are a result of large floods that provide infrequent, intense connections with more distant streams and riparian or floodplain waters.

Based on a review of the peer-reviewed scientific literature, the Report identifies five functions by which streams, wetlands, and open waters influence material transport into downstream waters:

- Source: The net export of materials, such as water and food resources
- Sink: The net removal or storage of materials, such as sediment and contaminants
- Refuge: The protection of materials, especially organisms
- Transformation: The transformation of materials, especially nutrients and chemical contaminants, into different physical or chemical forms
- Lags: The delayed or regulated release of materials, such as storm water

These functions are not static or mutually exclusive (e.g., a wetland can be both a source of organic matter and a sink for nitrogen) and can change over time (e.g., one wetland can be a water sink when evapotranspiration is high and a water source when evapotranspiration is low). Further, some functions work in conjunction with others. For example, a lag function can include transformation of materials prior to their delayed release. In a particular stream, wetland, or open water, the presence or absence of these functions depends upon the biota, hydrology, and environmental conditions in the watershed.

When considering effects on downstream waters, it is helpful to distinguish between *actual function* and *potential function* of a stream, wetland, or open water. For example, a wetland with appropriate conditions for denitrification is a *potential* sink for nitrogen, a nutrient that can be a contaminant when present in high concentrations. This function is conditional; if nitrogen were to enter a wetland (from agricultural runoff, for example), the wetland has the capacity to remove this nitrogen from the water. The wetland will not serve this function, however, if no nitrogen enters the wetland. Even if a stream or wetland is not currently serving an *actual* function, it has the *potential* to provide that function when a new material enters it, or when environmental conditions change. Thus, potential functions play a critical role in protecting those waters from future impacts.

## 2. Discussion of Major Conclusions

### A. Streams

The scientific literature demonstrates that streams, individually or cumulatively, exert a strong influence on the character and functioning of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, or biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Headwater streams (headwaters) are the most abundant stream type in most river networks, and supply most of the water in rivers. In addition to water, streams supply sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in rivers. Streams are biologically connected to downstream waters by dispersal and migration of aquatic and semi-aquatic organisms, including fish, amphibians, plants, microorganisms, and invertebrates, that use both up- and downstream habitats during one or more stages of their life cycles, or provide food resources to downstream communities. Chemical, physical, and biological connections between streams and downstream waters interact via processes such as nutrient spiraling, in which stream communities assimilate and chemically transform large quantities of nitrogen and other nutrients that would otherwise increase nutrient loading downstream.

#### Key findings:

a. Streams are hydrologically connected to downstream waters via channels that convey surface and subsurface water year-round (perennial flow), weekly to seasonally (intermittent flow), or only in direct response to precipitation (ephemeral flow). Streams are the dominant source of water in most rivers, and the great majority of tributaries are perennial, intermittent, and ephemeral headwater streams. For example, headwater streams, which are the smallest channels where stream flows begin, are the source of approximately 60% of the total mean annual flow to all northeastern U.S. streams and rivers.

b. Headwaters convey water into local storage compartments such as ponds, shallow aquifers, or river banks and into regional and alluvial aquifers. These local storage compartments are important sources of water for baseflow in rivers. The ability of streams to keep flowing even during dry periods typically depends on the delayed (lagged) release of local groundwater, also referred to as shallow groundwater, originating from these water sources, especially in areas with shallow groundwater tables and pervious subsurfaces. For example, in the southwestern United States, short-term shallow groundwater storage in alluvial floodplain aquifers, with gradual release into stream channels by intermittent and ephemeral streams, is a major source of annual flow in rivers.

c. Even infrequent flows through ephemeral or intermittent channels influence fundamental biogeochemical processes by connecting the channel and shallow groundwater with other landscape elements.

Infrequent, high-magnitude events are especially important for transmitting materials from headwater streams in most river networks. For example, headwater streams, including ephemeral and intermittent streams, shape river channels by accumulating and gradually or episodically releasing stored materials such as sediment and large woody debris. These materials provide substrate, habitat for aquatic organisms, and slow the flow of water through channels.

d. Connectivity between streams and rivers provides opportunities for materials, including nutrients and chemical contaminants, to be sequentially altered as they are transported downstream. Although highly efficient at transport of water and other physical materials, streams are not pipes. They are dynamic ecosystems with permeable beds and banks that interact with terrestrial and aquatic ecosystems above and below the surface. The connections formed by surface and subsurface streamflows act as a series of complex chemical, physical, and biological alterations that occur as materials move through different parts of the river system. The amount and quality of such materials that eventually reach a river are determined by the aggregate effect of these sequential alterations that begin at the source waters, which can be at some distance from the river. The greater the distance a material travels between a particular stream reach and the river, the greater the opportunity for that material to be altered in intervening stream reaches, which can allow for uptake, assimilation, or beneficial transformation. One example of sequential alteration with significant beneficial effects on downstream waters is the process of nutrient spiraling, in which nutrients entering headwater streams are transformed by various aquatic organisms and chemical reactions as they are transported downstream by streamflow. Nutrients which enter the headwater stream (e.g., via overland flow) are first removed from the water column by streambed algal and microbial populations. Fish or insects feeding on algae and microbes take up some of those nutrients, which are subsequently released back to the stream via excretion and decomposition, and the cycle is repeated. In each phase of the cycling process—from dissolved inorganic nutrients in the water column, through microbial uptake, subsequent transformations through the food web, and back to dissolved nutrients in the water column—nutrients are subject to downstream transport. Stream and wetland capacities for nutrient cycling have important implications for the form and concentration of nutrients exported to downstream waters.

e. The literature review found strong evidence that headwater streams function as nitrogen sources (export) and sinks (uptake and transformation) for river networks. One study estimated that rapid nutrient cycling in small streams that were free from agricultural or urban impacts removed 20–40% of the nitrogen that otherwise would be delivered to downstream waters. Nutrients are necessary to support aquatic life, but excess nutrients create conditions leading to eutrophication and hypoxia, in which oxygen concentrations fall below the level necessary to sustain most

within and near-bed animal life. Thus, the role of streams in influencing nutrient loads can have significant repercussions for hypoxic areas in downstream waters.

f. Headwaters provide critical habitat during one or more life cycle stages of many organisms capable of moving throughout river networks. This review found strong evidence that headwaters provide habitat for complex life-cycle completion, refuge from predators or adverse physical conditions in rivers, and reservoirs of genetic- and species-level diversity. Use of headwater streams as habitat is especially obvious for the many species that migrate between small streams and marine environments during their life cycles (e.g., Pacific and Atlantic salmon, American eels, certain lamprey species), and the presence of these species within river networks provides robust evidence of biological connections between headwaters and larger rivers. In prairie streams, many fishes swim upstream into tributaries to release eggs, which develop as they are transported downstream. Small streams also provide refuge habitat for riverine organisms seeking protection from temperature extremes, flow extremes, low dissolved oxygen, high sediment levels, or the presence of predators, parasites, and competitors.

### B. Riparian/Floodplain Waters

Wetlands and open waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers (e.g., wetlands and open waters in riparian areas and floodplains) are chemically, physically, or biologically connected with rivers via the export of channel-forming sediment and woody debris, temporary storage of local groundwater that supports baseflow in rivers, and transport of stored organic matter. They remove and transform excess nutrients such as nitrogen and phosphorus. They provide nursery habitat for breeding fish, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Moreover, wetlands in this landscape setting serve an important role in the integrity of downstream waters because they also act as sinks by retaining floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters.

#### Key Findings:

a. Riparian areas act as buffers that are among the most effective tools for mitigating nonpoint source pollution. The wetland literature shows that collectively, riparian wetlands improve water quality through assimilation, transformation, or sequestration of nutrients, sediment and other pollutants—such as pesticides and metals—that can affect downstream water quality. These pollutants enter wetlands via various pathways that include various sources such as dry and wet atmospheric deposition, some runoff from upland agricultural and urban areas, spray drift, and subsurface water flows, as well as point sources such as outfalls, pipes, and ditches.

b. Riparian and floodplain areas connect upland and aquatic environments through both surface and subsurface hydrologic flow paths. These areas are therefore uniquely situated in watersheds to receive and process

waters that pass over densely vegetated areas and through subsurface zones before reaching streams and rivers. When contaminants reach a riparian or floodplain area, such materials can be sequestered in sediments, assimilated into the wetland plants and animals, transformed into less harmful forms or compounds, or lost to the atmosphere. Wetland potential for biogeochemical transformations (e.g., denitrification) that can improve the quality of water entering streams and rivers is influenced by factors present in riparian areas and floodplains, including anoxic conditions, shallow water tables, slow organic matter decomposition, wetland plant communities, permeable soils, and complex topography.

c. Riparian and floodplain areas can reduce flood peaks by storing and desynchronizing floodwaters. They also can contribute to maintenance of flow by recharging alluvial aquifers. Many studies have documented the ability of riparian and floodplain areas to reduce flood pulses by storing excess water from streams and rivers. One review of wetland studies reported that riparian wetlands reduced or delayed floods in 23 of 28 studies. For example, peak discharges between upstream and downstream gauging stations on the Cache River in Arkansas were reduced 10–20% primarily due to floodplain water storage.

d. Riparian and floodplain areas store large amounts of sediment and organic matter from upland areas before those sediments enter the stream. For example, riparian areas have been shown to filter 80–90% of sediments leaving agricultural fields in North Carolina. (A. Cooper, *et al.*, "Riparian Areas as Filters for Agricultural Sediment," *Soil Science Society of America Proceedings* 51:416–420 (1987); R.B. Daniels, and J.G. Gilliam, "Sediment and Chemical Load Reduction by Grass and Riparian Filters," *Soil Science Society of America Journal* 60:246–251 (1996); R.J. Naiman, and H. Decamps, "The Ecology of Interfaces: Riparian Zones," *Annual Review of Ecology and Systematics* 28:621–658 (1997)).

e. Ecosystem function within a river system is driven by interactions between the physical environment and the diverse biological communities living within the river system. Movements of organisms connect aquatic habitats and populations in different locations through several processes important for the survival of individuals, populations, and species, and for the functioning of the river ecosystem. For example, lateral expansion and contraction of the river in its floodplain results in an exchange of matter and organisms, including fish populations that are adapted to use floodplain habitat for feeding and spawning during high water. Refuge populations of aquatic plants in floodplains can become important seed sources for the river network, especially if catastrophic flooding scours vegetation and seed banks in other parts of the channel. Many invertebrates exploit temporary hydrologic connections between rivers and floodplain wetland habitats, moving into these wetlands to feed, reproduce, or avoid harsh environmental conditions and then returning to the river network. Amphibians and aquatic reptiles in

many parts of the country commonly use both streams and wetlands, including wetlands in riparian and floodplain areas, to hunt, forage, overwinter, rest, or hide from predators.

#### C. Unidirectional Wetlands

Wetlands and open waters in landscape settings that lack bidirectional hydrologic exchanges with downstream waters (e.g., many prairie potholes, vernal pools, and playa lakes) provide numerous functions that can benefit downstream water quality and integrity. These functions include storage of floodwater; retention and transformation of nutrients, metals, and pesticides; and recharge of groundwater sources of river baseflow. The functions and effects of this diverse group of wetlands, hereafter referred to as "unidirectional wetlands," clearly affect the condition of downstream waters if there is a surface or shallow subsurface water connection to the river network. In unidirectional wetlands that are not connected to the river network through surface or shallow subsurface water, the type and degree of connectivity varies geographically within a watershed and over time. Because such wetlands occur on a gradient of connectivity, it is difficult to generalize about their effects on downstream waters. This evaluation is further complicated because, for certain functions (e.g., sediment removal and water storage), downstream effects arise from wetland isolation, rather than connectivity. The literature reviewed does not provide sufficient information to evaluate or generalize about the degree of connectivity (absolute or relative) or the downstream effects of wetlands in unidirectional landscape settings. However, evaluations of connectivity of individual wetlands or groups of wetlands could be possible through case-by-case analysis. Further, while the review did not specifically address other unidirectional water bodies, the conclusions apply to these water bodies (e.g., ponds and lakes that lack surface water inlets) as well, since the same principals govern hydrologic connectivity between these water bodies and downstream waters.

##### Key Findings:

a. Water storage by wetlands well outside of riparian or floodplain areas can affect streamflow. Hydrologic models of prairie potholes in the Starkweather Coulee subbasin (North Dakota) that drain to Devils Lake indicate that increasing the volume of pothole storage across the sub-basin by approximately 60% caused simulated total annual streamflow to decrease 50% during a series of dry years and 20% during wet years. Similar simulation studies of watersheds that feed the Red River of the North in North Dakota and Minnesota demonstrated qualitatively comparable results, suggesting that the ability of potholes to modulate streamflow may be widespread across portions of the prairie pothole region. This work also indicates that reducing wetland water storage capacity by connecting formerly isolated potholes through ditching or drainage to the Devils Lake and Red River basins could increase stormflow and contribute to downstream flooding. In many agricultural areas already crisscrossed by

extensive drainage systems, total streamflow and baseflow are enhanced by directly connecting potholes to stream networks. The impacts of changing streamflow are numerous, including altered flow regime, stream geomorphology, habitat, and ecology. The presence or absence of an effect of prairie pothole water storage on streamflow depends on many factors, including patterns of precipitation, topography and degree of human alteration. For example, in parts of the prairie pothole region with low precipitation, low stream density, and little human alteration, hydrologic connectivity between prairie potholes and streams or rivers is likely to be low.

b. Unidirectional wetlands act as sinks and transformers for various pollutants, especially nutrients, which pose a serious pollution problem in the United States. In one study, sewage wastewaters were applied to forested unidirectional wetlands in Florida for a period of 4.5 years. More than 95% of the phosphorus, nitrate, ammonium, and total nitrogen were removed by the wetland during the study period, and 66–86% of the nitrate removed was attributed to the process of denitrification. In another study, sizeable phosphorus retention occurred in unidirectional marshes that comprised only 7% of the lower Lake Okeechobee basin area in Florida. A unidirectional bog in Massachusetts was reported to sequester nearly 80% of nitrogen inputs from various sources, including atmospheric deposition, and prairie pothole wetlands in the upper Midwest were found to remove >80% of the nitrate load via denitrification. A large unidirectional prairie marsh was found to remove 86% of nitrate, 78% of ammonium, and 20% of phosphate through assimilation and sedimentation, sorption, and other mechanisms. Together, these and other studies indicate that on-site removal of nutrients by unidirectional wetlands is significant and geographically widespread. The effects of this removal on rivers are generally not reported in the literature.

c. Biological connectivity can occur between unidirectional wetlands and downstream waters through movement of amphibians, aquatic seeds, macroinvertebrates, reptiles, and mammals. Many species in those groups that use both stream and wetland habitats are capable of dispersal distances equal to or greater than distances between many unidirectional wetlands and river networks. Unidirectional wetlands can be hydrologically connected directly to river networks through channels, non-channelized surface flow, or subsurface flows. A wetland surrounded by uplands is defined as "geographically isolated." Our review found that in some cases, wetland types such as vernal pools and coastal depressional wetlands are collectively, and incorrectly, referred to as geographically isolated. Technically, the term "geographically isolated" should be applied only to the particular wetlands within a type or class that are completely surrounded by uplands. Furthermore, "geographic isolation" should not be confused with functional isolation, because geographically isolated wetlands can still have hydrological and biological connections to downstream waters.

d. Unidirectional wetlands occur along a gradient of hydrologic connectivity-isolation with respect to river networks, lakes, or marine/estuarine water bodies. This gradient includes, for example, wetlands that serve as origins for stream channels that have permanent surface water connections to the river network; wetlands with outlets to stream channels that discharge to deep groundwater aquifers; geographically isolated wetlands that have local groundwater or occasional surface water connections to downstream waters; and geographically isolated wetlands that have minimal hydrologic connection to other water bodies (but which could include surface and subsurface connections to other wetlands). The existence of this gradient among wetlands of the same type or in the same geographic region can make it difficult to determine or generalize, from the literature alone, the degree to which particular wetlands (individually or as classes), including geographically isolated wetlands, are hydrologically connected.

e. A related issue is that spatial scale must be considered when determining geographic isolation. Individual wetlands that are geographically isolated could be connected to downstream waters when considered as a complex (a group of interacting wetlands). This principle was demonstrated in a recent study that examined a depressional wetland complex on the Texas coastal plain. These wetlands have been considered as a type of geographically isolated wetlands. Collectively, however, they are geographically and hydrologically connected to downstream waters in the area. During an almost 4-year study period, nearly 20% of the precipitation that fell on the wetland complex flowed as surface runoff through an intermittent stream to a nearby waterway, the Armand Bayou. Thus, wetland complexes could have connections to downstream waters through stream channels even when the individual wetland components are geographically isolated.

### 3. Closing Comments

The strong hydrologic connectivity of river networks is apparent in the existence of stream channels that form the physical structure of the network itself. Given the discussion above, it is clear that streams and rivers are much more than a system of physical channels for conveying water and other materials downstream, but the presence of physical channels is one strong line of evidence for surface water connections from tributaries, or water bodies of other types, to downstream waters. Physical channels are defined by continuous bed and bank structures, which may include apparent disruptions (such as by bedrock outcrops, braided channels, flow-through wetlands) associated with changes in the material and gradient over and through which water flows. The continuation of bed and banks down gradient from such disruptions is evidence of the surface connection with the channel that is up gradient of the perceived disruption.

The structure and function of rivers are highly dependent on the constituent materials that are stored in and transported through them. Most of these materials, broadly defined here as any chemical,

physical, or biological entity, including, but not limited to, water, heat energy, sediment, wood, organic matter, nutrients, chemical contaminants, and organisms, originate outside of the river: They originate from either the upstream river network or other components of the river system, and then are transported to the river by water movement or other mechanisms. Thus, the fundamental way in which streams and wetlands affect river structure and function is by altering fluxes of materials to the river. The control of material fluxes depends on two key factors: (1) Functions within streams and wetlands that affect material fluxes, and (2) connectivity (or isolation) between streams and wetlands and rivers that allows (or prevents) transport of materials between the systems.

Absence of channels does not, however, mean that a wetland or open water is isolated or only infrequently connected to downstream waters. Areas that are infrequently flooded by surface water can be connected more regularly through shallow groundwater or through dispersal among biological populations and communities. Such wetlands and open waters also can reduce flood peaks by storing flood waters, filter large amounts of sediment and nutrients from upland areas, influence stream geomorphology by providing woody debris and sediment, and regulate stream temperature. They also serve as sources of food for river biota and sources of genetic diversity for populations of stream invertebrates.

Unidirectional wetlands can reduce and attenuate floods through water storage, and can recharge groundwater, thereby contributing to stream and river baseflow. These wetlands also affect nutrient delivery and improve water quality by functioning as sources of food and as sinks for metals, pesticides, excess nutrients. Biological connectivity can also occur between unidirectional wetlands and downstream waters, through movement of amphibians, aquatic insects, aquatic reptiles, migratory birds, and riverine mammals that require or opportunistically use both river and wetland or open water habitats. However, given a geographically isolated wetland for which a surface water connection cannot be observed, it is difficult to assess its degree of connectivity with the river network without site-specific data.

Additionally, caution should be used in interpreting connectivity for wetlands based on their being designated as "geographically isolated" since (a) the term can be mistakenly applied to a heterogeneous group of wetlands that can include wetlands that are not geographically isolated, (b) wetlands with permanent channels could be miscategorized as geographically isolated if the designation is based on maps or imagery with inadequate spatial resolution, obscured views, etc., and (c) wetland complexes could have connections to downstream waters through stream channels even if individual wetlands within the complex are geographically isolated. Thus, the term "geographically isolated" should only be applied to groups of wetlands if they fit the technical definition (i.e., they are surrounded by uplands).

Further, even geographically isolated wetlands can be connected to other wetlands and downstream waters through groundwater connections, occasional spillage, or biological connections. Thus, the term "geographically isolated" should not be used to infer lack of hydrologic, chemical, or biological connectivity.

Lastly, to understand the health, behavior, and sustainability of downstream waters, effects of small water bodies in a watershed need to be considered in aggregate. The contribution of material by a particular stream and wetland might be small, but the aggregate contribution by an entire class of streams and wetlands (e.g., all ephemeral streams in the river network) might be substantial. For example, western vernal pools typically occur within "vernal pool landscapes" or complexes of pools in which swales connect pools to each other and to seasonal streams, and in which the hydrology and ecology are tightly coupled with the local and regional geological processes that formed them. The vernal pool basins, swales, and seasonal streams are part of a single surface water and shallow groundwater system connected to the river network when seasonal precipitation exceeds storage capacity of the wetlands. Since rivers develop and respond over time and are functions of the whole watershed, understanding the integration of contributions and effects over time is also necessary to have an accurate understanding of the system, taking into account the duration and frequency of material export and delivery to downstream waters. In addition, when considering the effect of an individual stream or wetland, it is important to include the cumulative effect of all materials that originate from it, rather than each material individually, to understand that water body's influence on downstream waters.

## Part II: Additional Scientific Support

### i. Tributaries

The agencies propose that all waters that meet the proposed definition of tributary are "waters of the United States" because they meet Justice Kennedy's test for jurisdiction under *Rapanos*. In other words, the agencies are asserting that all tributaries have a significant nexus with traditional navigable waters, interstate waters, and/or the territorial seas. EPA and the Corps' longstanding definition of "waters of the United States" has included tributaries. That regulation was based on the agencies' historic view of the scope of the CWA and the general scientific understanding about the ecological and hydrological relationship between waters.

Tributaries have a substantial impact on the chemical, physical, or biological integrity of waters into which they eventually flow—including traditional navigable waters, interstate waters, and the territorial seas. The great majority of tributaries are headwater streams, and whether they are perennial, intermittent, or ephemeral, they play an important role in the transport of water, sediments, organic matter, pollutants, nutrients, and organisms to downstream environments. Tributaries serve to store

water (thereby reducing flooding), provide biogeochemical functions that help maintain water quality, trap and transport sediments, transport, store and modify pollutants, provide habitat for plants and animals, and sustain the biological productivity of downstream rivers, lakes and estuaries. These conclusions are strongly supported in the scientific literature, as discussed below.

Headwater streams are the smallest channels where stream flows begin, and often occur at the outer rims of a watershed. Typically these are first-order streams (i.e., they do not have any other streams flowing into them). However, headwater streams can include streams with multiple tributaries flowing into them and can be perennial, intermittent or ephemeral, but are still located near the channel origins of the tributary system in a watershed.

Protection of tributaries under the CWA is critically important because they serve many important functions which directly influence the integrity of downstream waters. It is necessary to regulate the entire tributary system to fulfill the objective of the CWA, because discharges of pollutants into the tributary system adversely affect the chemical, physical, or biological integrity of these waters. For example, destruction or modification of headwater streams has been shown to affect the integrity of downstream waters, in part through changes in hydrology, chemistry and stream biota. M.C. Freeman, *et al.*, "Hydrologic Connectivity and the Contribution of Stream Headwaters to Ecological Integrity at Regional Scales," *Journal of the American Water Resources Association* 43:5-14. (2007); M.S. Wipfli, *et al.*, "Ecological Linkages between Headwaters and Downstream Ecosystems: Transport of Organic Matter, Invertebrates, and Wood Down Headwater Channels," *Journal of the American Water Resources Association* 43:72-85 (2007). Additionally, activities such as discharging a pollutant into one part of the tributary system are well-documented to affect, at times, other parts of the system, even when the point of discharge is far upstream from the navigable water that experiences the effect of the discharge. In order to protect traditional navigable waters, interstate waters, and the territorial seas it is also critically important to protect tributaries as defined in today's proposal that are upstream from those waters.

#### A. The Agencies Have Concluded That Tributaries, as Defined in the Proposed Rule, Have a Significant Nexus

The scientific literature documents that tributary streams, including perennial, intermittent, and ephemeral streams, and certain categories of ditches are integral parts of river networks because they are directly connected to rivers via permanent surface features (channels and associated alluvial deposits) that concentrate, mix, transform, and transport water and other materials, including food resources, downstream. Tributaries transport, and often transform, chemical elements and compounds, such as nutrients, ions, dissolved and particulate organic matter and contaminants, influencing water quality, sediment deposition, nutrient availability, and biotic functions in rivers. Streams also are biologically connected to

downstream waters by dispersal and migration, processes which have critical implications for aquatic populations of organisms that use both headwater and river or open water habitats to complete their life cycles or maintain viable populations. The scientific literature clearly demonstrates that cumulatively, streams exert strong influence on the character and functioning of rivers. In light of these well documented connections and functions, the agencies concluded that tributaries, as defined, alone or in combination with other tributaries in a watershed, significantly affect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas. The scientific literature supports this conclusion for ephemeral tributaries, as well as for intermittent and perennial tributaries; for tributaries both near to and far from the downstream traditional navigable water, interstate water, or the territorial seas; and for natural tributaries or man-altered tributaries, which may include certain ditches and canals.

The discussion below summarizes the key points in the literature regarding the chemical, physical, and biological connections and functions of tributaries that significantly affect downstream waters. In addition, the evidence regarding headwater streams and non-perennial streams, types of tributaries whose important functional relationships to downstream traditional navigable waters and interstate waters might not be obvious, is summarized. The scientific literature does not use legal terms like "traditional navigable water," "interstate water," or "the territorial seas." Rather, the literature assesses tributaries in terms of their connections to and effects on downstream waters in a watershed. While the agencies define as "waters of the United States" tributaries only in watersheds which drain to a traditional navigable water, interstate water, or the territorial seas, that distinction does not affect the conclusions of the scientific literature with respect to the effects of tributaries on downstream waters.

#### B. Tributaries Significantly Affect the Physical Integrity of (a)(1) Through (a)(3) Waters

Tributaries, even when seasonally dry, are the dominant source of water in most rivers, rather than direct precipitation or groundwater input to main stem river segments. *See, e.g.*, Report at 4-3 (citing T.C. Winter, 2007, "The role of groundwater in generating streamflow in headwater areas and in maintaining base flow," *Journal of the American Water Resources Association* 43:15-25; P.A. Bukaveckas, "Rivers," in G.E. Likens, ed., *Encyclopedia of Inland Waters*, Vol. 1 (Elsevier: Oxford, 2009)). Distant headwaters with stronger connections to groundwater or consistently higher precipitation levels than downstream reaches contribute more water to downstream rivers. In the northeastern United States headwater streams contribute greater than 60% of the water volume in larger tributaries, including navigable rivers. *See, e.g., id.* (citing R.B. Alexander, *et al.*, "The role of headwater streams in downstream water quality," *Journal of the American Water Resources Association* 43:41-59 (2007)). The

contributions of tributaries to river flows are often readily measured or observed, especially immediately below confluences, where tributary flows increase the flow volume and alter physical conditions, such as water temperature, in the main stream. The physical effects of tributaries are particularly clear after intense rainfall occurs over only the upper tributary reaches of a river network. For example, a study of ephemeral tributaries to the Rio Grande in New Mexico found that after a storm event contributions of the stormflow from ephemeral tributaries accounted for 76% of the flow of the Rio Grande. *See, e.g., id.* at 4-5 (citing E.R. Vivoni, *et al.*, "Analysis of a Monsoon Flood Event in an Ephemeral Tributary and Its Downstream Hydrologic Effects," *Water Resources Research* 42:W03404 (2006)). A key effect of tributaries on the hydrologic response of river networks to storm events is dispersion, or the spreading of water output from a drainage basin over time. Hydrologic dispersion of connected tributaries influence the timing and volume of water reaching a river network outlet. *See, e.g., id.* at 4-5 to 4-6 (citing P. M. Saco and P. Kumar, "Kinematic dispersion in stream networks coupling hydraulics and network geometry," *Water Resources Research* 38:1244 (2002)). Tributaries also can reduce the amount of water that reaches downstream rivers and minimize downstream flooding, often through infiltration or seepage through channel beds and banks or through evapotranspiration. *See, e.g., id.* at 4-8 (citing S.K. Hamilton, *et al.*, "Persistence of Aquatic Refugia between Flow Pulses in a Dryland River System (Cooper Creek, Australia)," *Limnology and Oceanography* 50:743-754 (2005); J.F. Costelloe, *et al.*, "Determining Loss Characteristics of Arid Zone River Waterbodies," *River Research and Applications* 23:715-731 (2007)).

One of the primary functions of tributaries is transporting sediment to downstream waters. Tributaries, particularly headwaters, shape and maintain river channels by accumulating and gradually or episodically releasing sediment and large woody debris into river channels. Sediment transport is also clearly provided by ephemeral streams. Effects of the releases of sediment and large woody debris are especially evident at tributary-river confluences, where discontinuities in flow regime and temperature clearly demonstrate physical alteration of river structure and function by headwater streams. Report at 4-10, 4-14. Sediment movement is critical for maintaining the river network, including rivers that are considered to be traditional navigable waters, as fluvial (produced by the action of a river or stream) sediments are eroded from some channel segments, and deposited in others downstream to form channel features, stream and riparian habitat which supports the biological communities resident downstream, and influence the river hydrodynamics. *See, e.g., J.L. Florsheim, et al.*, "Bank Erosion as a Desirable Attribute of Rivers," *Bioscience* 58:519-29 (2008); Report at 4-9 (citing M. Church, "Bed material transport and the morphology of alluvial river channels," *Annual Review of Earth and*

*Planetary Sciences*: 325–354 (2006)). While essential to river systems, too much sediment can impair ecological integrity by filling interstitial spaces, blocking sunlight transmission through the water column, and increasing contaminant and nutrient concentrations. Report at 4–9 (citing P.J. Wood and P.D. Armitage, “Biological Effects of Fine Sediment in the Lotic Environment,” *Environmental Management* 21:203–217 (1997)). Over sedimentation thus can reduce photosynthesis and primary productivity within the stream network and otherwise have harmful effects on downstream biota, including on the health and abundance of fish, aquatic macrophytes (plants), and aquatic macroinvertebrates that inhabit downstream waters. See, e.g., Wood and Armitage 1997. Headwater streams tend to trap and store sediments behind large structures, such as boulders and trees, that are transported downstream only during infrequent large storm events. See Report at 4–10, 4–12 (citing L.E. Benda, and T.W. Cundy, “Predicting deposition of debris flows in mountain channels,” *Canadian Geotechnical Journal* 27:409–417 (1990); T. Gomi and R.C. Sidle, “Bed load transport in managed steep-gradient headwater streams of southeastern Alaska,” *Water Resources Research* 39:1336 (2003); L.E. Benda, et al., “Geomorphology of steep-land headwaters: The transition from hillslopes to channels,” *Journal of the American Water Resources Association* 41:835–851 (2005); P.E. Bigelow, et al., “On Debris Flows, River networks, and the Spatial Structure of Channel Morphology,” *Forest Science* 53:220–238 (2007); J.P.R. Gooderham, et al., “Upstream Heterogeneous Zones: Small Stream Systems Structured by a Lack of Competence?” *Journal of the North American Benthological Society* 26:365–374 (2007)).

Tributaries can greatly influence water temperatures in tributary networks. This is important because water temperature is a critical factor governing the distribution and growth of aquatic life, both directly (through its effects on organisms) and indirectly (through its effects on other physicochemical properties, such as dissolved oxygen and suspended solids). *Id.* at 4–13 (citing J.D. Allan, *Stream Ecology—Structure and Function of Running Waters* (New York, NY: Chapman & Hall, 1995)). For instance, water temperature controls metabolism and level of activity in cold-blooded species like fish, amphibians, and aquatic invertebrates. See, e.g., G.G. Ice, “Chapter 3: Stream Temperature and Dissolved Oxygen,” in J.D. Stednick, ed., *Hydrologic and Biological Responses to Forest Practices* (Springer, 2008). Temperature can also control the amount of dissolved oxygen in streams, as colder water holds more dissolved oxygen, which fish and other fauna need to breathe. Connections between tributaries and downstream rivers can affect water temperature in river networks. See, e.g., Report at 4–13 (citing S. Knispel, and E. Castella, “Disruption of a Longitudinal Pattern in Environmental Factors and Benthic Fauna by a Glacial Tributary,” *Freshwater Biology* 48:604–618 (2003); S.P. Rice, et al., “The Ecological Importance of Tributaries and Confluences,” in S.P. Rice, et

al., ed., *River Confluences, Tributaries and the Fluvial Network*, (Chichester, UK: John Wiley & Sons, 2008), pp. 209–242)). In particular, tributaries provide both cold and warm water refuge habitats that are critical for protecting aquatic life. *Id.* at 4–32. Because headwater tributaries often depend on groundwater inputs, temperatures in these systems tend to be warmer in the winter (when groundwater is warmer than ambient temperatures) and colder in the summer (when groundwater is colder than ambient temperatures) relative to downstream waters. *Id.* (citing G. Power, et al., “Groundwater and Fish: Insights from Northern North America,” *Hydrological Processes* 13:401–422 (1999)). Thus tributaries provide organisms with both warm water and coldwater refuges at different times of the year. *Id.* (citing R.A. Curry, et al., “Use of Small Streams by Young Brook Trout Spawned in a Lake,” *Transactions of the American Fisheries Society* 126:77–83 (1997); C.V. Baxter, and F.R. Hauer, “Geomorphology, Hyporheic Exchange and Selection of Spawning Habitat by Bull Trout (*Salvelinus confluentus*),” *Canadian Journal of Fisheries and Aquatic Sciences* 57: 1470–1481 (2000); T.R. Labbe, and K.D. Fausch, “Dynamics of Intermittent Stream Habitat Regulate Persistence of a Threatened Fish at Multiple Scales,” *Ecological Applications* 10:1774–1791 (2000); M.J. Bradford, et al., “Ecology of Juvenile Chinook Salmon in a Small Non-natal Stream of the Yukon River Drainage and the Role of Ice Conditions on Their Distribution and Survival,” *Canadian Journal of Zoology—Revue Canadienne De Zoologie* 79:2043–2054 (2001)). For example, when temperature conditions in downstream waters are adverse, fish can travel upstream and use tributaries as refuge habitat. *Id.* (citing Curry et al. 1997; M.A. Cairns, et al., “Influence of Summer Stream Temperatures on Black Spot Infestation of Juvenile Coho Salmon in the Oregon Coast Range,” *Transactions of the American Fisheries Society* 134:1471–1479 (2005)). Tributaries also help buffer temperatures in downstream waters. *Id.* at 4–13 to 4–14 (citing D. Caissie, “The thermal regime of rivers: A review,” *Freshwater Biology* 51:1389–1406 (2006)). Temperatures in tributaries affect downstream water temperature many kilometers away. *Id.* at 4–14 (citing B. Gardner, and P.J. Sullivan, “Spatial and Temporal Stream Temperature Prediction: Modeling Nonstationary Temporal Covariance Structures,” *Water Resources Research* 40:W01102 doi (2004); B.R. Johnson, et al., “Use of Spatially Explicit Physicochemical Data to Measure Downstream Impacts of Headwater Stream Disturbance,” *Water Resources Research* 46:W09526 (2010)).

C. Tributaries Significantly Affect the Chemical Integrity of (a)(1) Through (a)(3) Waters

Tributaries transform and export significant amounts of nutrients and carbon to downstream waters, serving important source functions that greatly influence the chemical integrity of downstream waters. Organic carbon, in both dissolved and particulate forms, exported from tributaries is consumed by downstream organisms. The

organic carbon that is exported downstream thus supports biological activity (including metabolism) throughout the river network. See, e.g., Report at 4–22 (citing S.G. Fisher and G.E. Likens, “Energy Flow in Bear Brook, New Hampshire: An Integrative Approach to Stream Ecosystem Metabolism,” *Ecological Monographs* 43: 421–439 (1973); J.L. Meyer, “The Microbial Loop in Flowing Waters,” *Microbial Ecology* 28:195–199 (1994); J.B. Wallace, et al., “Multiple Trophic Levels of a Forest Stream Linked to Terrestrial Litter Inputs,” *Science* 277:102–104 (1997); R.O. Hall and J.L. Meyer, “The Trophic Significance of Bacteria in a Detritus-Based Stream Food Web,” *Ecology* 79:1995–2012 (1998); R.O. Hall, et al., “Organic Matter Flow in Stream Food Webs with Reduced Detrital Resource Base,” *Ecology* 81:3445–3463 (2000); C. Augspurger, et al., “Tracking Carbon Flow in a 2-Week-Old and 6-Week-Old Stream Biofilm Food Web,” *Limnology and Oceanography* 53:642–650 (2008)). Much or most of the organic carbon that is exported from tributaries has been altered either physically or chemically by ecosystem processes within the tributary streams, particularly by headwater streams.

Nutrient export from tributaries has a large effect on downstream water quality, as excess nutrients from surface runoff from lawns and agricultural fields can cause algal blooms that reduce dissolved oxygen levels and increase turbidity in rivers, lakes, estuaries, and territorial seas. Water low in dissolved oxygen cannot support aquatic life; it is widely-recognized that this phenomenon has resulted in the devastation of commercial and recreational fisheries in the northern Gulf of Mexico. Committee on Environment and Natural Resources, *Integrated Assessment of Hypoxia in the Northern Gulf of Mexico* (Washington, DC: National Science and Technology Council, 2000). The amount of nitrogen that is exported downstream varies depending on stream size, and how much nitrogen is present in the system. Nitrogen loss is greater in smaller, shallow streams, most likely because denitrification and settling of nitrogen particles occur at slower rates in deeper channels. Report at 4–16 (citing R.G. Alexander, et al., “Effect of Stream Channel Size on the Delivery of Nitrogen to the Gulf of Mexico,” *Nature* 403:758–761 (2000)). At low loading rates, the biotic removal of dissolved nitrogen from water is high and occurs primarily in small tributaries, reducing the loading to larger tributaries and rivers downstream. At high nitrogen loading rates, tributaries become nitrogen saturated and are not effectively able to remove nitrogen, resulting in high nitrogen export to rivers. *Id.* at 4–18 (citing P.J. Mulholland, et al., “Stream Denitrification across Biomes and Its Response to Anthropogenic Nitrate Loading,” *Nature* 452:202–205 (2008)). The transport of nitrogen and phosphorus downstream has also been well-documented, particularly in the cases of the Gulf of Mexico and the Chesapeake Bay. Tributary streams in the uppermost portions of the Gulf and Bay watersheds transport the majority of nutrients to the downstream waters; an estimated 85% of nitrogen arriving at the hypoxic zone in the Gulf originates in the

upper Mississippi (north of Cairo, Illinois) and the Ohio River Basins. D. Goolsby, et al., *Topic Report 3, Flux and Sources of Nutrients in the Mississippi-Atchafalaya River Basin* (Washington, DC: National Science and Technology Council Committee on Environment and Natural Resources, 1999). The export of nutrients from streams in the Mississippi River Basin has an effect on anoxia, or low oxygen levels, in the Gulf. Report at 4–17 (citing N.N. Rabalais, et al., “Gulf of Mexico Hypoxia, a.k.a. ‘the Dead Zone,’” *Annual Review of Ecology and Systematics* 33:235–263 (2002)). Similarly, nutrient loads from virtually the entire 64,000 square mile watershed affect water quality in the Chesapeake Bay. Simulation tools have been used to determine the nutrient and sediment load reductions that must be made at many different points throughout the entire watershed in order to achieve acceptable water quality in the mainstem of the Bay. These reductions included specific annual nitrogen caps on the upper reaches of the Susquehanna River in New York State, more than 400 miles from the mouth of the Chesapeake Bay. See e.g., U.S. Environmental Protection Agency (EPA), Region III, Chesapeake Bay Program Office, *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads: The Collaborative Process, Technical Tools and Innovative Approaches*, EPA 903–R–03–007 (Washington, DC: EPA, 2003); Rabalais et al. 2002.

Although tributaries export nutrients, carbon, and contaminants downstream, they also transform these substances. Phosphorous and nitrogen arrive at downstream waters having already been cycled, or taken up and transformed by living organisms, many times in headwater and smaller tributaries. Report at 4–19 to 4–20, 6–3 to 6–4 (citing J.R. Webster, and B.C. Patten, “Effects of watershed perturbation on stream potassium and calcium dynamics,” *Ecological Monographs* 49:51–72 (1979); J.D. Newbold, et al., “Measuring nutrient spiraling in streams,” *Canadian Journal of Fisheries and Aquatic Sciences* 38:860–863 (1981); J. Elwood, et al., “Resource spiraling: An operational paradigm for analyzing lotic ecosystems,” in T.D. Fontaine and S.M. Bartell, ed., *Dynamics of Lotic Ecosystems* (Ann Arbor, MI: Ann Arbor Science, 1983), pp. 3–23; S.H. Ensign, and M.W. Doyle, “Nutrient Spiraling in Streams and River Networks,” *Journal of Geophysical Research- Biogeosciences* 111:G04009 (2006)). In addition, some of the nutrient that is taken up as readily available inorganic forms is released back to the water as organic forms that are less available for biotic uptake. *Id.* at 4–20 (citing P.J. Mulholland, et al., “Production of Soluble, High Molecular Weight Phosphorus and Its Subsequent Uptake by Stream Detritus,” *Verhandlungen des Internationalen Verein Limnologie* 23:1190–1197 (1988); S.P. Seitzinger, et al., “Bioavailability of DON from Natural and Anthropogenic Sources to Estuarine Plankton,” *Limnology and Oceanography* 47:353–366 (2002)). Similarly, nutrient incorporated into particulates is not entirely regenerated, but accumulates in longitudinally increasing particulate loads

(i.e. increases moving downstream). *Id.* at 4–20 (citing J.L. Merriam, et al., “Characterizing Nitrogen Dynamics, Retention and Transport in a Tropical Rainforest Stream Using an in situ N–15 Addition,” *Freshwater Biology* 47:143–160 (2002); M.R. Whiles, and W.K. Dodds, “Relationships between Stream Size, Suspended Particles, and Filter-Feeding Macroinvertebrates in a Great Plains Drainage Network,” *Journal of Environmental Quality* 31:1589–1600 (2002); R.O. Hall, et al., “Hydrologic Control of Nitrogen Removal, Storage, and Export in a Mountain Stream,” *Limnology and Oceanography* 54:2128–2142 (2009)). Headwater streams have seasonal cycles in the concentrations of phosphorous and nitrogen that are delivered downstream by accumulating nutrient derived from temporarily growing streambed biomass. *Id.* (citing P.J. Mulholland, and W.R. Hill, “Seasonal Patterns in Streamwater Nutrient and Dissolved Organic Carbon Concentrations: Separating Catchment Flow Path and In-Stream Effects,” *Water Resources Research* 33:1297–1306 (1997); P.J. Mulholland, “The Importance of In-stream Uptake for Regulating Stream Concentrations and Outputs of N and P from a Forested Watershed: Evidence from Long-Term Chemistry Records for Walker Branch Watershed,” *Biogeochemistry* 70:403–426 (2004)). Such variations have been demonstrated to affect downstream productivity. *Id.* (citing P.J. Mulholland, et al., “Longitudinal Patterns of Nutrient Cycling and Periphyton Characteristics in Streams: a Test of Upstream-Downstream Linkage,” *Journal of the North American Benthological Society* 14:357–370 (1995)). Nitrification, the microbial transformation of ammonium to nitrate, affects the form of downstream nutrient delivery. Nitrification occurs naturally in undisturbed headwater streams, but increases sharply in response to ammonium inputs, thereby reducing potential ammonium toxicity from pollutant inputs. *Id.* (citing Newbold, et al., “Phosphorus Dynamics in a Woodland Stream Ecosystem: a Study of Nutrient Spiraling,” *Ecology* 64:1249–1265 (1983); S.C. Chapra, *Surface Water Quality Modeling* (McGraw-Hill, 1996); E.S. Bernhardt, et al., “Whole-system Estimates of Nitrification and Nitrate Uptake in Streams of the Hubbard Brook Experimental Forest,” *Ecosystems* 5:419–430 (2002)). Denitrification, the removal of nitrate from streamwater through transformation to atmospheric nitrogen, is widespread among headwater streams; research indicates that small, unimpacted tributaries can reduce up to 40% of downstream nitrogen delivery through denitrification. *Id.* at 4–20 to 4–21 (citing P.J. Mulholland, et al., “Stream Denitrification across Biomes and Its Response to Anthropogenic Nitrate Loading,” *Nature* 452:202–205 (2008)). Small tributaries also affect the downstream delivery of nutrients through abiotic processes. Streams can reduce phosphorus concentrations through sorption (i.e., “sticking”) to stream sediments. *Id.* at 4–21 (citing J.L. Meyer, “The Role of Sediments and Bryophytes in Phosphorus Dynamics in a Headwater Stream Ecosystem,” *Limnology and Oceanography* 24:365–375 (1979)). This is particularly

beneficial to downstream chemical integrity where phosphorus sorbs to contaminants such as metal hydroxide precipitates. *Id.* (citing J.A. Simmons, “Phosphorus Removal by Sediment in Streams Contaminated with Acid Mine Drainage,” *Water Air and Soil Pollution* 209:123–132 (2010)).

Tributaries also store significant amounts of nutrients and carbon, functioning as important sinks (lags) for river networks so that they do not reach downstream traditional navigable waters, interstate waters, or the territorial seas. Small tributary streams in particular often have the greatest effect on downstream water quality, in terms of storage and reducing inputs to downstream waters. For instance, uptake and transformation of inorganic nitrogen often occurs most rapidly in the smallest tributaries. See, e.g., *id.* at 4–18 (citing B.J. Peterson, et al., “Control of Nitrogen Export from Watersheds by Headwater Streams,” *Science* 292:86–90 (2001)). Small tributaries affect the downstream delivery of nutrients such as phosphorus through abiotic processes; such streams can reduce phosphorus concentrations by sorption to stream sediments.

Tributaries can also serve as a temporary or permanent source or sink for contaminants, for instance substances like metals, sodium, and even dead fish carcasses that adversely affect organisms when occurring at excessive or elevated concentrations to reduce the amounts that reach downstream traditional navigable waters, interstate waters, or the territorial seas. The transport of contaminants to downstream waters can impact water quality downstream, if they are not stored in tributaries. See, e.g., *id.* at 4–26 (citing X. Wang, et al., “Water Quality Changes as a Result of Coalbed Methane Development in a Rocky Mountain Watershed,” *Journal of the American Water Resources Association* 43:1383–1399 (2007)). Tributaries can also serve as at least a temporary sink for contaminants that would otherwise impair downstream water quality. See, e.g., *id.* at 133–134 (citing W.L. Graf, *Plutonium and the Rio Grande: Environmental Change and Contamination in the Nuclear Age* (New York: Oxford University Press, 1994)).

The distances and extent of metal contaminant transport was shown in separate studies in the upper Arkansas River in Colorado, and Clark Fork River in Montana, where past mining activities impacted the headwater tributaries. River bed sediments showed that metals originating from the mining and smelting areas in the headwaters were reaching water bodies up to 550 km downstream. *Id.* at 4–26 to 4–27 (citing E.V. Axtmann, and S.N. Luoma, “Large-scale Distribution of Metal Contamination in the Fine-grained Sediments of the Clark Fork River, Montana, USA,” *Applied Geochemistry* 6:75–88 (1991); B.A. Kimball, et al., “Effects of Colloids on Metal Transport in a River Receiving Acid Mine Drainage, Upper Arkansas River, Colorado, USA,” *Applied Geochemistry* 10:285–306 (1995)).

Military studies of the distribution, transport, and storage of radionuclides (e.g., plutonium, thorium, uranium) have provided convincing evidence for distant chemical

connectivity in river networks because the natural occurrence of radionuclides is extremely rare. From 1942 to 1952, prior to the full understanding of the risks of radionuclides to human health and the environment, plutonium dissolved in acid was discharged untreated into several intermittent headwater streams that flow into the Rio Grande at the Los Alamos National Laboratory, New Mexico. *Id.* at 4–28 (citing W.L. Graf, *Plutonium and the Rio Grande: Environmental Change and Contamination in the Nuclear Age* (New York: Oxford University Press, 1994); S.L. Reneau, *et al.*, “Geomorphic Controls on Contaminant Distribution along an Ephemeral Stream,” *Earth Surface Processes and Landforms* 29:1209–1223 (2004)). Also during this time, nuclear weapons testing occurred west of the upper Rio Grande near Socorro, New Mexico (Trinity blast site) and in Nevada, where fallout occurred on mountainous areas with thin soils that are readily transported to headwater streams in the upper Rio Grande basin. The distribution of plutonium within the Rio Grande illustrates how headwater streams transport and store contaminated sediment that has entered the basin through fallout and from direct discharge. Los Alamos Canyon, while only representing 0.4% of the drainage area at its confluence with the Rio Grande, had a mean annual bedload contribution of plutonium almost seven times that of the mainstem. *Id.* (citing Graf 1994). Much of the bedload contribution occurred sporadically during intense storms that were out of phase with flooding on the upper Rio Grande. Total estimated contributions of plutonium between the two sources to the Rio Grande were approximately 90% from fallout to the landscape and 10% from direct effluent discharge at Los Alamos National Laboratory. *Id.* (citing Graf 1994).

#### C. Tributaries Significantly Affect the Biological Integrity of (a)(1) Through (a)(3) Waters

Tributaries are biologically linked to downstream waters through the movement of living organisms or their reproductive propagules, such as eggs or seeds. For organisms that drift with water flow, biological connections depend on hydrological connections. However, many aquatic organisms are capable of active movement with or against water flow, and others disperse actively or passively over land by walking, flying, drifting, or “hitchhiking.” All of these different types of movement form the basis of biological connectivity between headwater tributaries and downstream waters.

Headwater tributaries increase the amount and quality of habitat available to aquatic organisms. Under adverse conditions, small tributaries provide safe refuge, allowing organisms to persist and recolonize downstream areas once adverse conditions have abated. *See, e.g.*, Report at 4–29 (citing J.L. Meyer and J.B. Wallace, “Lost Linkages and Lotic Ecology: Rediscovering Small Streams,” Pages 295–317 in M.C. Press, N. J. Huntly, and S. Levin, editors. *Ecology: Achievement and Challenge* (Oxford, UK: Blackwell Science, 2001); A. Meyer *et al.*, “The Effect of Low Flow and Stream Drying

on the Distribution and Relative Abundance of the Alien Amphipod, *Echinogammarus berilloni* (Catta, 1878) in a Karstic Stream System (Westphalia, Germany),” *Crustaceana* 77:909–922 (2004); A.D. Huryn *et al.*, “Landscape Heterogeneity and the Biodiversity of Arctic Stream Communities: A Habitat Template Analysis,” *Canadian Journal of Fisheries and Aquatic Sciences* 62:1905–1919 (2005)). Use of tributaries by salmon and other anadromous fish for spawning is well-documented, but even non-migratory species can travel great distances within the river and tributary networks. *See, e.g., id.* at 4–31 (citing O.T. Gorman, “Assemblage Organization of Stream Fishes: The Effects of Rivers on Adventitious Streams,” *American Naturalist* 128(4): 611–616 (1986); A. L. Sheldon, “Conservation of Stream Fishes: Patterns of Diversity, Rarity, and Risk,” *Conservation Biology* 2:149–156 (1988); N.P. Hitt and P.L. Angermeier, “Evidence for Fish Dispersal from Spatial Analysis of Stream Network Topology,” *Journal of the North American Benthological Society* 27:304–320 (2008)). Tributaries also serve as an important source of food for biota in downstream rivers. Tributaries export plankton, vegetation, fish eggs, insects, invertebrates like worms or crayfish, smaller fish that originate in upstream tributaries and other food sources that drift downstream to be consumed by other animals. *See, e.g., id.* at 4–29 (citing D.J. Progar and A.R. Modenke, “Insect Production from Temporary and Perennially Flowing Headwater Streams in Western Oregon,” *Journal of Freshwater Ecology* 17:391–407 (2002)). For example, many fish feed on drifting insects, and numerous studies document the downstream drift of stream invertebrates that then are eaten by fish in larger rivers. *See, e.g., id.* at 4–29 to 4–30 (citing S. Nakano and M. Murakami, “Reciprocal Subsidies: Dynamic Interdependence between Terrestrial and Aquatic Food Webs,” *Proceedings of the National Academy of Sciences USA* 98:166–170 (2001); M.S. Wipfli and D.P. Gregovich, “Export of Invertebrates and Detritus from Fishless Headwater Streams in Southeastern Alaska: Implications for Downstream Salmonid Production,” *Freshwater Biology* 47:957–969 (2002)).

Biological connectivity also allows gene flow, or genetic connectivity, among tributary and river populations. Gene flow is needed to maintain genetic diversity in a species, a basic requirement for that species to be able to adapt to environmental change. Populations connected by gene flow have a larger breeding population size, making them less prone to the deleterious effects of inbreeding and local extinction. *Id.* at 4–33 (citing R. Lande and S. Shannon, “The role of genetic variation in adaptation and population persistence in a changing environment,” *Evolution* 50:434–437 (1996)). Genetic connectivity exists at multiple scales and can extend beyond one a single river catchment, and for species capable of long distance movement (such as salmon), reveals complex interactions among spatially distant populations of aquatic organisms *Id.* (citing J.M. Hughes, *et al.*, “Genes in Streams: Using DNA to Understand the Movement of Freshwater Fauna and Their Riverine

Habitat,” *Bioscience* 59:573–583 (2009); C.D. Anderson, “Considering spatial and temporal scale in landscape-genetic studies of gene flow,” *Molecular Ecology* 19:3565–3575 (2010)).

#### D. Headwater Tributaries Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

As discussed above, the scientific literature supports the conclusion that tributaries, including headwater streams, have a significant nexus to downstream waters based on their contribution to the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters. Headwater tributaries, the small streams at the uppermost reaches of the tributary network, are the most abundant streams in the United States. *See, e.g., id.* at 4–2 (citing T.L. Nadeau and M.C. Rains, “Hydrological connectivity between headwater streams and downstream waters: How science can inform policy,” *Journal of the American Water Resources Association* 43:118–133 (2007)). Collectively, they help shape the chemical, physical, and biological integrity of downstream waters, and provide many of the same functions as non-headwater streams. *See, e.g., id.* at 1–7 to 1–8, 4–1. For example, headwater streams reduce the amount of sediment delivered to downstream waters by trapping sediment from water and runoff. *See, e.g., M. Dieterich and N.H. Anderson, “Dynamics of Abiotic Parameters, Solute Removal and Sediment Retention in Summer-Dry Headwater Stream of Western Oregon,” Hydrobiologia* 379: 1–15 (1998). Headwater streams shape river channels by accumulating and gradually or episodically releasing sediment and large woody debris into river channels. They are also responsible for most nutrient cycling and removal, and thus transforming and changing the amount of nutrients delivered to downstream waters. *See, e.g., Report* at 4–18 (citing B.J. Peterson, *et al.*, “Control of Nitrogen Export from Watersheds by Headwater Streams,” *Science* 292: 86–90 (2001)). A close connection exists between the water quality of these streams and the water quality of traditional navigable waters, interstate waters, and the territorial seas. *See, e.g., State of Ohio Environmental Protection Agency, Nonpoint Source Impacts on Primary Headwater Streams* (Columbus, OH: Ohio Environmental Protection Agency, 2003). Activities such as discharging a pollutant into one part of the tributary system are well-documented to affect other parts of the system, even when the point of discharge is far upstream from the navigable water that experiences the effect of the discharge. *See, e.g., F.M. Dunnivant and E. Anders, A Basic Introduction To Pollutant Fate and Transport: An Integrated Approach With Chemistry, Modeling, Risk Assessment, and Environmental Legislation* (Hoboken, NJ: John Wiley & Sons, Inc., 2006).

Headwater streams provide unique habitat and protection for amphibians, fish, and other aquatic or semi-aquatic species living in and near the stream that may use the downstream waters for other portions of their life stages. *See, e.g., Report* at 1–8; J.L. Meyer, *et al.*, “The Contribution of Headwater Streams to Biodiversity in River Networks,” *Journal of the American Water Resources*

Association 43(1): 86–103 (2007). They also serve as migratory corridors for fish. Tributaries can improve or maintain biological integrity and can control water temperatures in the downstream waters. See, e.g., Report at 4–14 (citing J.L. Ebersole, et al., “Cold water patches in warm streams: Physicochemical characteristics and the influence of shading,” *Journal of the American Water Resources Association* 39:355–368 (2003); B. Gardner, and P.J. Sullivan, “Spatial and temporal stream temperature prediction: Modeling nonstationary temporal covariance structures,” *Water Resources Research* 40:1–9 (2004); B.R. Johnson, et al., “Use of spatially explicit physicochemical data to measure downstream impacts of headwater stream disturbance,” *Water Resources Research* 46:W09526 (2010)). Headwater streams also provide refuge habitat for riverine organisms seeking protection from temperature extremes, flow extremes, low dissolved oxygen, high sediment levels, or the presence of predators, parasites, and competitors. See, e.g., id. at 4–32 (citing J.C. Scrivener, et al., “Juvenile Chinook salmon (*Oncorhynchus tshawytscha*) utilization of Hawks Creek, a small and nonnatal tributary of the Upper Fraser River,” *Canadian Journal of Fisheries and Aquatic Sciences* 51:1139–1146 (1994); R.A. Curry, et al., “Use of small streams by young brook trout spawned in a lake,” *Transactions of the American Fisheries Society* 126:77–83 (1997); A.M. Pires, et al., “Seasonal changes in fish community structure of intermittent streams in the middle reaches of the Guadiana basin, Portugal,” *Journal of Fish Biology* 54:235–249 (1999); M.J. Bradford, et al., “Ecology of juvenile Chinook salmon in a small nonnatal stream of the Yukon River drainage and the role of ice conditions on their distribution and survival,” *Canadian Journal of Zoology-Revue Canadienne De Zoologie* 79:2043–2054 (2001); M.A. Cairns, et al., “Influence of summer stream temperatures on black spot infestation of juvenile coho salmon in the Oregon Coast Range,” *Transactions of the American Fisheries Society* 134:1471–1479 (2005); Wigington, P. J., et al., “Coho salmon dependence on intermittent streams,” *Frontiers in Ecology and the Environment* 4:513–518 (2006)). Headwater streams serve as a source of food materials such as insects, larvae, and organic matter to nourish the fish, mammals, amphibians, and other organisms in downstream streams, rivers, and lakes. See, e.g., id. at 4–22, 4–24 (citing S.G., Fisher, and G.E. Likens, “Energy flow in Bear Brook, New Hampshire: An integrative approach to stream ecosystem metabolism,” *Ecological Monographs* 43:421–439 (1973); J.L. Meyer, “The microbial loop in flowing waters,” *Microbial Ecology* 28:195–199 (1994); J.B. Wallace, et al., “Multiple trophic levels of a forest stream linked to terrestrial litter inputs,” *Science* 277:102–104 (1997); R.O. Hall, and J.L. Meyer, “The trophic significance of bacteria in a detritus-based stream food web,” *Ecology* 79:1995–2012 (1998); R.O. Hall, et al., “Organic matter flow in stream food webs with reduced detrital resource base,” *Ecology* 81:3445–3463 (2000); T. Gomi, et al., “Understanding processes and downstream linkages of headwater

systems,” *Bioscience* 52:905–916 (2002); C. Augspurger, et al., “Tracking carbon flow in a 2-week-old and 6-week-old stream biofilm food web,” *Limnology and Oceanography* 53:642–650 (2008)). Disruptions in these biological processes affect the ecological functions of the entire downstream system. See, e.g., L.A. Kaplan, et al., “Patterns of Dissolved Organic Carbon in Transport,” *Limnology and Oceanography* 25: 1034–1043 (1980); R.L. Vannote, et al., “The River Continuum Concept,” *Canadian Journal of Fisheries and Aquatic Sciences* 37: 130–37 (1980). Headwater streams can help to maintain base flow in the larger rivers downstream, which is particularly important in times of drought. See, e.g., Report at 4–4, 4–66 (citing P.D. Brooks, and M.M. Lemon, “Spatial variability in dissolved organic matter and inorganic nitrogen concentrations in a semiarid stream, San Pedro River, Arizona,” *Journal of Geophysical Research-Biogeosciences* 112:G03S05.D (2007); Tetzlaff, and C. Soulsby, “Sources of baseflow in larger catchments—using tracers to develop a holistic understanding of runoff generation,” *Journal of Hydrology* 359:287–302 (2008)). At the same time, the network of headwater streams can regulate the flow of water into downstream waters, mitigating low flow and high flow extremes, reducing local and downstream flooding, and preventing excess erosion caused by flooding. See, e.g., United States, U.S. EPA and USDA/ARS Southwest Watershed Research Center, EPA/600/R–08/134, ARS/2330462008: *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest* (Washington, DC: U.S. EPA and USDA/ARS Southwest Watershed Research Center, Levick et al., 2008) (Levick et al. 2008).

#### F. Ephemeral and Intermittent Tributaries Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

Tributaries do not need to flow perennially to have a significant nexus to downstream waters. Approximately 59% of streams across the United States (excluding Alaska) flow intermittently or ephemerally; ephemeral and intermittent streams are particularly prevalent in the arid and semi-arid Southwest, where they account for over 81% of streams. Levick et al. 2008. Despite their intermittent or ephemeral flow, these streams nonetheless perform the same important ecological and hydrological functions documented in the scientific literature as perennial streams, through their movement of water, nutrients, and sediment to downstream waters. *Id.* The importance of intermittent and ephemeral streams is documented in a 2008 peer-reviewed report by EPA’s Office of Research and Development and the U.S. Department of Agriculture’s Agricultural Research Service, which addresses the hydrological and ecological significance of ephemeral and intermittent streams in the arid and semi-arid Southwestern United States and their connections to downstream waters; the report is a state-of-the-art synthesis of current knowledge of the ecology and hydrology in these systems. *Id.*

Intermittent and ephemeral streams are chemically, physically, and biologically connected to downstream waters, and these connections have effects downstream. See, e.g., *id.* In some areas, stormflows channeled into alluvial floodplain aquifers by intermittent and ephemeral streams are the major source of annual streamflow in rivers. Perennial flows are not necessary for chemical connections. Periodic flows in ephemeral or intermittent tributaries can have a strong influence on biogeochemistry by connecting the channel and other landscape elements. See, e.g., Report at 4–16 (citing H.M. Valett, et al., “Biogeochemical and Metabolic Responses to the Flood Pulse in a Semiarid Floodplain,” *Ecology* 86(1): 220–234 (2005)). This episodic connection can be very important for transmitting a substantial amount of material into downstream rivers. See, e.g., *id.* (citing Nadeau and Rains (2007)). Ephemeral desert streams have been shown to export particularly high sediment loadings. See, e.g., *id.* at 4–10 (citing M.A. Hassan, “Observations of Desert Food Bores,” *Earth Surface Processes and Landforms* 15:481–485 (1990)). Ephemeral streams can also temporarily and effectively store large amounts of sediment that would otherwise wash downstream, contributing to the maintenance of downstream water quality and productive fish habitat. See, e.g., S.H. Duncan, et al., “Transport of Road-Surface Sediment through Ephemeral Stream Channels,” *Water Resources Bulletin* 23(1): 113–119 (1987). This temporary storage of sediment thus helps maintain the chemical and biologic integrity of downstream waters.

The Report provides case studies of prairie streams and Southwest intermittent and ephemeral streams, two stream types whose jurisdictional status has been called into question in the past. These case studies highlight the importance of these streams to downstream waters, despite their small size and ephemeral or intermittent flow regime. Prairie streams are frequently subjected to the extremes of drying and flooding, and intermittent or flashy hydrology is prevalent in river networks throughout most of the Great Plains. Report at 4–40 (citing W.J. Matthews, “North American Prairie Streams as Systems for Ecological Study,” *Journal of the North American Benthological Society* 7:387–409 (1988); A.V. Zale et al., “The Physicochemistry, Flora, and Fauna of Intermittent Prairie Streams: A Review of the Literature,” *United States Fish and Wildlife Service Biological Report* 89:1–44 (1989); N.L. Poff, “A Hydrogeography of Unregulated Streams in the United States and an Examination of Scale Dependence in Some Hydrological Descriptors,” *Freshwater Biology* 36:71–91 (1996); W.K. Dodds, et al., “Life on the Edge: The Ecology of Great Plains Prairie Streams,” *Bioscience* 54:205–216 (2004)). Prairie streams typically represent a collection of spring-fed, perennial pools and reaches, embedded within larger, intermittently flowing segments. *Id.* at 4–55 (citing T.R. Labbe, and K.D. Fausch, “Dynamics of Intermittent Stream Habitat Regulate Persistence of a Threatened Fish at Multiple Scales,” *Ecological Applications* 10:1774–1791 (2000)). These streams have

significant chemical, physical, and biological connections to downstream waters, despite extensive alteration of historical prairie regions by agriculture, water impoundment, water withdrawals, and other human activities, and the challenges these alterations create for assessing connectivity. *Id.* (citing W.J. Matthews, and H.W. Robinson, "Influence of Drainage Connectivity, Drainage Area and Regional Species Richness on Fishes of the Interior Highlands in Arkansas," *American Midland Naturalist* 139:1–19 (1998); W.K. Dodds, *et al.*, "Life on the Edge: The Ecology of Great Plains Prairie Streams," *Bioscience* 54:205–216 (2004)). The most notable connections are via flood propagation, contaminated sediment transport, nutrient retention, and the extensive transport and movement of fish species (including eggs and larvae) throughout these networks. *Id.* at 4–55 (citing H.F. Matthai, *Floods of June 1965 in South Platte River Basin, Colorado*, Water Supply Paper 1850–B (Washington, DC: U.S. Geological Survey, 1969); A.J. Horowitz, *et al.*, "The Effect of Mining on the Sediment-trace Element Geochemistry of Cores from the Cheyenne River Arm of Lake Oahe, South Dakota, USA," *Chemical Geology* 67:17–33 (1988); DC Marron, "The Transport of Mine Tailings as Suspended Sediment in the Belle Fourche River, West-central South Dakota, USA," *International Association of Hydrologic Sciences* 184:19–26 (1989); W.K. Dodds, *et al.*, "Nitrogen Transport from Tallgrass Prairie Watersheds," *Journal of Environmental Quality* 25:973–981 (1996); K.D. Fausch, and K.R. Bestgen, "Ecology of Fishes Indigenous to the Central and Southwestern Great Plains," in F.L. Knopf and F.B. Samson, *et al.*, *Ecology and Conservation of Great Plains Vertebrates*, (New York, NY: Springer-Verlag, 1997), pp. 131–166; S.P. Platania, and C.S. Altenbach, "Reproductive Strategies and Egg Types of Seven Rio Grande Basin Cyprinids," *Copeia* 1998:559–569 (1998); K.M. Fritz, and W.K. Dodds, "Resistance and Resilience of Macroinvertebrate Assemblages to Drying and Flood in a Tallgrass Prairie Stream System," *Hydrobiologia* 527:99–112 (2004); K.M. Fritz, and W.K. Dodds, "Harshness: Characterization of Intermittent Stream Habitat over Space and Time," *Marine and Freshwater Research* 56:13–23 (2005); N.R. Franssen, *et al.*, "Effects of Floods on Fish Assemblages in an Intermittent Prairie Stream," *Freshwater Biology* 51:2072–2086 (2006); R.B. Alexander, *et al.*, "Differences in Phosphorus and Nitrogen Delivery to the Gulf of Mexico from the Mississippi River Basin," *Environmental Science & Technology* 42:822–830 (2008); J.S. Perkins, and K.B. Gido, "Stream Fragmentation Thresholds for a Reproductive Guild of Great Plains Fishes," *Fisheries* 36:371–383 (2011)).

Southwestern intermittent and ephemeral streams exert strong influences on the structure and function of downstream waters, and the case study (included in the Report) echoes many of the findings of the functions of intermittent and ephemeral tributaries generally, which are described above. The case study focuses on the heavily studied San Pedro River, located in southeast Arizona, in particular, as a representative example of the

hydrological behavior and the connectivity of rivers in the Southwest, but also examines evidence relevant to other Southwestern streams. The chemical, physical, and biological connections of Southwestern intermittent and ephemeral streams highlighted in the case study are summarized below. Flows from ephemeral streams are one of the major drivers of the dynamic hydrology of Southwest rivers (particularly of floods during monsoon seasons. *Id.* at 4–60, 4–67 (citing DC Goodrich, *et al.*, "Linearity of Basin Response as a Function of Scale in a Semiarid Watershed," *Water Resources Research* 33:2951–2965 (1997); F. Yuan, and S. Miyamoto, "Characteristics of Oxygen-18 and Deuterium Composition in Waters from the Pecos River in American Southwest," *Chemical Geology* 255:220–230 (2008)).

Downstream river fishes and invertebrates are adapted to the variable flow regimes that are influenced strongly by ephemeral tributary systems, which provide isolated pools as refuges for fish during dry periods. *Id.* at 4–68 to 4–69 (citing K.R. John, "Survival of Fish in Intermittent Streams of the Chiricua Mountains, Arizona," *Ecology* 45:112–119 (1964); T.R. Labbe, and K.D. Fausch, "Dynamics of Intermittent Stream Habitat Regulate Persistence of a Threatened Fish at Multiple Scales," *Ecological Applications* 10:1774–1791 (2000); J.N. Rinne, and D. Miller, "Hydrology, Geomorphology and Management: Implications for Sustainability of Native Southwestern Fishes," *Reviews in Fisheries Science* 14:91–110 (2006); D.A. Lytle, *et al.*, "Evolution of Aquatic Insect Behaviors across a Gradient of Disturbance Predictability," *Proceedings of the Royal Society—Series B* 275:453–462 (2008)).

Ephemeral tributaries in the Southwest also supply water to mainstem river alluvial aquifers, which aids in the sustaining river baseflows downstream. *Id.* at 4–64 (citing DC Goodrich, *et al.*, "Linearity of Basin Response as a Function of Scale in a Semiarid Watershed," *Water Resources Research* 33:2951–2965 (1997); J.B. Callegary, *et al.*, "Rapid Estimation of Recharge Potential in Ephemeral-Stream Channels using Electromagnetic Methods, and Measurements of Channel and Vegetation Characteristics," *Journal of Hydrology* 344:17–31 (2007)).

Ephemeral tributaries export sediment downstream during major hydrologic events; the sediment, in turn, contributes to materials that comprise alluvial aquifers and shape the fluvial geomorphology (the science of how rivers and streams form given the landscape setting) of downstream waters. *Id.* at 4–65 (citing G.C. Nanson, and J.C. Croke, "A Genetic Classification of Floodplains," *Geomorphology* 4:459–486 (1992)).

The nutrient and biogeochemical integrity of downstream Southwestern rivers, such as the San Pedro River, is heavily influenced by nutrient export from ephemeral tributaries after storm flow events. *Id.* at 4–18, 4–66 (citing P.D. Brooks, and M.M. Lemon, "Spatial Variability in Dissolved Organic Matter and Inorganic Nitrogen Concentrations in a Semiarid Stream, San Pedro River, Arizona," *Journal of Geophysical Research—Biogeosciences* 112:G03S05 (2007)).

Extensive downstream

river riparian communities are supported by water, sediment and nutrients exported to the river from ephemeral tributaries; these riparian communities have a profound influence on the river attributes through shading, allochthonous (originating from outside of the channel) inputs of organic matter, detritus, wood, and invertebrates to the river. *Id.* at 4–65 to 4–66 (citing S.V. Gregory, *et al.*, "An Ecosystem Perspective of Riparian Zones: Focus on Links between Land and Water," *Bioscience* 41:540–551 (1991); R.J. Naiman, *et al.*, *Riparia: Ecology, Conservation, and Management of Streamside Communities* (Burlington, MA: Elsevier, Inc., 2005); J.C. Stromberg, *et al.*, "Effects of Stream Flow Intermittency on Riparian Vegetation of a Semiarid Region River (San Pedro River, Arizona)," *River Research and Applications* 21:925–938 (2005); M. Baillie, *et al.*, "Quantifying Water Sources to a Semiarid Riparian Ecosystem, San Pedro River, Arizona," *Journal of Geophysical Research* 112:G03S02 (2007); National Research Council, *Riparian Areas: Functions and Strategies for Management* (Washington, DC: National Academy Press, 2002)).

E. Tributary Lakes, Ponds, and Wetlands Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

As discussed elsewhere in this preamble, riparian and floodplain wetlands have a significant nexus to downstream waters, and wetlands that are tributaries are a subset of such wetlands. The fact that a wetland tributary is in-stream often enhances its ability to filter pollutants and contaminants that would otherwise make it downstream; in-stream wetlands also attenuate floodwaters. Lakes and ponds serve many important functions that affect the chemical, physical, and biological conditions downstream. Lake tributaries can act as sinks, storing floodwaters, sediment, and nutrients, as these materials have the opportunity to settle out, at least temporarily, as water moves through the lake to downstream waters. *See, e.g.*, R.W. Phillips, *et al.*, "Connectivity and Runoff Dynamics in Heterogeneous Basins," *Hydrological Processes* 25(19): 3061–3075 (2011). The attenuation of floodwaters can also maintain stream flows downstream. *Id.* Lakes, as with other tributaries, can also act as sources, contributing flow, nutrient, sediment, and other materials downstream. Total Maximum Daily Loads (TMDLs) for nutrients have been established for many in-stream lakes across the country in recognition of the ability of lakes to transport nutrients downstream, contributing to downstream impairments. *See, e.g.* Maine Department of Environmental Protection, *Phosphorus Control Action Plan and Total Maximum Daily (Annual Phosphorous) Load Report, Daigle Pond, New Canada, Aroostook County, Maine*, Daigle Pond PCAP—TMDL Report, Maine DEPLW—0789 (Maine DEP, 2006); U.S. Environmental Protection Agency, "Section 6 Echo Park Lake TMDLs," *Los Angeles Area Lakes TMDLs, January 2011 Revised Draft* (2011). Lakes can also serve as habitat for species that then move downstream. For instance, brook trout that are stocked in headwater

lakes in Idaho and Montana are capable of invading most downstream habitat, including through very steep channel slopes and waterfalls. S.B. Adams, *et al.*, "Geography of Invasion in Mountain Streams: Consequences of Headwater Lake Fish Introductions," *Ecosystems* 4(4): 296–307. These non-native species can then affect the biological integrity of downstream waters by impacting populations of native fish species, such as cutthroat trout, downstream. *See, e.g.*, J.B. Dunham, *et al.*, "Alien Invasions in Aquatic Ecosystems: Toward an Understanding of Brook Trout Invasions and Potential Impacts on Inland Cutthroat Trout in Western North America," *Reviews in Fish Biology and Fisheries* 12(4): 373–391 (2002). For example, non-native trout were introduced in headwater tributary lakes to the Little Kern River in the southern Sierra Nevada and dispersed downstream, causing the near-extinction of the native Little Kern golden trout. R.A. Knapp, and K.R. Matthews, "Effects on Nonnative Fishes on Wilderness Lake Ecosystems in the Sierra Nevada and Recommendations for Reducing Impacts," in D. N. Cole, *et al.*, ed., *Wilderness Science in a Time of Change Conference, Volume 5: Wilderness Ecosystems, Threats, and Management, Missoula, Montana, May 23–27, 1999*, Proceedings RMRS-P-15-VOL-5 (Ogden, UT: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, 2000), 312–317. These studies demonstrate the ability of organisms to travel from tributary lakes to downstream waters, which is not limited to just non-native species; many other species can also move downstream and back again.

One type of wetlands located in-stream are unidirectional wetlands that are connected to the river network through a channel (e.g., wetlands that serve as stream origins; a definition of "unidirectional wetlands" can be found in part I section 4.B above). These tributary wetlands are generally exemplary of tributary wetlands as a whole, and because the Report focuses in part on these wetlands, they are discussed here in further detail. These are wetlands from which a stream channel originates. Report at 5–1 to 5–2. They are part of the stream network itself, and along with first- and second-order streams, form the headwaters of the river network. Such wetlands have a direct hydrologic connection to the tributary network via unidirectional flow from wetland to the headwater stream. Channel origin wetlands generally have important chemical, physical, and biological effects on (a)(1) through (a)(3) waters, including hydrologic, water quality, and habitat functions, regardless if the outflow from the wetland to the stream is perennial, intermittent, or ephemeral. *Id.* Like other wetlands, wetlands that serve as stream origins can transport channel-forming sediment and woody debris, transport stored organic matter, remove and transform pollutants and excess nutrients such as nitrogen and phosphorus, attenuate and store floodwaters, contribute to stream baseflow through groundwater recharge, and provide habitat for breeding fish, amphibians, reptiles, birds, and other aquatic and semi-aquatic species that move from the wetlands to the river network. *Id.* at 5–41.

Wetlands that serve as stream origins connect via perennial, intermittent, or ephemeral drainages to river networks. *Id.* at 5–22 to 5–23 (citing M.C. Rains, *et al.*, "The Role of Perched Aquifers in Hydrological Connectivity and Biogeochemical Processes in Vernal Pool Landscapes, Central Valley, California," *Hydrological Processes* 20:1157–1175 (2006); M.C. Rains, *et al.*, "Geological Control of Physical and Chemical Hydrology in California Vernal Pools," *Wetlands* 28:347–362 (2008); T.R. Morley, *et al.*, "The Role of Headwater Wetlands in Altering Streamflow and Chemistry in a Maine, USA Catchment," *Journal of the American Water Resources Association* 47:337–349 (2011)). Regardless of the permanence of flow, such wetlands have an impact on downstream water. *Id.* at 5–1 to 5–2. Wetland seeps, for example, can form where groundwater discharges from breaks in slope. *Id.* at 5–21 (citing B.R. Hall, *et al.*, "Environmental Influences on Plant Species Composition in Ground-water Seeps in the Catskill Mountains of New York," *Wetlands* 21:125–134 (2001); M.A. O'Driscoll, and D.R. DeWalle, "Seeps Regulate Stream Nitrate Concentration in a Forested Appalachian Catchment," *Journal of Environmental Quality* 39:420–431 (2010)). They often have perennial connections to the stream, providing important sources of water downstream, particularly during summer baseflow. *Id.* at 5–22 (citing T.R. Morley, *et al.*, "The Role of Headwater Wetlands in Altering Streamflow and Chemistry in a Maine, USA Catchment," *Journal of the American Water Resources Association* 47:337–349 (2011)). In Maine, for example, seeps were found to provide 40 to 80% of stream water during baseflow periods. *Id.* In other cases, surface connections between channel origin wetlands and streams are intermittent or ephemeral. For example, California vernal pools spill water a great number of days during the years via channels, providing water downstream. *Id.* (citing M.C. Rains, *et al.*, "The Role of Perched Aquifers in Hydrological Connectivity and Biogeochemical Processes in Vernal Pool Landscapes, Central Valley, California," *Hydrological Processes* 20:1157–1175 (2006); M.C. Rains, *et al.*, "Geological Control of Physical and Chemical Hydrology in California Vernal Pools," *Wetlands* 28:347–362 (2008)). In addition to surface water connections, groundwater flow can hydrologically connect wetlands that serve as stream origins with the stream network. *Id.* at 5–23.

The hydrologic connection of the wetland to the stream can affect streamflow by altering baseflow or storm flow through several mechanisms, including surface storage and groundwater recharge. *Id.* at 5–25. Studies at the larger scale have shown that wetlands, by storing water, reduce peak streamflows and, thus, downstream flooding. *Id.* (citing J. Jacques, and D. L. Lorenz, *Techniques for Estimating the Magnitude and Frequency of Floods of Ungauged Streams in Minnesota*, Report 87–4170 (Washington, DC: U.S. Geological Survey, 1988); Vining, K.C., *Simulation of Streamflow and Wetland Storage, Starkweather Coulee Subbasin, North*

*Dakota, Water Years 1981–98*, Water-Resources Investigations Report 02–4113 (Bismarck, ND: U.S. Geological Survey, 2002), 33 p.; P. McEachern, *et al.*, "Landscape Control of Water Chemistry in Northern Boreal Streams of Alberta," *Journal of Hydrology* 323:303–324 (2006); R.A. Gleason, *et al.* *Estimating Water Storage Capacity of Existing and Potentially Restorable Wetland Depressions in a Subbasin of the Red River of the North*, U.S. Geological Survey Open-File Report 2007–1159 (Reston, VA: U.S. Geological Survey, 2007), 36 p.). In some cases, however, where wetlands that serve as stream origins are already saturated prior to rainfall, they can convey stormwater quickly downstream and thus actually increase flood peaks. *Id.* at 227 (citing Bay, R., "Runoff from Small Peatland Watersheds," *Journal of Hydrology* 9:90–102 (1969); A. Bullock, and M. Acreman, "The Role of Wetlands in the Hydrological Cycle," *Hydrology and Earth System Sciences* 7:358–389 (2003)). This is because the wetland soil, if completely saturated, cannot store any additional water, making the wetland enable to store floodwater.

Wetlands that serve as stream origins have important chemical connections to downstream waters that affect the integrity of those waters. These wetlands contain diverse microbial populations that perform various chemical transformations, acting as source of compounds and influencing the water quality downstream. *Id.* at 5–28 (citing K.R. Reddy, and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications*, 774 p. (2008)). Sulfate-reducing bacteria found in some headwater wetlands produce methylated mercury, which is then transported downstream by surface flows. *Id.* (citing O.K. Linqvist, *et al.*, "Mercury in the Swedish Environment—Recent Research on Causes, Consequences, and Remedial Measures," *Water Air and Soil Pollution* 55:xi-xiii (1991); G. Mierle, and R. Ingram, "The Role of Humic Substances in the Mobilization of Mercury from Watersheds," *Water Air and Soil Pollution* 56:349–357 (1991); C.T. Driscoll, *et al.*, "The Role of Dissolved Organic Carbon in the Chemistry and Bioavailability of Mercury in Remote Adirondack Lakes," *Water Air and Soil Pollution* 80:499–508 (1995); B.A. Branfireun, *et al.*, "In situ Sulphate Stimulation of Mercury Methylation in a Boreal Peatland: Toward a Link Between Acid Rain and Methylmercury Contamination in Remote Environments," *Global Biogeochemical Cycles* 13:743–750 (1999)). Wetlands, including those that serve as stream origins, are the principle sources of dissolved organic carbon (DOC) in forests to downstream waters. *Id.* (citing P.J. Mulholland, and E.J. Kuenzler, "Organic Carbon Export from Upland and Forested Wetland Watersheds," *Limnology and Oceanography* 24:960–966 (1979); N.R. Urban, *et al.*, "Export of Dissolved Organic Carbon and Acidity from Peatlands," *Water Resources Research* 25:1619–1628 (1989); B.W. Eckhardt and T.R. Moore, "Controls on Dissolved Organic Carbon Concentrations in Streams of Southern Quebec," *Canadian Journal of Fisheries and Aquatic Sciences* 47:1537–1544 (1990); J.-F. Koprivnjak and T.R. Moore,

- "Sources, Sinks, and Fluxes of Dissolved Organic Carbon in Subarctic Fen Catchments," *Arctic and Alpine Research* 24:204–210 (1992); P. Kortelainen, "Content of Total Organic Carbon in Finnish Lakes and Its Relationship to Catchment Characteristics," *Canadian Journal of Fisheries and Aquatic Sciences* 50:1477–1483 (1993); T.A. Clair, et al., "Exports of Carbon and Nitrogen from River Basins in Canada's Atlantic Provinces," *Global Biogeochemical Cycles* 8:441–450 (1994); D. Hope, et al., "A Review of the Export of Carbon in River Water: Fluxes and Processes," *Environmental Pollution* 84:301–324 (1994); P.J. Dillon and L.A. Molot, "Effects of Landscape Form on Export of Dissolved Organic Carbon, Iron, and Phosphorus from Forested Stream Catchments," *Water Resources Research* 33:2591–2600 (1997); S.E. Gergel, et al., "Dissolved Organic Carbon as an Indicator of the Scale of Watershed Influence on Lakes and Rivers," *Ecological Applications* 9:1377–1390 (1999). Export of DOC to downstream waters supports primary productivity, effects pH and buffering capacity, and regulates exposure to UV–B radiation. *Id.* at 5–29 (citing K.N. Eshelman and H.F. Hemond, "The Role of Organic Acids in the Acid-base Status of Surface Waters at Bickford Watershed, Massachusetts," *Water Resources Research* 21:1503–1510 (1985); L.O. Hedim, et al., "Patterns of Nutrient Loss from Unpolluted Old-growth Temperate Forests: Evaluation of Biogeochemical Theory," *Ecology* 76:493–509 (1995); D.W. Schindler and P.J. Curtis, "The Role of DOC in Protecting Freshwaters Subjected to Climate Warming and Acidification from UV Exposure," *Biogeochemistry* 36:1–8 (1997); J.C. Nuff and G.P. Asner, "Dissolved Organic Carbon in Terrestrial Ecosystems: Synthesis and a Model," *Ecosystems* 4:29–48 (2001).
- Wetlands also act as sinks and transformers for pollutants, including excess nutrients, through such processes as denitrification, ammonia volatilization, microbial and plant biomass assimilation, sedimentation, sorption and precipitation, biological uptake, and long-term storage of plant detritus. *Id.* (citing K.C. Ewel and H.T. Odum, *Cypress Swamps* (Gainesville, FL: University Presses of Florida, 1984); S.J. Nixon and V.J. Lee, *Wetlands and Water Quality: A Regional Review of Recent Research in the United States on the Role of Freshwater and Saltwater Wetlands as Sources, Sinks, and Transformers of Nitrogen, Phosphorus, and Various Heavy Metals*, Technical Report Y-86-2 (Vicksburg, MS: U.S. Army Corps of Engineers, Waterways Experiment Station, 1986); C. Johnston, "Sediment and Nutrient Retention by Freshwater Wetlands: Effects on Surface Water Quality," *Critical Reviews in Environmental Control* 21:491–565 (1991); K.R. Reddy, et al., "Phosphorus Retention in Streams and Wetlands: A Review," *Critical Reviews in Environmental Science and Technology* 29:83–146 (1999); W.J. Mitsch and J.G. Gosselink, *Wetlands*, 4th edition (Hoboken, NJ: John Wiley & Sons Inc., 2007); K.R. Reddy, and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications* (Boca Raton, FL: CRC Press, 2008); R.H. Kadlec and S.D. Wallace, *Treatment Wetlands*, 2nd edition (Boca Raton, FL: CRC Press, 2009)). Specifically, wetlands reduce phosphorus, nitrate, and ammonium by large percentages. *Id.* at 5–30 (citing F.E. Dierberg and P.L. Brezonik, "Nitrogen and Phosphorus Mass Balances in a Cypress Dome Receiving Wastewater," in K.C. Ewel and H.T. Odum, ed., *Cypress Swamps* (Gainesville, FL: University Presses of Florida, 1984), pp. 112–118; E.J. Dunne, et al., "Phosphorus Release and Retention by Soils of Natural Isolated Wetlands," *International Journal of Environment and Pollution* 28:496–516 (2006); T.E. Jordan, et al., "Comparing Functional Assessments of Wetlands to Measurements of Soil Characteristics and Nitrogen Processing," *Wetlands* 27:479–497 (2007)). These processes are important for protecting downstream waters from pollutants from agricultural runoff. Wetland microbial processes reduce other pollutants, such as pesticides, hydrocarbons, heavy metals, and chlorinated solvents. *Id.* (citing R.R. Brooks, et al., "Cobalt and Nickel Uptake by the *Nyssaceae*," *Taxon* 26:197–201 (1977); C.M. Kao, et al., "Non-point Source Pesticide Removal by a Mountainous Wetland," *Water Science and Technology* 46:199–206 (2002); P.I. Boon, "Biogeochemistry and Bacterial Ecology of Hydrologically Dynamic Wetlands," in D. P. Batzer and R. R. Sharitz, ed., *Ecology of Freshwater and Estuarine Wetlands* (Berkeley, CA: University of California Press, 2006), pp. 115–176).
- Tributary wetlands have important biological connections downstream that impact the integrity of (a)(1) through (a)(3) waters. Emergent and aquatic vegetation found in wetlands disperse by water, wind, and hitchhiking on migratory animals from tributary wetlands downstream. *Id.* at 5–31 (citing M.B. Soons and G.W. Heil, "Reduced Colonization Capacity in Fragmented Populations of Wind-Dispersed Grassland Forbs," *Journal of Ecology* 90:1033–1043 (2002); M.B. Soons, "Wind Dispersal in Freshwater Wetlands: Knowledge for Conservation and Restoration," *Applied Vegetation Science* 9:271–278 (2006); C. Nilsson, et al., "The Role of Hydrochory in Structuring Riparian and Wetland Vegetation," *Biological Reviews* 85:837–858 (2010)). Similarly, fish move between the river network and wetlands during times of surface water connections, and tributary wetlands by definition are connected on the surface to downstream waters. *Id.* at 5–32 (citing J.W. Snodgrass, et al., "Factors affecting the occurrence and structure of fish assemblages in isolated wetlands of the upper coastal plain, USA," *Canadian Journal of Fisheries and Aquatic Sciences* 53:443–454 (1996); K.D. Zimmer, et al., "Effects of fathead minnow colonization and removal on a prairie wetland ecosystem," *Ecosystems* 4:346–357 (2001); M.J. Baber, et al., "Controls on fish distribution and abundance in temporary wetlands," *Canadian Journal of Fisheries and Aquatic Sciences* 59:1441–1450 (2002); M.A. Hanson, et al., "Biotic interactions as determinants of ecosystem structure in prairie wetlands: An example using fish," *Wetlands* 25:764–775 (2005); B.R. Herwig, et al., "Factors influencing fish distributions in shallow lakes in prairie and prairie-parkland regions of Minnesota, USA," *Wetlands* 30:609–619 (2010)). Mammals that can disperse overland can also contribute to connectivity. *Id.* (citing C.E. Shanks, and G.C. Arthur, "Muskrat movements and population dynamics in Missouri farm ponds and streams," *Journal of Wildlife Management* 16:138–148 (1952); W.R. Clark, "Ecology of muskrats in prairie wetlands," in H.R. Murkin, et al., ed., *Prairie Wetland Ecology: The Contribution of the Marsh Ecology Research Program*, (Ames, IA: Iowa State University Press, 2000), pp. 287–313). Insects also hitchhike on birds and mammals from tributary wetlands to the stream network, which can then serve as a food source for downstream waters. *Id.* (citing J. Figuerola, and A.J. Green, "Dispersal of Aquatic Organisms by Waterbirds: A Review of Past Research and Priorities for Future Studies," *Freshwater Biology* 47:483–494 (2002); J. Figuerola, et al., "Invertebrate Eggs Can Fly: Evidence of Waterfowl-Mediated Gene Flow in Aquatic Invertebrates," *American Naturalist* 165:274–280 (2005)). Insects that are flight-capable also use both stream and tributary wetlands, moving from the stream to the wetland to find suitable habitat for overwintering, refuge from adverse conditions, hunting, foraging, or breeding. *Id.* at 5–33 (citing D.D. Williams, "Environmental Constraints in Temporary Fresh Waters and Their Consequences for the Insect Fauna," *Journal of the North American Benthological Society* 15:634–650 (1996); A.J. Bohonak and D.G. Jenkins, "Ecological and Evolutionary Significance of Dispersal by Freshwater Invertebrates," *Ecology Letters* 6:783–796 (2003)). Amphibians and reptiles, including frogs, toads, and newts, also move between streams or rivers and tributary wetlands to satisfy part of their life history requirements, feed on aquatic insects, and avoid predators. *Id.* (citing V.S. Lamoureux and D.M. Madison, "Overwintering Habitats of Radio-Implanted Green Frogs, *Rana clamitans*," *Journal of Herpetology* 33:430–435 (1999); K.J. Babbitt, et al., "Patterns of Larval Amphibian Distribution Along a Wetland Hydroperiod Gradient," *Canadian Journal of Zoology-Revue Canadienne De Zoologie* 81:1539–1552 (2003); S.B. Adams, et al., "Instream Movements by Boreal Toads (*Bufo boreas boreas*)," *Herpetological Review* 36:27–33 (2005); D.M. Green, "*Bufo americanus*, American Toad," in M. Lannoo, ed., *Amphibian Declines: The Conservation Status of United States Species* (Berkeley, CA: University of California Press, 2005), pp. 692–704; T.W. Hunsinger and M.J. Lannoo, "Notophthalmus viridescens, Eastern Newt," in M. Lannoo, ed., *Amphibian Declines: The Conservation Status of United States Species* (Berkeley, CA: University of California Press, 2005), pp. 912–914; J.W. Petranka, and C.T. Holbrook, "Wetland Restoration for Amphibians: Should Local Sites Be Designed to Support Metapopulations or Patchy Populations?," *Restoration Ecology* 14:404–411 (2006); A.L. Subalusky, et al., "Ontogenetic Niche Shifts in the American Alligator Establish Functional Connectivity between Aquatic Systems," *Biological Conservation* 142:1507–1514 (2009)).
- Lake, pond, and wetland tributaries, including wetlands that serve as stream origins, have important chemical, physical,

and biological connections downstream that affect (a)(1) through (a)(3) waters. Their direct hydrologic connection to the stream network facilitates the significant impact they have downstream. This impact on downstream waters occurs regardless of whether their flow is perennial, intermittent, or ephemeral. Thus, lake, pond, and wetland tributaries serve the same important functions as stream tributaries, which in turn greatly impact downstream (a)(1) through (a)(3) waters, particularly when their functional contributions to the chemical, physical, and biological conditions of downstream waters are combined at a watershed scale.

**F. Man-Made or Man-Altered Tributaries Significantly Affect the Physical, Chemical and Biological Integrity of (a)(1) Through (a)(3) Waters**

The agencies' proposed rule clarifies that man-made and man-altered tributaries as defined in the proposed rule are "waters of the United States" because the significant nexus between a tributary and a traditional navigable water or interstate water is not broken where the tributary flows through a culvert or other structure. Note that the proposal excludes certain ditches from CWA jurisdiction by rule in paragraphs (b)(3) and (b)(4). The scientific literature indicates that structures that convey water do not affect the connectivity between streams and downstream rivers. Indeed, because such structures can reduce water losses from evapotranspiration and seepage, such structures likely enhance the extent of connectivity by more completely conveying the water downstream.

Man-made and man-altered tributaries include impoundments, ditches, canals, channelized streams, piped, and the like. Ditches and canals are wide-spread across the United States. Ditches may have been streams that were channelized. They are purposely constructed to allow the hydrologic flow of the tributary to continue downstream. Man-made and man-altered tributaries, despite human manipulation, usually continue to have chemical, physical, or biological connections downstream and to serve important functions downstream. Because these tributaries are hydrologically connected to downstream waters, the chemical and some biological connections to downstream waters that are supported by this hydrologic connection are still intact. Oftentimes man-made tributaries create connections where they did not previously exist, such as canals that connect two rivers in different watersheds.

Tributary ditches and other man-made or man-altered waters that meet the definition of "tributary" have a significant nexus to (a)(1) through (a)(3) waters due to their impact, either individually or with other tributaries, on the chemical, physical, or biological integrity of those downstream waters. Tributary ditches and the like, as with other tributaries, have chemical, physical, and biological connections with downstream waters that substantially impact those waters. Tributary ditches and canals can have perennial, intermittent, or ephemeral flow. As described above, tributaries of all flow regimes have a significant nexus to downstream (a)(1)

through (a)(3) waters. Due to the often straightened and channelized nature of ditches, these tributaries quickly move water downstream to (a)(1) through (a)(3) waters. Ditches and canals, like other tributaries, export sediment, nutrients, and other materials downstream. Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream. See, e.g., J.P. Schmidt, *et al.*, "Nitrogen Export from Coastal Plain Field Ditches," *Journal of Soil and Water Conservation* 62(4):235–243; J.S. Strock, *et al.*, "Managing Natural Processes in Drainage Ditches for Nonpoint Source Nitrogen Control." *Journal of Soil and Water Conservation* 62(4): 188–196 (2007). Ditches provide habitat for fish and other aquatic organisms. See, e.g., P.C. Smiley, Jr., *et al.*, "Contribution of Habitat and Water Quality to the Integrity of Fish Communities in Agricultural Drainage Ditches," *Journal of Soil and Water Conservation* 63(6):218A–219A (2008). Fish and other aquatic organisms utilize canals and ditches to move to different habitats, sometimes over long distances. F.J. Rabiel, "Biogeographic Barriers, Connectivity and Homogenization of Freshwater Faunas: It's a Small World after All," *Freshwater Biology* 52(4): 696–710 (2007).

These significant connections and functions continue even where the tributary has a natural or man-made break in its channel, bed and banks, or OHWM. The presence of a channel, bed and banks, and OHWM upstream or downstream of the break is an indication that connections still exist. The significant nexus between a tributary and a downstream water is not broken where the tributary flows underground for a portion of its length, such as in karst topography. The hydrologic connection still exists, meaning that the chemical and biological connections that are mediated by the hydrologic connection also still exist. Similarly, flow through boulder fields does not sever the hydrologic connection. When a tributary flows through a wetland enroute to another or the same tributary, the significant nexus still exists even though the bed and banks or ordinary high watermark is broken for the length of the wetland. As discussed in Part II, section 1.G. of this appendix, in-stream wetlands provide numerous benefits downstream, and the presence of the wetland in stream can provide additional water quality benefits to the receiving waters. Flow in flat areas with very low gradients may temporarily break the tributary's bed and banks or OHWM, but these systems continue to have a significant nexus downstream. These are just illustrative examples of break in ordinary high watermark; there are several other types, all of which do not break the significant nexus between a tributary and the downstream (a)(1) through (a)(3) water.

There are more than 80,000 dams in the United States, with over 6,000 exceeding 15 meters in height. Report at 3–48 (citing U.S. Army Corps of Engineers, *National Inventory of Dams* (2009)). The purpose of a dam is to impound (store) water for any of several reasons (e.g. flood control, human water supply, irrigation, livestock water supply, energy generation, containment of mine

tailings, recreation or pollution control). See <http://www.damsafety.org/layout/subsection.aspx?groupid=14&contentid=47>. Many dams fulfill a combination of the above functions. Because the purpose of a dam is to retain water effectively and safely, the water retention ability of a dam is of prime importance. Water may pass from the reservoir to the downstream side of a dam by: passing through the main spillway or outlet works; passing over an auxiliary spillway; overtopping the dam; seepage through the abutments; and seepage under the dam. *Id.* All water retention structures are subject to seepage through their foundations and abutments. Department of the Army, U.S. Army Corps of Engineers, *Engineering and Design—Design, Construction and Maintenance of Relief Wells*, EM 1110–2–1914 (Washington, DC: Department of the Army, 1992), p. 1–1. Thus waters behind a dam still maintain a hydrologic connection to downstream waters.

Numerous studies have shown that dams impede biotic movements, reducing biological connectivity between upstream and downstream locations. Report at 3–48 (citing E.A. Greathouse, *et al.*, "Indirect Upstream Effects Of Dams: Consequences Of Migratory Consumer Extirpation In Puerto Rico," *Ecological Applications* 16: 339–352 (2006); C.J. Hall, *et al.*, "The Historic Influence of Dams on Diadromous Fish Habitat with a Focus on River Herring and Hydrologic Longitudinal Connectivity," *Landscape Ecology* 26: 95–107(2011)). Dams alter but typically do not sever the hydrologic connection between upstream and downstream waters. (See Part II, section 2.C. of this appendix). Upstream of large dams riparian areas are permanently inundated, increasing hydrological connectivity. Downstream, peak flows and the potential for overbank lateral flow are reduced; however, dams may also reduce flow variability downstream, resulting in higher minimum flows and reduced flow intermittency and thereby increasing hydrological (and potentially biological) connectivity. *Id.* (citing N.L. Poff, *et al.*, "Homogenization of Regional River Dynamics by Dams and Global Biodiversity Implications," *Proceedings of the National Academy of Sciences of the United States of America* 104: 5732–5737 (2007)). Where an impoundment does stop flow, it also has significant effects on downstream waters. For example, the downstream segments have a reduced quantity of waters, less sediment, and reduced species biological connectivity with upstream refugia.

Because dams reduce the amount of sediment delivered downstream, the reservoirs behind dams are actually very effective at retaining sediment, which can have significant effects in downstream waters. For instance, the Mississippi River's natural sediment load has been reduced by an estimated 50% through dam construction in the Mississippi Basin. M.D. Blum, and H. H. Roberts, "Drowning of the Mississippi Delta Due to Insufficient Sediment Supply and Global Sea-Level Rise," *Nature Geoscience* 2(7): 488–491 (2009).

Man-made or man-altered tributaries continue to have chemical, physical, and

biological connections that significantly affect the integrity of (a)(1) through (a)(3) waters. Though the man-made or man-altered nature of such tributaries can change the nature of the connections, it does not eliminate them. Thus, man-made and man-altered tributaries continue to serve the same important functions as "natural" tributaries, which in turn greatly impact downstream (a)(1) through (a)(3) waters, particularly when their functional contributions to the chemical, physical, and biological conditions of downstream waters are combined at a watershed scale.

#### ii. Adjacent Waters

Adjacent waters, including adjacent wetlands, alone or in combination with other adjacent waters in the watershed, have a substantial impact on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. In addition, waters adjacent to tributaries serve many important functions that directly influence the integrity of downstream waters including traditional navigable waters, interstate waters, and the territorial seas. Adjacent waters store water, which can reduce flooding of downstream waters, and the loss of adjacent waters has been shown, in some circumstances, to increase downstream flooding. Adjacent waters maintain water quality and quantity, trap sediments, store and modify potential pollutants, and provide habitat for plants and animals, thereby sustaining the biological productivity of downstream rivers, lakes and estuaries, which may be traditional navigable waters, interstate waters, or the territorial seas. The scientific literature and Report supports these conclusions, as discussed in greater detail below.

#### 1. Adjacent Waters Under This Proposed Rule Have a Significant Nexus to (a)(1) Through (a)(3) Waters

The discussion below summarizes the key points made in the Report and explains the technical basis for supporting a conclusion that adjacent waters, as defined in this proposed rule, have a significant nexus to waters identified in paragraphs (a)(1) through (a)(3) of the proposed rule. The geographic position of an "adjacent" water relative to the stream is indicative of the relationship they share, with many of its defining characteristics resulting from the movement of materials and energy between the two. A review and analysis of the scientific literature supports the conclusion that individually or in combination with similarly situated waters in a watershed, adjacent waters have a significant effect on the chemical, physical, and biological integrity of downstream traditionally navigable waters, interstate waters, and the territorial seas.

#### a. Riparian and Floodplain Waters Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

Waters, including wetlands, often lie within landscape settings that have bidirectional hydrological exchange with (a)(1) through (a)(5) waters (e.g., wetlands and open waters in riparian areas and flood plains). Such waters play an integral role in

the chemical, physical, and biological integrity of the waters to which they are adjacent. Riparian areas and floodplains often describe the same geographic region. Report at 3–4. Therefore, the discussion of the functions of waters, including wetlands, in riparian areas will typically apply to floodplains unless otherwise noted. Where connections arise specifically from the act of inundation of adjacent land during times of higher-than-normal water, the term "floodplain" is solely used to describe the area.

Riparian areas are transition zones between terrestrial and aquatic ecosystems that are distinguished by gradients in biophysical conditions, ecological processes, and biota. *Id.*, Report at 31. Waters including wetlands in riparian areas significantly influence exchanges of energy and matter with aquatic ecosystems. See, e.g., *id.* (citing National Research Council, *Riparian Areas: Functions and Strategies for Management* (Washington, DC: The National Academies Press, 2002)).

Floodplains are low gradient areas bordering stream or river channels, lakes, and impoundments that were formed by sediment deposition from those waters under present climatic conditions. These natural geomorphic features are inundated during moderate to high water events. *Id.* (citing L.B. Leopold, *A View of the River* (Cambridge, MA: Harvard University Press, 1994); W.R. Osterkamp, *Annotated Definitions of Selected Geomorphic Terms and Related Terms of Hydrology, Sedimentology, Soil Science and Ecology*, USGS Open File Report 2008–1217 (Reston, VA: U.S. Department of the Interior, U.S. Geological Survey, 2008)). By "present climatic conditions," the agencies mean that currently or recently active floodplains will be used to help determine whether wetlands or waters are adjacent to "waters of the United States." The proposed definition is limited to the present climatic conditions in order to best represent the floodplain that has an active and significant relationship with the stream or river channel. Historic floodplains that played a role in the river or lake dynamics in the past only will not be used to determine whether a water is adjacent. Floodplains formed under different climatic conditions that no longer connect to the stream channel that formed them are terraces. *Id.* It should be noted that "floodplain" as defined in today's proposed rule does not necessarily equate to the 100-year floodplain as defined by the Federal Emergency Management Agency (FEMA). However, the FEMA defined floodplain may often coincide with the current definition proposed in this rule. Flood insurance rate maps are based on the probability of a flood event occurring (e.g., 100-year floods have a 1% probability of occurring in a given year or 500 year-floods have a 0.2% probability of occurring in a particular year). Flood insurance rate maps are not based on an ecological definition of the term "floodplain," and therefore may not be appropriate for identifying adjacent wetlands and waters for the purposes of CWA jurisdiction. Flood insurance rate maps are developed by applying models and other information to identify areas that would be inundated by a flood event of a particular probability of recurring.

Riparian waters take many different forms. Some may be wetlands, which are defined in paragraph (c)(6) of the proposed rule. Others may be ponds, oxbow lakes, or other types of open waters. Oxbow lakes, commonly found in floodplains, are formed when river meanders are cutoff from the rest of the river. *Id.* at 5–42.

#### b. Riparian and Floodplain Waters Significantly Affect the Physical Integrity of (a)(1) Through (a)(3) Waters

Scientific research shows waters and wetlands in riparian areas and floodplains to be important in protecting the physical integrity of aquatic resources. Because riparian and floodplain waters exhibit bidirectional exchange of water with the waters to which they are adjacent, they play an important role in determining the volume and duration of stream flow. Riparian and floodplain waters also have an essential role in regulating and stabilizing sediment transport to downstream waters. These characteristics are fundamental to the physical integrity of streams as well as downstream traditional navigable waters, interstate waters, and the territorial seas.

Riparian and floodplain wetlands are important for the reduction or delay of floods. *Id.* at 3–22 (citing A. Bullock and M. Acreman, "The Role of Wetlands in the Hydrological Cycle," *Hydrology and Earth System Sciences* 7:358–389 (2003)). Waters in riparian areas control flooding during times of high precipitation or snowmelt by capturing water from overbank flow and storing excess stream water. *Id.* at 5–6. One study found that peak flows in the Cache River in Arkansas decreased by 10–20% mainly because of floodplain water storage. *Id.* (citing R. Walton, *et al.*, "Hydrology of the Black Swamp Wetlands on the Cache River, Arkansas," *Wetlands* 16:279–287 (1996)). Research has shown that floodplain wetlands in Ohio store about 40% of the flow of small streams. *Id.* at 5–6 to 5–7 (citing D.E. Gamble, *et al.*, *An Ecological and Functional Assessment of Urban Wetlands in Central Ohio, Columbus, Ohio*, EPA Technical Report WET/2007–3B, (Columbus, OH: Ohio Environmental Protection Agency, Wetland Ecology Group, Division of Surface Water, 2007)). These and similar findings point to the close hydrological influence that waters in riparian and floodplain areas have on streams.

Some adjacent waters are bordering or contiguous with (a)(1) through (a)(5) waters. Because of their close physical proximity to nearby water bodies, they readily exchange their waters through the saturated soils surrounding the stream or through surface exchange. This commingling of waters allows bordering or contiguous waters to both provide chemically transformed waters to streams and to absorb excess stream flow.

Flow between neighboring waters and streams is more longitudinal (downslope) at headwaters and more lateral further downstream. *Id.* at 5–38, Table 5–3. These connections in part determine stream flow volume and duration. Waters, including wetlands, in riparian areas connect to neighboring water bodies through various surface and subsurface connections. See, e.g., *id.* at 3–4 (citing National Research Council,

*Riparian Areas: Functions and Strategies for Management* (Washington, DC: National Academy Press, 2002)). Floodplains, similarly, are closely associated with the groundwater found beneath and beside river channels (which are considered shallow aquifers) and waters in floodplains readily exchange water with such aquifers. *Id.* at 3–14 (citing J.A. Stanford and J. V. Ward, “An Ecosystem Perspective of Alluvial Rivers: Connectivity and the Hyporheic Corridor,” *Journal of the North American Benthological Society* 12:48–60 (1993); C. Amoros and G. Bornette, “Connectivity and Biocomplexity in Waterbodies of Riverine Floodplains,” *Freshwater Biology* 47:761–776 (2002); G.C. Poole, *et al.*, “Multiscale Geomorphic Drivers of Groundwater Flow Paths: Subsurface Hydrologic Dynamics and Hyporheic Diversity,” *Journal of the North American Benthological Society* 25:288–303 (2006)). Riparian and floodplain wetlands are frequently contiguous with streams and other water bodies and significantly influence the hydrology of such water bodies. *Id.* at 5–6 (citing R.J. Naiman, *et al.*, *Riparia: Ecology, Conservation, and Management of Streamside Communities* (Burlington, MA: Elsevier Academic Press, 2005); P. Vidon, *et al.*, “Hot Spots and Hot Moments in Riparian Zones: Potential for Improved Water Quality Management,” *Journal of the American Water Resources Association* 46:278–298 (2010)). Floodplain wetlands are important for the reduction or delay of floods. *Id.* (citing A. Bullock and M. Acreman, “The Role of Wetlands in the Hydrological Cycle,” *Hydrology and Earth System Sciences* 7:358–389 (2003)). Oxbow lakes also retain flood waters. *Id.* at 5–44. Adjacent ponds generally function similarly to oxbow lakes.

Waters in riparian areas filter sediment washed down from uplands and collect sediment from overbank flow as the river or stream floods. *Id.* at 5–7. For example, riparian areas were observed to collect 80–90% of the sediment from farmlands in a study in North Carolina. *Id.* (citing A. Cooper, *et al.*, “Riparian Areas as Filters for Agricultural Sediment,” *Soil Science Society of America Proceedings* 51:416–420 (1987); R.B. Daniels and J.G. Gilliam, “Sediment and Chemical Load Reduction by Grass and Riparian Filters,” *Soil Science Society of America Journal* 60:246–251 (1996); R.J. Naiman and H. Decamps, “The Ecology of Interfaces: Riparian Zones,” *Annual Review of Ecology and Systematics* 28:621–658 (1997)). Maintaining the equilibrium between sediment deposition and sediment transport is important to maintain the physical shape and structure of stream channels. Significant changes to upstream channels can affect the chemical, physical, and biological condition of downstream (a)(1) through (a)(3) waters.

The physical effects of excess sediment can impair chemical and ecological integrity in a variety of ways. *Id.* at 5–9 (citing P.J. Wood and P.D. Armitage, “Biological Effects of Fine Sediment in the Lotic Environment,” *Environmental Management* 21:203–217 (1997)). Excess sediment is linked to increasing contaminant and nutrient concentrations, all of which tributaries can transmit downstream, affecting water quality. Excess sediment may block and absorb

sunlight transmission through the water column, inhibiting plant photosynthesis and warming the water in the stream. Sediment may fill the interstitial spaces between rocks in a streambed, which many fish and aquatic species use for mating, reproduction, and shelter from predators. This kind of physical degradation of tributary streambeds results in less suitable habitat available for animals and fish that move between upstream and downstream waters. Riparian waters that retain sediments thus protect downstream waters from the effects of excess sediment.

Oxbow lakes play similar roles in the floodplain as they are an integral part of alluvial floodplains of meandering rivers. *Id.* at 5–42 (citing K.O. Winemiller, *et al.*, “Fish Assemblage Structure in Relation to Environmental Variation among Brazos River Oxbow Lakes,” *Transactions of the American Fisheries Society* 129:451–468 (2000), K. Glinska-Lewczuk, “Water Quality Dynamics of Oxbow Lakes in Young Glacial Landscape of NE Poland in Relation to Their Hydrological Connectivity,” *Ecological Engineering* 35:25–37 (2009)). They connect to rivers by periodic overland flow, typically from the river during flooding events, and bidirectional shallow subsurface flow through fine river soils (bidirectional means flow from river to lake and lake to river). *Id.* at 5–43 to 5–44. Oxbow lakes generally have an important influence on the condition and function of rivers. *Id.* at 5–48 to 5–49. That influence can vary with the distance from the river and the age of the oxbow, reflecting the frequency and nature of the exchange of materials that takes place between the two water bodies.

Because adjacent waters support riparian vegetation, they affect the capacity of riparian vegetation to influence stream flow, morphology, and habitat provided in the nearby water body. Vegetation in riparian waters influences the amount of water in the stream by capturing and transpiring stream flow and intercepting groundwater and overland flow. *Id.* at 3–22, 5–7 (citing P. Meyboom, “Three Observations on Streamflow Depletion by Phreatophytes,” *Journal of Hydrology* 2:248–261 (1964)). Riparian vegetation in adjacent waters also reduces stream bank erosion, serving to maintain the physical integrity of the channel. See, *e.g.*, *id.* at 5–8 (citing C.E. Beeson and P. F. Doyle, “Comparison of Bank Erosion at Vegetated and Non-Vegetated Channel Bends,” *Journal of the American Water Resources Association* 31:983–990 (1995)). In addition, inputs of woody debris from aquatic vegetation into waters make important contributions to the channel’s geomorphology and the stream’s aquatic habitat value. *Id.* (citing N.H. Anderson and J. R. Sedell, “Detritus Processing by Macroinvertebrates in Stream Ecosystems,” *Annual Review of Entomology* 24:351–377 (1979); M.E. Harmon, *et al.*, “Ecology of Coarse Woody Debris in Temperature Ecosystems,” *Advances in Ecological Research* 15:133–302 (1986); F. Nakamura and F. J. Swanson, “Effects of Coarse Woody Debris on Morphology and Sediment Storage of a Mountain Stream System in Western Oregon,” *Earth Surface Processes and Landforms* 18:43–61 (1993); T.E. Abbe and D.

R. Montgomery, “Large Woody Debris Jams, Channel Hydraulics and Habitat Formation in Large Rivers,” *Regulated Rivers: Research & Management* 12:201–221 (1996); R.J. Naiman and H. Decamps, “The Ecology of Interfaces: Riparian Zones,” *Annual Review of Ecology and Systematics* 28:621–658 (1997); A.M. Gurnell, *et al.*, “Large Wood and Fluvial Processes,” *Freshwater Biology* 47:601–619 (2002)). Also, the riparian vegetation that overhangs streams provides shade, providing a critically important function of reducing fluctuations in water temperature helping to reduce excessive algal production and to maintain life-supporting oxygen levels in streams and other waters. *Id.* at 5–9 (citing S.V. Gregory, *et al.*, “An Ecosystem Perspective of Riparian Zones: Focus on Links between Land and Water,” *Bioscience* 41:540–551 (1991); E.C. Volkmar and R.A. Dahlgren, “Biological Oxygen Demand Dynamics in the Lower San Joaquin River, California,” *Environmental Science & Technology* 40:5653–5660 (2006)). Even small changes in water temperature can have significant impacts on the type and number of species present in waters, with higher temperatures generally associated with degraded habitat which supports only those species that can tolerate higher temperatures and reduced levels of dissolved oxygen. Higher water temperatures are associated with streams and rivers with less valuable recreational and commercial fisheries. As discussed below, these physical characteristics of headwater streams influence what types of organisms live in the region.

Headwaters and nearby wetlands supply downstream waters with dissolved organic carbon as a result of decomposition processes from dead organic matter such as plants. The biological consequences of this dissolved organic carbon are discussed in more detail below. The presence of dissolved organic carbon can affect how light penetrates the water, an important factor in the growth of plants, algae, and other primary producers, and can protect aquatic organisms from the harmful effects of UV-B radiation. *Id.* at 5–28 to 5–29 (citing K.N. Eshelman and H.F. Hemond, “The role of organic acids in the acid-base status of surface waters at Bickford Watershed, Massachusetts,” *Water Resources Research* 21:1503–1510 (1985); J.E. Hobbie and R.G. Wetzel, “Microbial control of dissolved organic carbon in lakes: Research for the future,” *Hydrobiologia* 229:169–180 (1992); D.W. Schindler and P.J. Curtis, “The role of DOC in protecting freshwaters subjected to climate warming and acidification from UV exposure,” *Biogeochemistry* 36:1–8 (1997); K.R. Reddy and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications*, (Boca Raton, FL: CRC Press, 2008)).

c. Riparian and Floodplain Waters Significantly Affect the Chemical Integrity of (a)(1) Through (a)(3) Waters

As stated above in the section on tributaries, pollutants such as petroleum waste products and other harmful pollutants dumped into any part of the tributary system are likely to flow downstream, or to be washed downstream, and thereby pollute traditional navigable waters, interstate

waters, and the territorial seas from which American citizens take their drinking water, shellfish, fin fish, water-based recreation, and many other uses. Some wetlands perform the valuable function of trapping or filtering out some pollutants (such as fertilizers, silt, and some pesticides), thereby reducing the likelihood that those pollutants will reach and pollute the tributaries of the downstream navigable or interstate waters (and eventually pollute those downstream waters themselves). However, many other pollutants (such as petroleum wastes and toxic chemical wastes), if dumped into wetlands or other waters that are adjacent to tributary streams, may reach those tributaries themselves, and thereafter flow downstream to pollute the nation's drinking water supply, fisheries, and recreation areas.

Riparian and floodplain waters play a critical role in controlling the chemicals that enter streams and other "waters of the United States" and as a result are vital in protecting the chemical, physical, and biological integrity of downstream (a)(1) through (a)(3) waters. Runoff (the water that has not evaporated or infiltrated into the groundwater) from uplands is a large source of pollution, but research has shown that wetlands and other riparian waters trap and chemically transform a substantial amount of the nutrients, pesticides, and other pollutants before they enter streams, river, lakes and other waters.

Chemicals and other pollutants enter waters from point sources, non-point sources, atmospheric deposition, upstream reaches, and through the hyporheic zone, a region beneath and alongside a stream bed where surface water and shallow groundwater mix. *Id.* at 5–10 (citing SW. Nixon and V.J. Lee, *Wetlands and Water Quality: A Regional Review of Recent Research in the United States on the Role of Freshwater and Saltwater Wetlands as Sources, Sinks, and Transformers of Nitrogen, Phosphorus, and Various Heavy Metals*, Technical Report Y-86-2, (Vicksburg, MS: U.S. Army Corp of Engineers, Waterways Experiment Station, 1986); D.F. Whigham and T.E. Jordan, "Isolated Wetlands and Water Quality," *Wetlands* 23:541–549 (2003); S.L. Whitmire and S.K. Hamilton, "Rates of Anaerobic Microbial Metabolism in Wetlands of Divergent Hydrology on a Glacial Landscape," *Wetlands* 28:703–714 (2008)). Throughout the stream network, but especially in headwater streams and their adjacent wetlands, chemicals are sequestered, assimilated, transformed, or lost to the atmosphere by microbes, fungi, algae, and macrophytes present in riparian waters and soils. *Id.* (citing SW. Nixon and V.J. Lee, *Wetlands and Water Quality: A Regional Review of Recent Research in the United States on the Role of Freshwater and Saltwater Wetlands as Sources, Sinks, and Transformers of Nitrogen, Phosphorus, and Various Heavy Metals*, Technical Report Y-86-2, (Vicksburg, MS: U.S. Army Corp of Engineers, Waterways Experiment Station, 1986); C. Johnston, "Sediment and Nutrient Retention by Freshwater Wetlands: Effects on Surface Water Quality," *Critical Reviews in Environmental Control* 21:491–565 (1991); P.I. Boon, "Biogeochemistry and Bacterial

Ecology of Hydrologically Dynamic Wetlands," in D.P. Batzer and R.R. Sharitz, ed., *Ecology of Freshwater and Estuarine Wetlands* (Berkeley, CA: University of California Press, 2006), pp. 115–176; W.J. Mitsch and J.G. Gosselink, *Wetlands*, 4th edition, (Hoboken, NJ: John Wiley & Sons Inc., 2007); K.R., Reddy and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications* (Boca Raton, FL: CRC Press, 2008). These chemical processes reduce or eliminate pollution that would otherwise enter streams, rivers, lakes and other waters and subsequently downstream traditional navigable waters, interstate waters, or the territorial seas. The removal of the nutrients nitrogen and phosphorus is a particularly important role for riparian waters. Nutrients are necessary to support aquatic life, but the presence of excess nutrients can lead to eutrophication and the depletion of oxygen nearby waters and in waters far downstream. See, e.g., *id.* at 1–8. Eutrophication is a large problem in waters across the United States including such significant ecosystems as the Chesapeake Bay and Lake Spokane in Washington. W.M. Kemp, et al., "Eutrophication of Chesapeake Bay: Historical Trends and Ecological Interactions," *Marine Ecology Progress Series* 303(21):1–29 (2005); D.J. Moore and J. Ross, *Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load: Water Quality Improvement Report*, Publication No. 07-10-073 (Spokane, WA: Washington State Department of Ecology, 2010); R.R. Murphy, et al., "Long-Term Trends in Chesapeake Bay Seasonal Hypoxia, Stratification, and Nutrient Loading," *Estuaries and Coasts* 34(6):1293–1309 (2011). Eutrophication is the process by which plants and algae grow in waters to such an extent that the abundance of vegetation monopolizes the available oxygen, detrimentally affecting other aquatic organisms. *Id.* Oxbow lakes also have high mineralization rates, suggesting that similar to adjacent wetlands they process and trap nutrients from runoff. Report at 5–45 to 5–46 (citing K.O. Winemiller, et al., "Fish Assemblage Structure in Relation to Environmental Variation among Brazos River Oxbow Lakes," *Transactions of the American Fisheries Society* 129:451–468 (2000)). Protection of these waters therefore helps maintain the chemical integrity of the nation's waters.

The removal of nitrogen is an important function of all waters, including wetlands, in the riparian areas. Riparian areas regularly remove more than half of dissolved nitrogen found in surface and subsurface water by plant uptake and microbial transformation. *Id.* at 5–11 (citing P. Vidon, et al., "Hot Spots and Hot Moments in Riparian Zones: Potential for Improved Water Quality Management," *Journal of the American Water Resources Association* 46:278–298 (2010)). Denitrification in surface and subsurface flows is highest where there is high organic matter and/or anoxic conditions. *Id.* Denitrification occurs in wetland soils where there is high organic matter, low oxygen, denitrifying microbes, and saturated soil conditions, and rates increase with proximity to streams. *Id.* (citing S.V. Gregory, et al., "An Ecosystem

Perspective of Riparian Zones: Focus on Links between Land and Water," *Bioscience* 41:540–551 (1991); P. Vidon, et al., "Hot Spots and Hot Moments in Riparian Zones: Potential for Improved Water Quality Management," *Journal of the American Water Resources Association* 46:278–298 (2010)). Riparian waters are therefore important in maintaining the conditions important for denitrification, which in turn protects streams, rivers, lakes and other waters from nitrogen pollution.

Plant uptake of dissolved nitrogen in subsurface flows also accounts for large quantities of nitrogen removal. Riparian forests have been found to remove 75% of dissolved nitrate transported from agricultural fields in Maryland. *Id.* (citing P. Vidon, et al., "Hot Spots and Hot Moments in Riparian Zones: Potential for Improved Water Quality Management," *Journal of the American Water Resources Association* 46:278–298 (2010)). Likewise, riparian forests in Georgia remove 65% of nitrogen and 30% of phosphorus from agricultural sources. *Id.* at 5–11 to 5–12 (citing Vidon, et al. 2010). A Pennsylvania forest removed 26% of the nitrate from the subsurface. *Id.* at 5–12 (citing J.D. Newbold, et al., "Water Quality Functions of a 15-Year-Old Riparian Forest Buffer System," *Journal of the American Water Resources Association* 46:299–310 (2010)). The vegetation associated with riparian waters also removes nitrogen from subsurface flows. Therefore, the conservation of riparian waters helps protect downstream waters from influxes of dissolved nitrogen.

Phosphorus is another potentially harmful nutrient that is captured and processed in riparian waters. *Id.* (citing T.A. Dillaha and S.P. Inamdar, "Buffer Zones as Sediment Traps or Sources," in N.E. Haycock, T.P. Burt, K.W.T. Goulding, and G. Pinay, ed., *Buffer Zones: Their Processes and Potential in Water Protection*, Proceedings of the International Conference on Buffer Zones, September 1996 (Hertfordshire, UK: Quest Environmental, 1997), pp. 33–42; A.N. Sharpley and S. Rekolainen, "Phosphorus in Agriculture and Its Environmental Implications," in H. Tunney, et al., ed., *Phosphorus Losses from Soil to Water* (Cambridge, UK: CAB International, 1997), pp. 1–54; G.C. Carlyle and A.R. Hill, "Groundwater Phosphate Dynamics in a River Riparian Zone: Effects of Hydrologic Flowpaths, Lithology, and Redox Chemistry," *Journal of Hydrology* 247:151–168 (2001)). Biogeochemical processes, sedimentation, and plant uptake account for high rates of removal of particulate phosphorus in riparian areas. *Id.* (citing C.C. Hoffmann, et al., "Phosphorus Retention in Riparian Buffers: Review of Their Efficiency," *Journal of Environmental Quality* 38:1942–1955 (2009)). The amount of contact the water has with nearby soils determines the ability of the riparian area to remove phosphorus. *Id.* This function of upstream riparian waters is crucial for maintaining the chemical and biological integrity of the waters to which they are adjacent, and for preventing eutrophication in downstream traditional navigable waters, interstate waters, and the territorial seas.

d. Riparian and Floodplain Waters Significantly Affect the Biological Integrity of (a)(1) Through (a)(3) Waters

Waters and wetlands located in both riparian areas and floodplains support the biological integrity of downstream (a)(1) through (a)(3) waters in a variety of ways. They provide habitat for aquatic and water-tolerant plants, invertebrates, and vertebrates, and provide feeding, refuge, and breeding areas for invertebrates and fish. Seeds, plants, and animals move between waters in the riparian zone and floodplains and the adjacent streams, and from there colonize or utilize downstream waters, including traditional navigable waters.

Organic matter from adjacent wetlands is critical to aquatic food webs, particularly in headwaters, where it is the primary source of energy flow due to low light conditions that inhibit photosynthesis. *Id.* at 5–13 (citing J.L. Tank, *et al.*, “A Review of Allochthonous Organic Matter Dynamics and Metabolism in Streams,” *Journal of the North American Benthological Society* 29:118–146 (2010)). Headwater streams tend to be located in heavily vegetated areas compared to larger waters, so they are more likely to contain leaf litter, dead and decaying plants, and other organic matter that forms the basis of headwater food webs. The organic matter is processed by microbes and insects that make the energy available to higher levels of stream life such as amphibians and fish. Studies have shown that macroinvertebrates rely on leaf inputs in headwater streams and that excluding organic litter from a stream resulted in significant changes to the food web at multiple levels. *Id.* (citing G.W. Minshall, “Role of Allochthonous Detritus in the Tropic Structure of a Woodland Springbrook Community,” *Ecology* 48:139–149 (1967); J.B. Wallace, *et al.*, “Multiple Trophic Levels of a Forest Stream Linked to Terrestrial Litter Inputs,” *Science* 277:102–104 (1997); J.L. Meyer, *et al.*, “Leaf Litter as a Source of Dissolved Organic Carbon in Streams,” *Ecosystems* 1:240–249 (1998)). Fish and amphibian species found in headwaters travel downstream and in turn become part of the food web for larger aquatic organisms in rivers and other waters. Organic material provided by riparian waters to small, headwater streams is therefore important not only to the small streams that directly utilize this source of energy to support their biological populations but also to the overall biological integrity of downstream waters that also benefit from the movement of fish and other species that contribute to the food web of larger streams and rivers.

Floodplain water bodies, including oxbow lakes, accumulate organic carbon, an important function influenced by the size and frequency of floods from adjacent rivers. *See, e.g., id.* at 5–45 (citing A. Cabezas, *et al.*, “Changing Patterns of Organic Carbon and Nitrogen Accretion on the Middle Ebro Floodplain (NE Spain),” *Ecological Engineering* 35:1547–1558 (2009)). These stored chemicals are available for exchange with river water when hydrological connections form. Organic materials are the basis for the food web in stream reaches where photosynthetic production of energy is

absent or limited, particularly in headwater systems where vegetative litter alone makes up the base of the aquatic food web. The maintenance of floodplain waters is therefore an important component of protecting the biological integrity of downstream waters into which the headwaters flow.

The waters, including wetlands, in the riparian area play an important role in the removal of pesticides. *Id.* at 5–14 (citing P. Vidon, *et al.*, “Hot Spots and Hot Moments in Riparian Zones: Potential for Improved Water Quality Management,” *Journal of the American Water Resources Association* 46:278–298 (2010)). Microbes near plant roots break down these pesticides. *See, e.g., id.* (citing G. Voos, and P.M. Groffman, “Relationships between microbial biomass and dissipation of 2,4-D and dicamba in soil,” *Biology and Fertility of Soils* 24:106–110 (1996)). Uptake by aquatic plants has also been shown to be an important mechanism of removal of the pesticides alachlor and atrazine. *Id.* (citing K.G. Paterson and J.L. Schnoor, “Fate of Alachlor and Atrazine in a Riparian Zone Field Site,” *Water Environment Research* 64:274–283 (1992)). Riparian waters also trap and hold pesticide contaminated runoff preventing it from harming neighboring waters.

Riparian areas are dynamic places that support a diversity of aquatic, amphibious, and terrestrial species adapted to the unique habitat created by periodic flooding events. *Id.* at 5–15 (citing W.J. Junk, *et al.*, “The flood pulse concept in river-floodplain systems,” in D.P. Dodge, ed., *Proceedings of the International Large River Symposium Ottawa* (Ottawa, Canada: Canadian Special Publication of Fisheries and Aquatic Sciences 106, 1989), pp. 110–127; K. Tockner, *et al.*, “An Extension of the Flood Pulse Concept,” *Hydrological Processes* 14:2861–2883 (2000); C.T. Robinson, *et al.*, “The Fauna of Dynamic Riverine Landscapes,” *Freshwater Biology* 47:661–677 (2002)). Plants, invertebrates, and vertebrates use waters, including wetlands, in the riparian areas for habitat, nutrients, and breeding. As a result, the waters, including wetlands, in the riparian areas act as sources of organisms, particularly during inundation events, replenishing neighboring waters with organisms, seeds, and organic matter. Inundation and hydrological connectivity of riparian areas greatly increase the area of aquatic habitats and species diversity. *Id.* at 5–15 to 5–16 (citing W.J. Junk *et al.* 1989; R. Jansson, *et al.*, “Hydrochory Increases Riparian Plant Species Richness: A Comparison between a Free-Flowing and a Regulated River,” *Journal of Ecology* 93:1094–1103 (2005)). Aquatic animals, including amphibians and fish, take advantage of the waters present in riparian areas, either inhabiting them or moving between the riparian water and neighboring waters. *Id.* at 5–15, 5–17, 5–19 (citing G.H. Copp, “The habitat diversity and fish reproductive function of floodplain ecosystems,” *Environmental Biology of Fishes* 26:1–27 (1989); L.A. Smock, *et al.*, “Lotic macroinvertebrate production in three dimensions: Channel surface, hyporheic, and floodplain environments,” *Ecology* 73:876–886 (1992); L.A. Smock, “Movements of

invertebrates between stream channels and forested floodplains,” *Journal of the North American Benthological Society* 13:524–531 (1994); C. T. Robinson, *et al.*, “The fauna of dynamic riverine landscapes,” *Freshwater Biology* 47:661–677 (2002); J.S. Richardson, *et al.*, “Riparian communities associated with Pacific Northwest headwater streams: Assemblages, processes, and uniqueness,” *Journal of the American Water Resources Association* 41:935–947 (2005); C. Ilg, *et al.*, “Long-term reactions of plants and macroinvertebrates to extreme floods in floodplain grasslands,” *Ecology* 89:2392–2398 (2008); D.E. Shoup, and D. H. Wahl, “Fish diversity and abundance in relation to interannual and lakespecific variation in abiotic characteristics of floodplain lakes of the lower Kaskaskia River, Illinois,” *Transactions of the American Fisheries Society* 138:1076–1092 (2009)). Likewise, seeds, plant fragments, and whole plants move between riparian and floodplain waters and the river network. *Id.* at 5–15 (citing R.L. Schneider, and R.R. Sharitz, “Hydrochory and regeneration in a bald cypress water tupelo swamp forest,” *Ecology* 69:1055–1063 (1988); B. Middleton, “Hydrochory, seed banks, and regeneration dynamics along the landscape boundaries of a forested wetland,” *Plant Ecology* 146:169–184 (2000); C. Nilsson, *et al.*, “The role of hydrochory in structuring riparian and wetland vegetation,” *Biological Reviews* 85:837–858 (2010)).

Hydrological connections are often drivers of biological connections, and flooding events enhance the existing connections between floodplain waters and the river network. As a result, waters within floodplains have important functions for aquatic health. Many species have cycles timed to flooding events, particularly in circumstances where flooding is associated with annual spring snowmelt or high precipitation. *Id.* at 5–15 to 5–17, 5–20 (citing J.R. Thomas, *et al.*, “A landscape perspective of the stream corridor invasion and habitat characteristics of an exotic (*Dioscorea oppositifolia*) in a pristine watershed in Illinois,” *Biological Invasions* 8:1103–1113 (2006); L.M. Tronstad, *et al.*, “Aerial colonization and growth: Rapid invertebrate responses to temporary aquatic habitats in a river floodplain,” *Journal of the North American Benthological Society* 26:460–471 (2007); A. Gurnell, *et al.*, “Propagule deposition along river margins: Linking hydrology and ecology,” *Journal of Ecology* 96:553–565 (2008)). Waters within floodplains act as sinks of seeds, plant fragments, and invertebrate eggs, allowing for cross-breeding and resulting gene flow across time. *Id.* at 5–19 to 5–21 (citing K.M. Jenkins, and A.J. Boulton, “Connectivity in a dryland river: Short-term aquatic macroinvertebrate recruitment following floodplain inundation,” *Ecology* 84:2708–2723 (2003); D. Frisch, and S.T. Threlkeld, “Flood-mediated dispersal versus hatching: Early recolonisation strategies of copepods in floodplain ponds,” *Freshwater Biology* 50:323–330 (2005); B. Vanschoenwinkel, *et al.*, “Wind mediated dispersal of freshwater invertebrates in a rock pool metacommunity: Differences in dispersal capacities and modes,” *Hydrobiologia* 635:363–372 (2009)).

Micro- and macroinvertebrates colonize nutrient rich waters within floodplains during periods of inundation, facilitating an increase in population and sustaining them through times of limited resources and population decline. *Id.* at 5–19 (citing W.J. Junk, *et al.*, “The flood pulse concept in river-floodplain systems,” in D.P. Dodge, ed., *Proceedings of the International Large River Symposium Ottawa* (Ottawa, Canada: Canadian Special Publication of Fisheries and Aquatic Sciences 106, 1989), pp. 110–127; B. Malmqvist, “Aquatic invertebrates in riverine landscapes,” *Freshwater Biology* 47:679–694 (2002); C. Ilg, *et al.*, “Long-term reactions of plants and macroinvertebrates to extreme floods in floodplain grasslands,” *Ecology* 89:2392–2398 (2008)). Such animals are adapted to high floods, desiccation (drying out), or other stresses that come with these regular, systemic fluctuations. *Id.* at 5–20 (citing Jenkins and Boulton 2003). Floodplain waters therefore maintain various biological populations, which periodically replenish adjacent jurisdictional waters, serving to maintain their biological integrity.

Plants and animals use waters, including wetlands, in the riparian areas and floodplains for habitat, food, and breeding. Oxbow lakes in the floodplain provide critical fish habitat needed for feeding and rearing, leading researchers to conclude that the entire floodplain should be considered a single functional unit, essential to the river’s biological integrity. *Id.* at 5–17 (citing D.E. Shoup and D.H. Wahl, “Fish Diversity and Abundance in Relation to Interannual and Lake-Specific Variation in Abiotic Characteristics of Floodplain Lakes of the Lower Kaskaskia River, Illinois,” *Transactions of the American Fisheries Society* 138:1076–1092 (2009)). Since adjacent ponds are structurally and biologically similar to oxbow lakes they serve similar functions relative to the nearby river or stream. Waters, including wetlands, in the riparian areas also provide food sources for stream invertebrates, which colonize during inundation events. *Id.* at 5–19 (citing W.J. Junk, *et al.*, “The Flood Pulse Concept in River-Floodplain Systems,” in D.P. Dodge, ed., *Proceedings of the International Large River Symposium Ottawa* (Ottawa, Canada: Canadian Special Publication of Fisheries and Aquatic Sciences 106, 1989), pp. 110–127; C. Ilg, *et al.*, “Long-term Reactions of Plants and Macroinvertebrates to Extreme Floods in Floodplain Grasslands,” *Ecology* 89:2392–2398 (2008)). Riparian waters also form an integral part of the food web, linking primary producers and plants to higher animals. *Id.* (citing B. Malmqvist, “Aquatic Invertebrates in Riverine Landscapes,” *Freshwater Biology* 47:679–694 (2002); G.U.Y. Woodward and A.G. Hildrew, “Food Web Structure in Riverine Landscapes,” *Freshwater Biology* 47:777–798 (2002), T.K. Stead, *et al.*, “Secondary Production of a Stream Metazoan Community: Does the Meiofauna Make a Difference?,” *Limnology and Oceanography* 50:398–403 (2005), D.J. Woodford and A.R. McIntosh, “Evidence of Source-Sink Metapopulations in a Vulnerable Native Galaxiid Fish Driven by Introduced Trout,” *Ecological Applications* 20:967–977 (2010)). Likewise, floodplains are important

foraging, hunting, and breeding sites for fish and amphibians. *Id.* at 5–15 (citing G.H. Copp, “The Habitat Diversity and Fish Reproductive Function of Floodplain Ecosystems,” *Environmental Biology of Fishes* 26:1–27 (1989); J.S. Richardson, *et al.*, “Riparian Communities Associated with Pacific Northwest Headwater Streams: Assemblages, Processes, and Uniqueness,” *Journal of the American Water Resources Association* 41:935–947 (2005)).

Plants and animals move back and forth between riparian or floodplain waters and the river network. This movement is assisted in some cases when flooding events create hydrological connections. For instance, these floodplain and riparian wetlands provide refuge, feeding, and rearing habitat for many fish species. *Id.* at 5–17 (citing C.H. Wharton, *et al.*, *The Ecology of Bottomland Hardwood Swamps of the Southeast: A Community Profile*, FWS/OBS–81/37 (Washington, DC: U.S. Department of the Interior, Fish and Wildlife Service, Biological Services Program, 1982); M.P. Matheny and C.F. Rabeni, “Patterns of Movement and Habitat Use by Northern Hogsuckers in an Ozark Stream,” *Transactions of the American Fisheries Society* 124:886–897 (1995); A.A. Pease, *et al.*, “Habitat and Resource Use by Larval and Juvenile Fishes in an Arid-Land River (Rio Grande, New Mexico),” *Freshwater Biology* 51:475–486 (2006); J.A. Henning, *et al.*, “Use of Seasonal Freshwater Wetlands by Fishes in a Temperate River Floodplain,” *Journal of Fish Biology* 71:476–492 (2007); C.A. Jeffres, *et al.*, “Ephemeral Floodplain Habitats Provide Best Growth Conditions for Juvenile Chinook Salmon in a California River,” *Environmental Biology of Fishes* 83:449–458 (2008)). Seeds ingested by animals such as carp are dispersed in stream channels and associated waters. See, *e.g.*, *id.* at 5–16 (citing B.J.A. Pollux, *et al.*, “Consequences of Intraspecific Seed-Size Variation in *Sparganium emersum* for Dispersal by Fish,” *Functional Ecology* 21:1084–1091 (2007)). Also, phytoplankton move between floodplain wetlands and the river network. *Id.* at 5–17 (citing D.G. Angeler, *et al.*, “Phytoplankton community similarity in a semiarid floodplain under contrasting hydrological connectivity regimes,” *Ecological Research* 25:513–520 (2010)). In turn, the primary productivity conditions in the floodplain results in large populations of phytoplankton that enrich river networks when hydrological connections form. *Id.* (citing P.W. Lehman, *et al.*, “The Influence of Floodplain Habitat on the Quantity and Quality of Riverine Phytoplankton Carbon Produced During the Flood Season in San Francisco Estuary,” *Aquatic Ecology* 42:363–378 (2008)). This influx of carbon into the river system nourishes the downstream waters, for example, supporting fisheries.

However, even when hydrological connections are absent, some organisms can move between riparian waters and their neighboring tributaries by overland movement in order to complete their life cycle. River-dwelling mammals, such as river otters, move from the river to riparian wetlands. *Id.* at 5–18 (citing D.G. Newman and C.R. Griffin, “Wetland Use by River

Otters in Massachusetts,” *Journal of Wildlife Management* 58:18–23 (1994)). Several species of amphibians and reptiles including frogs, snakes and turtles use both streams and neighboring waters. *Id.* at 1–10, 5–4 to 5–5 (Table 5–1), 5–15 (citing J.S. Richardson, *et al.*, “Riparian Communities Associated with Pacific Northwest Headwater Streams: Assemblages, Processes, and Uniqueness,” *Journal of the American Water Resources Association* 41:935–947 (2005)). Movement between wetlands and the river network also occurs by the dispersal of seed and plant fragments and the wind dispersal of invertebrates. *Id.* at 5–15, 5–20 (citing R.L. Schneider and R.R. Sharitz, “Hydrochory and Regeneration in a Bald Cypress Water Tupelo Swamp Forest,” *Ecology* 69:1055–1063 (1988); B. Middleton, “Hydrochory, Seed Banks, and Regeneration Dynamics Along the Landscape Boundaries of a Forested Wetland,” *Plant Ecology* 146:169–184 (2000); A.M. Gurnell, “Analogies Between Mineral Sediment and Vegetative Particle Dynamics in Fluvial Systems,” *Geomorphology* 89:9–22 (2007); A. Gurnell, *et al.*, “Propagule Deposition Along River Margins: Linking Hydrology and Ecology,” *Journal of Ecology* 96:553–565 (2008); C. Nilsson, *et al.*, “The Role of Hydrochory in Structuring Riparian and Wetland Vegetation,” *Biological Reviews* 85:837–858 (2010); L.M. Tronstad, *et al.*, “Aerial Colonization and Growth: Rapid Invertebrate Responses to Temporary Aquatic Habitats in a River Floodplain,” *Journal of the North American Benthological Society* 26:460–471 (2007)). Animals, particularly migratory fish, may thus move between adjacent waters and (a)(1) through (a)(3) waters. And even when some species do not traverse the entire distance from adjacent waters to downstream waters, the downstream waters still benefit from the ecological integrity that persists because of the close relationship that adjacent waters have with nearby waters. This is because the chemical and biological properties that arise from interactions between adjacent waters and tributaries move downstream and support the integrity of (a)(1) through (a)(3) waters.

Biological connections between adjacent waters and river systems do not always increase with hydrologic connections. In some cases, the lack of connection improves the biological contribution provided by riparian waters towards neighboring streams, rivers, and lakes. For instance, the periodic hydrologic disconnectedness of oxbow lakes is necessary for the accumulation of plankton, an important source of carbon more easily assimilated by the aquatic food chain than terrestrial forms of carbon. *Id.* at 5–46 (citing C. Baranyi, *et al.*, “Zooplankton Biomass and Community Structure in a Danube River Floodplain System: Effects of Hydrology,” *Freshwater Biology* 47:473–482 (2002); S. Keckeis, *et al.*, “The Significance of Zooplankton Grazing in a Floodplain System of the River Danube,” *Journal of Plankton Research* 25:243–253 (2003)). Similarly, some degree of hydrological disconnectedness is important in increasing the number of mollusk species and macroinvertebrate diversity in oxbow lakes, which in turn support the diversity of

mollusks throughout the aquatic system. *Id.* at 5–46 to 5–47 (citing W. Reckendorfer, *et al.*, “Floodplain Restoration by Reinforcing Hydrological Connectivity: Expected Effects on Aquatic Mollusc Communities,” *Journal of Applied Ecology* 43:474–484 (2006); K. Obolewski, *et al.*, “Effect of Hydrological Connectivity on the Molluscan Community Structure in Oxbow Lakes of the Lyna River,” *Oceanological and Hydrobiological Studies* 38:75–88 (2009)).

## 2. Confined Surface and Shallow Subsurface Hydrologic Connections Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

Wetlands and open waters, including those outside the riparian zone and floodplain, can be connected downstream through unidirectional flow from the wetland or open water to a nearby tributary. Such connections can occur through a confined surface or a shallow subsurface hydrologic connection. Report at 3–7, 5–23. Outside of the riparian zone and floodplain, surface hydrologic connections between adjacent waters and jurisdictional waters can occur via confined flows (e.g. a swale, gully, ditch, or other discrete feature). For purposes of this rule, confined surface connections are defined as permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches. In some cases, these connections will be a result of “fill and spill” hydrology. A directional flowpath is a path where water flows repeatedly from the wetland or open water to the nearby jurisdictional water that at times contains water originating in the wetland or open water as opposed to just directly from precipitation. For the purposes of this rule, “fill and spill” describes situations where wetlands or open waters fill to capacity during intense precipitation events or high cumulative precipitation over time and then spill to the downstream jurisdictional water. *Id.* at 5–62 (citing T.C. Winter and D.O. Rosenberry, “Hydrology of Prairie Pothole Wetlands during Drought and Deluge: A 17-year Study of the Cottonwood Lake Wetland Complex in North Dakota in the Perspective of Longer Term Measured and Proxy Hydrological Records,” *Climatic Change* 40:189–209 (1998); S.G. Leibowitz, and K.C. Vining, “Temporal connectivity in a prairie pothole complex,” *Wetlands* 23:13–25 (2003)). Water connected through such flows originate from the adjacent wetland or open water, travel to the downstream jurisdictional water, and are connected to those downstream waters by swales or other directional flowpaths on the surface.

A confined surface hydrologic connection, which may be perennial, intermittent or ephemeral, supports periodic flows between the adjacent water and the jurisdictional water. For example, wetland seeps are likely to have perennial connections to streams that provide important sources of baseflow, particularly during summer. *Id.* at 5–22 (citing T.R. Morley, *et al.*, “The Role of Headwater Wetlands in Altering Streamflow and Chemistry in a Maine, USA catchment,” *Journal of the American Water Resources Association* 47:337–349 (2011)). Other wetlands are connected to streams via

intermittent or ephemeral conveyances and can contribute flow to downstream waters via their surface hydrologic connection. *Id.* at 5–22 (citing M.C. Rains, *et al.*, “The Role of Perched Aquifers in Hydrological Connectivity and Biogeochemical Processes in Vernal Pool Landscapes, Central Valley, California,” *Hydrological Processes* 20:1157–1175 (2006); M.C. Rains, *et al.*, “Geological Control of Physical and Chemical Hydrology in California Vernal Pools,” *Wetlands* 28:347–362 (2008); B.P. Wilcox, *et al.*, “Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands,” *Wetlands* 31:451–458 (2011)). The surface hydrologic connection of the neighboring water to the jurisdictional water and the close proximity of the waters enhance the neighboring waters substantial effects the waters have on downstream (a)(1) through (a)(3) waters. Wetlands and open waters that are connected to (a)(1) through (a)(5) waters through a confined surface hydrologic connection will have an impact on downstream (a)(1) through (a)(3) waters, regardless of whether the outflow is permanent, intermittent, or ephemeral. *See, e.g., id.* at 5–1 to 5–2.

Wetlands and open waters with confined surface connections can affect the physical integrity of waters to which they connect. Such waters can provide an important source of baseflow to the streams to which they are adjacent, helping to sustain the water levels in the nearby streams. *Id.* at 5–22 (citing T.R. Morley, *et al.*, “The Role of Headwater Wetlands in Altering Streamflow and Chemistry in a Maine, USA catchment,” *Journal of the American Water Resources Association* 47:337–349 (2011); M.C. Rains, *et al.*, “The Role of Perched Aquifers in Hydrological Connectivity and Biogeochemical Processes in Vernal Pool Landscapes, Central Valley, California,” *Hydrological Processes* 20:1157–1175 (2006); M.C. Rains, *et al.*, “Geological Control of Physical and Chemical Hydrology in California Vernal Pools,” *Wetlands* 28:347–362 (2008); B.P. Wilcox, *et al.*, “Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands,” *Wetlands* 31:451–458 (2011)) and T.M. Lee, *et al.*, *Effect of Groundwater Levels and Headwater Wetlands on Streamflow in the Charlie Creek Basin, Peace River Watershed, West-Central Florida*, U.S. Geological Survey Scientific Investigations Report 2010–5189 (Reston, Virginia: U.S. Department of the Interior, U.S. Geological Survey, 2010). Waters with a confined surface connection to downstream jurisdictional waters can affect streamflow by altering baseflow or stormflow through several mechanisms, including surface storage and groundwater recharge. Report at 5–25. Wetlands effectively store water because the entire aboveground portion of the wetland basin is available for water storage, in contrast to upland areas where soil particles or rock reduce water storage volume for a given volume of that soil or rock (i.e., the specific yield). *Id.* at 5–25 (citing A.I. Johnson, *Specific Yield—Compilation of Specific Yields for Various Materials*, USGS Water Supply Paper 1662–D (Washington, DC: U.S. Department of the Interior, U.S. Geological Survey, 1967)). By storing water,

these waters can reduce peak streamflow, and thus, downstream flooding. *Id.* at 5–25 (citing A. Bullock, and M. Acreman, “The Role of Wetlands in the Hydrological Cycle,” *Hydrology and Earth System Sciences* 7:358–389 (2003); P. McEachern, *et al.*, “Landscape Control of Water Chemistry in Northern Boreal Streams of Alberta,” *Journal of Hydrology* 323:303–324 (2006)). Antecedent moisture conditions, available wetland storage, and evaporation rates could impact water storage, as some waters connected to jurisdictional waters via discrete features may actually reduce flows in the streams they neighbor during dry periods. *Id.* at 5–26 (citing A. Bullock, and M. Acreman, “The Role of Wetlands in the Hydrological Cycle,” *Hydrology and Earth System Sciences* 7:358–389 (2003)). Thus, wetlands and open waters with a confined hydrologic connection to jurisdictional waters may function as a sink in dry periods if storage capacity is not exceeded and evaporation rates surpass groundwater recharge. *Id.* at 5–26 to 5–27.

Wetlands and open waters with confined surface connections can affect the chemical integrity of waters to which they connect. Such waters can affect water quality of jurisdictional waters through source and sink functions, often mediated by transformation of chemical constituents. The surface hydrologic connections to nearby jurisdictional waters provide pathways for materials transformed in the wetlands and open waters (such as methylmercury or degraded organic matter) to reach and affect the nearby waters and the downstream (a)(1) through (a)(3). *Id.* at 5–27. Functions that occur in the wetlands and open waters can affect downstream (a)(1) through (a)(3) waters when compounds that are transformed in wetland environments move to downstream waters via the surface hydrologic connection. *Id.* at 5–28 (citing T.C. Winter and J.W. LaBaugh, “Hydrologic Considerations in Defining Isolated Wetlands,” *Wetlands* 23:532–540 (2003)). For example, methylmercury (which can form in peatlands) can be transported through entrainment with organic matter exports, and can move through surface flows from peatlands with confined surface connections to downstream waters. *Id.* at 5–28 (citing O. Linqvist, *et al.*, “Mercury in the Swedish Environment—Recent Research on Causes, Consequences, and Remedial Measures,” *Water Air and Soil Pollution* 55:xi–xiii (1991); G. Mierle, and R. Ingram, “The Role of Humic Substances in the Mobilization of Mercury from Watersheds,” *Water Air and Soil Pollution* 56:349–357 (1991); V.L. St. Louis, *et al.*, “Importance of Wetlands as Sources of Methyl mercury to Boreal Forest Ecosystems,” *Canadian Journal of Fisheries and Aquatic Sciences* 51:1065–1076 (1994); C.T. Driscoll, *et al.*, “The Role of Dissolved Organic Carbon in the Chemistry and Bioavailability of Mercury in Remote Adirondack Lakes,” *Water Air and Soil Pollution* 80:499–508 (1995); P. Porvari, and M. Verta, “Total and Methyl mercury Concentrations and Fluxes from Small Boreal Forest Catchments in Finland,” *Environmental Pollution* 123:181–191 (2003)). The mercury that is transported downstream can enter the food chains of the

(a)(1) through (a)(3) waters and negatively impact wildlife inhabiting those downstream waters. *Id.* at 5–28. Export of dissolved organic matter from neighboring waters connected via a confined surface connection can have potentially negative effects on downstream waters because contaminants, such as MeHg and other trace metals, can be adsorbed to the organic matter. *Id.* at 5–28 (citing E.M. Thurman, *Organic Geochemistry of Natural Waters* (Boston, MA: Martinus Nijhoff/Dr. W. Junk Publishers, 1985); C.T. Driscoll, *et al.*, “The Role of Dissolved Organic Carbon in the Chemistry and Bioavailability of Mercury in Remote Adirondack Lakes,” *Water Air and Soil Pollution* 80:499–508 (1995)). Dissolved organic matter, however, is also an important source of energy for downstream aquatic communities. *Id.* at 5–28 (citing J.E. Hobbie and R.G. Wetzel, “Microbial control of dissolved organic carbon in lakes: Research for the future,” *Hydrobiologia* 229:169–180 (1992); K.R. Reddy and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications*, 774 p. (2008)). Wetlands with confined surface hydrologic connections to the stream are connected to jurisdictional tributary system and therefore can efficiently transport dissolved organic carbon and other dissolved organic matter to the nearby jurisdictional water and downstream (a)(1) through (a)(3) waters. *See, e.g.*, I.F. Creed, *et al.*, “Cryptic Wetlands: Integrating Hidden Wetlands in Regression Models of the Export of Dissolved Organic Carbon from Forested Landscapes,” *Hydrological Processes* 17:3629–3648 (2003). Adjacent waters with a surface hydrologic connection to jurisdictional waters can also improve water quality through assimilation, transformation, or sequestration of nutrients and other pollutants. Report at 5–29 (citing, *e.g.*, K.R. Reddy, and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications*, 774 p. (2008)). These processes can occur during times of lower hydroperiods when water is not present in the surface hydrologic connection between the adjacent water and the jurisdictional water. Pollutants can be attenuated or retained in such adjacent waters through processes including denitrification, ammonia volatilization, microbial and plant biomass assimilation, sedimentation, sorption and precipitation reactions, biological uptake, and long-term storage in plant detritus. *Id.* at 5–29 (citing K.R. Reddy, *et al.*, “Phosphorus Retention in Streams and Wetlands: A Review,” *Critical Reviews in Environmental Science and Technology* 29:83–146 (1999); K.R. Reddy and R.D. DeLaune, *Biogeochemistry of Wetlands: Science and Applications*, 774 p. (2008)). Through retention and mitigation of pollutants and other chemical compounds, adjacent waters with a surface hydrologic connection to jurisdictional waters can substantially improve water quality downstream.

Wetlands and open waters with confined surface connections can affect the biological integrity of waters to which they connect. Movement of organisms between these adjacent waters and the nearby jurisdictional water is governed by many of the same factors that affect movement of organisms

between riparian/floodplain waters and the river network. *Id.* at 5–31. Because such waters are at least periodically hydrologically connected to the nearby jurisdictional tributary network on the surface, dispersal of organisms can occur actively through the surface connection or via wind dispersal, hitchhiking, walking, crawling, or flying. *See, e.g., id.* at 5–31. For example, waterborne dispersal of aquatic and emergent plants can occur between the jurisdictional water and the neighboring water due to the periodic hydrologic connection to the tributary system. *Id.* at 5–31 (citing C. Nilsson, *et al.*, “The Role of Hydrochory in Structuring Riparian and Wetland Vegetation,” *Biological Reviews* 85:837–858 (2010)). Fish can also move between the jurisdictional water and the neighboring water to which it is connected via a surface hydrologic connection during periodic surficial hydrologic connections. *Id.* at 5–32 (citing J.W. Snodgrass, *et al.*, “Factors affecting the occurrence and structure of fish assemblages in isolated wetlands of the upper coastal plain, USA,” *Canadian Journal of Fisheries and Aquatic Sciences* 53:443–454 (1996); K.D. Zimmer, *et al.*, “Effects of fathead minnow colonization and removal on a prairie wetland ecosystem,” *Ecosystems* 4:346–357 (2001); M.J. Baber, *et al.*, “Controls on fish distribution and abundance in temporary wetlands,” *Canadian Journal of Fisheries and Aquatic Sciences* 59:1441–1450 (2002); M.A. Hanson, *et al.*, “Biotic interactions as determinants of ecosystem structure in prairie wetlands: An example using fish,” *Wetlands* 25:764–775 (2005); B.R. Herwig, *et al.*, “Factors influencing fish distributions in shallow lakes in prairie and prairie-parkland regions of Minnesota, USA,” *Wetlands* 30:609–619 (2010)). Mammals and aquatic and semi-aquatic amphibians and reptiles that can disperse overland can also contribute to connectivity, as can aquatic birds, particularly given the close proximity of the neighboring water to the jurisdictional water. Mammals and birds can act as transport vectors for hitchhikers like algae or aquatic insects. *Id.* at 5–32 (citing J.P. Roscher, “Alga Dispersal by Muskrat Intestinal Contents,” *Transactions of the American Microscopical Society* 86:497–498 (1967)); J. Figuerola and A.J. Green, “Dispersal of Aquatic Organisms by Waterbirds: a Review of Past Research and Priorities for Future Studies,” *Freshwater Biology* 47:483–494 (2002); J. Figuerola, *et al.*, “Invertebrate Eggs Can Fly: Evidence of Waterfowl-Mediated Gene Flow in Aquatic Invertebrates,” *American Naturalist* 165:274–280 (2005)). Amphibians and reptiles move between streams and their adjacent waters to satisfy part of their life-history requirements. *Id.* at 5–33, Table 5–2. The hydrologic connection between neighboring waters with a surface connection to the jurisdictional water allows for that movement to occur either in the water or over land. Aquatic insects that use both streams and their adjacent waters can move outside of the stream network to the nearby wetland or open water to seek suitable habitat for overwintering, refuge from adverse conditions, hunting, foraging or breeding, and then return to the stream for other life-

history requirements. *Id.* at 5–33 (citing D.D. Williams, “Environmental Constraints in Temporary Fresh Waters and Their Consequences for the Insect Fauna,” *Journal of the North American Benthological Society* 15:634–650 (1996); A.J. Bohonak and D.G. Jenkins, “Ecological and Evolutionary Significance of Dispersal by Freshwater Invertebrates,” *Ecology Letters* 6:783–796 (2003)). Neighboring waters with a confined surface hydrologic connection to jurisdictional waters help to maintain various biological populations, which periodically replenish adjacent jurisdictional waters, serving to maintain the biological integrity of (a)(1) through (a)(3) waters.

A shallow subsurface hydrologic connection is lateral water flow through a shallow subsurface layer, such as can be found in steeply sloping areas with shallow soils and soils with a restrictive horizon that prevents vertical water flow, or in karst systems. K.J. Devito, *et al.*, “Groundwater-Surface Water Interactions in Headwater Forested Wetlands of the Canadian Shield,” *Journal of Hydrology* 181:127–47 (1996); M.A. O’Driscoll and R.R. Parizek, “The Hydrologic Catchment Area of a Chain of Karst Wetlands in Central Pennsylvania, USA,” *Wetlands* 23:171–79 (2003); B.J. Cook and F.R. Hauer, “Effects of Hydrologic Connectivity on Water Chemistry, Soils, and Vegetation Structure and Function in an Intermontane Depressional Wetland Landscape,” *Wetlands* 27:719–38 (2007). Shallow subsurface connections may be found below the ordinary root zone (below 12 inches), where other wetland delineation factors may not be present. The presence of an aquiclude (impervious layer) near the surface leads to shallow subsurface flows through the soil, which favors local groundwater flowpaths that connect to nearby wetlands or streams. Report at 3–38.

Wetlands with shallow subsurface connections can affect the physical integrity of waters to which they connect. In general, the volume and sustainability of streamflow within river networks depends on contributions from groundwater, especially in areas with shallow groundwater tables and pervious (meaning water can easily pass through) subsurfaces. *Id.* at 3–12 (citing J.J. de Vries, “Seasonal Expansion and Contraction of Stream Networks in Shallow Groundwater Systems,” *Journal of Hydrology* 170:15–26 (1995); T.C. Winter, “The Role of Groundwater in Generating Streamflow in Headwater Areas and in Maintaining Base Flow,” *Journal of the American Water Resources Association* 43:15–25 (2007); G.R. Kish, *et al.*, “A Geochemical Mass-Balance Method for Base-Flow Separation, Upper Hillsborough River Watershed, West-Central Florida, 2003–2005 and 2009,” *USGS Scientific Investigations Report 2010–5092* (Washington, DC: U.S. Department of the Interior, U.S. Geological Survey, 2010)). Because wetlands with shallow subsurface connections to streams and rivers provide some of these groundwater contributions, they influence the flow regime. Wetlands connected via shallow subsurface connections also can act as water sinks when evapotranspiration is high, but as water sources when evapotranspiration is low. *Id.*

at 3–25. As a result, these adjacent waters moderate peak flows, reduce downstream flooding, and provide runoff to help maintain baseflow for streams during times of low flows.

Wetlands and other waters with shallow subsurface connections affect the chemical and biological integrity of downstream waters in ways similar to wetlands with surface connections. The distance between these wetlands and jurisdictional waters may influence the connectivity since wetlands with shorter distances to the stream network will have higher hydrological and biological connectivity than wetlands located further from the same network. *Id.* at 3–43. The distance between the wetland and water may also influence whether waters are connected via surface or shallow subsurface hydrologic connections, as wetlands and open waters that are closer to rivers and streams will have a higher probability of being connected than more distant waters, assuming that conditions governing type and quantity of flows (e.g. slope, soil and aquifer permeability) are similar. *Id.* at 5–2. For wetlands connected to tributaries through groundwater flows, less distant wetlands/waters are generally connected through shallower flowpaths, assuming similar soil and geologic properties. *Id.* at 3–11 (Figure 3–5), 3–42. These shallower subsurface flows have the greatest interchange with surface waters and travel between points in the shortest amount of time. *Id.* at 3–42.

### 3. Adjacent Waters, Including Wetlands, Separated From Other “Waters of the United States” by Man-Made Dikes or Barriers, Natural River Berms, Beach Dunes and the Like Significantly Affect the Chemical, Physical, or Biological Integrity of (a)(1) Through (a)(3) Waters

The terms earthen dam, dike, berm, and levee are used to describe similar structures whose primary purpose is to help control flood waters. Such structures vary in scale and size. A levee is an embankment whose primary purpose is to furnish flood protection from seasonal high water and which is therefore subject to water loading for periods of only a few days or weeks a year. Earthen embankments that are subject to water loading for prolonged periods (longer than normal flood protection requirements) are called earth dams. There are a wide variety of types of structures and an even wider set of construction methods. These range from a poorly constructed, low earthen berm pushed up by a backhoe to a well-constructed, impervious core, riprap lined levee that protects houses and cropland. Generally, levees are built to detach the floodplain from the channel, decreasing overbank flood events. S.B. Franklin, *et al.*, “Complex Effects of Channelization and Levee Construction on Western Tennessee Floodplain Forest Function,” *Wetlands* 29(2): 451–464 (2009). The investigation methods to determine the presence or absence of the hydrologic connection depend on the type of structure, the underlying soils, the presence of groundwater, and the depth of the water table. Department of the Army, U.S. Army Corps of Engineers, Engineering and Design—Design and Construction of Levees,

EM 1110–2–1913 (Washington, DC, Department of the Army, 2000), p. 1–1.

Man-made berms and the like are fairly common along streams and rivers across the United States and often accompany stream channelization. S.B. Franklin, *et al.*, “Complex Effects of Channelization and Levee Construction on Western Tennessee Floodplain Forest Function,” *Wetlands* 29(2): 451–464 (2009). One study conducted in Portland, Oregon found that 42% of surveyed wetlands had dams, dikes, or berms. M. Kentula, *et al.*, “Tracking Changes in Wetlands with Urbanization: Sixteen Years of Experience in Portland, Oregon, USA,” *Wetlands* 24(4):734–743 (2004). Likewise, over 90% of the tidal freshwater wetlands of the Sacramento-San Joaquin Delta have been diked or leveed. C. Simenstad, *et al.*, “Preliminary Results from the Sacramento-San Joaquin Delta Breached Levee Wetland Study,” *Interagency Ecological Program for the Sacramento-San Joaquin Estuary Newsletter* 12(4):15–21 (1999). At least 40,000 kilometers of levees, floodwalls, embankments, and dikes are estimated across the United States, with approximately 17,000 kilometers of levees in the Upper Mississippi Valley alone. S.E. Gergel, *et al.*, “Consequences of Human-altered Floods: Levees, Floods, and Floodplain Forests along the Wisconsin River,” *Ecological Applications* 12(6): 1755–1770 (2002).

Adjacent waters separated from the tributary network by dikes, levees, berms and the like continue to have a hydrologic connection to downstream waters. This is because berms and similar features typically do not block all water flow. Indeed, even dams, which are specifically designed and constructed to impound large amounts of water effectively and safely, do not prevent all water flow, but rather allow seepage under the foundation of the dam and through the dam itself. See, e.g., International Atomic Energy Agency, Factsheet on Investigating Leaks through Dams and Reservoirs, <http://www.tc.iaea.org/tcweb/publications/factsheets/sheet20dr.pdf>; U.S. Bureau of Reclamation, Provo Office, Safety of Dams, <http://www.usbr.gov/uc/provo/progact/damsafety.html>; Federal Energy Regulatory Commission (FERC), “Chapter 14: Dam Safety Performance Monitoring Program,” Engineering Guidelines for the Evaluation of Hydropower Projects (FERC, 2005), pp. 14–36 to 14–39.

Seepage is the flow of a fluid through the soil pores. Seepage through a dam, through the embankments, foundations or abutments, or through a berm is a normal condition. D.A. Kovacic, *et al.*, “Effectiveness of Constructed Wetlands in Reducing Nitrogen and Phosphorus Export from Agricultural Tile Drainage,” *Journal of Environmental Quality* 29(4): 1262–1274 (2000); Federal Energy Regulatory Commission (FERC), “Chapter 14: Dam Safety Performance Monitoring Program,” Engineering Guidelines for the Evaluation of Hydropower Projects (FERC, 2005), pp. 14–36 to 14–39. This is because water seeks paths of least resistance through the berm or dam and its foundation. Michigan Department of Environmental Quality, Seepage Through Earth Dams (2002), [\[3313\\\_3684\\\_3723-9515-.00.html\]\(http://www.michigan.gov/deq/0,1607,7-135-3313\_3684\_3723-9515-.00.html\). All earth and rock-fill dams are subject to seepage through the embankment, foundation, and abutments. Department of the Army, U.S. Army Corps of Engineers, Seepage Analysis and Control for Dams, EM 1110–2–1901, \(Washington, DC: Department of the Army, Original 1986—Revised 1993\), Page 1–1; Department of the Army, U.S. Army Corps of Engineers, Engineering and Design: General Design and Construction Considerations for Earth and Rock-filled Dams, EM 1110–2–2300 \(Washington, DC: Department of the Army, 2004\), pp. 6–1 to 6–7. Concrete gravity and arch dams similarly are subject to seepage through the foundation and abutments. Department of the Army, U.S. Army Corps of Engineers, Seepage Analysis and Control for Dams, EM 1110–2–1901 \(Washington, DC: Department of the Army, Original 1986—Revised 1993\), Page 1–1. Levees and the like are subject to breaches and breaks during times of floods. C. Nilsson, \*et al.\*, “Fragmentation and Flow Regulation of the World’s Large River Systems,” \*Science\* 308\(5720\):405–408 \(2005\). Levees are similarly subject to failure in the case of extreme events, such as the extensive levee failures caused by Hurricanes Katrina and Rita. J.W. Day, \*et al.\*, “Restoration of the Mississippi Delta: Lessons from Hurricanes Katrina and Rita,” \*Science\* 315\(5819\): 1679–1684 \(2007\). In designing levees and similar structures, seepage control is necessary to prevent possible failure caused by excessive uplift pressures, instability of the downstream slope, piping through the embankment and/or foundation, and erosion of material by migration into open joints in the foundation and abutments. \*Id.\*; D.A. Kovacic, \*et al.\*, “Effectiveness of Constructed Wetlands in Reducing Nitrogen and Phosphorus Export from Agricultural Tile Drainage,” \*Journal of Environmental Quality\* 29\(4\): 1262–1274 \(2000\); U.S. Department of the Interior, Bureau of Reclamation, Upper Colorado Region, see <http://www.usbr.gov/uc/provo/progact/damsafety.html>; International Atomic Energy Agency, Investigating Leaks through Dams and Reservoirs, see <http://www-tc.iaea.org/tcweb/publications/factsheets/sheet20dr.pdf>; California Division of Safety of Dams, Embankment Design, see <http://damsafety.water.ca.gov/guidelines/embankment.htm>.](http://www.michigan.gov/deq/0,1607,7-135-</a></p>
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The rate at which water moves through the embankment depends on the type of soil in the embankment, how well it is compacted, the foundation and abutment preparation, and the number and size of cracks and voids within the embankment. All but the smallest earthen dams are commonly built with internal subsurface drains to intercept water seeping from the reservoir (i.e., upstream side) to the downstream side. Department of the Army, U.S. Army Corps of Engineers, Construction Control for Earth and Rock-filled Dams, EM 1110–2–1911, September 30, 1995, Washington, DC 20314–1000, Page 1–1. Where it is not intercepted by a subsurface drain, the seepage will emerge downstream from or at the toe of the embankment. Michigan Department of Environmental Quality, Seepage Through Earth Dams (2002),

3313\_3684\_3723-9515-.00.html. Seepage may vary in appearance from a "soft," wet area to a flowing "spring." It may show up first as an area where the vegetation is lush and darker green. Cattails, reeds, mosses, and other marsh vegetation may grow in a seepage area. Michigan Department of Environmental Quality, Seepage Through Earth Dams (2002), [http://www.michigan.gov/deq/0,1607,7-135-3313\\_3684\\_3723-9515-.00.html](http://www.michigan.gov/deq/0,1607,7-135-3313_3684_3723-9515-.00.html).

Engineered berms are typically designed to interfere with the seasonal pattern of water level (hydroperiod) of the area behind the berm, reducing the frequency and severity of inundation. Berms are not designed to eliminate all hydrologic connection between the channel on one side and the area behind the berm on the other. It is almost always impracticable to build a berm that will not be overtopped by a flood of maximum severity, and most berms are not designed to withstand severe floods. See, e.g., Department of the Army, U.S. Army Corps of Engineers, Seepage Analysis and Control for Dams, EM 1110-2-1901, (Washington, DC: Department of the Army, Original 1986—Revised 1993), Page 1-1. Levees are designed to allow seepage and are frequently situated on foundations having natural covers of relatively fine-grain impervious to semipervious soils overlying pervious sands and gravels. Department of the Army, U.S. Army Corps of Engineers, Engineering and Design: Design Guidance for Levee Underseepage, ELT 1110-2-569, Washington, DC: Department of the Army, 2005), pp. 1-9. These surface strata constitute impervious or semipervious blankets when considered in connection with seepage. Principal seepage control measures for foundation underseepage are (a) cutoff trenches, (b) riverside impervious blankets, (c) landslide berms, (d) pervious toe trenches, and (e) pressure relief wells. Department of the Army, U.S. Army Corps of Engineers, Engineering and Design—Design and Construction of Levees, EM 1110-2-1913 (Washington, DC, Department of the Army, 2000), p. 1-1. Overtopping of an embankment dam is very undesirable because the embankment materials may be eroded away. Additionally, only a small number of concrete dams have been designed to be overtopped. Water normally passes through the main spillway or outlet works; it should pass over an auxiliary spillway only during periods of high reservoir levels and high water inflow. All embankment and most concrete dams have some seepage. See, e.g., <http://www.damsafety.org/layout/subsection.aspx?groupid=14&contentid=47>. However, it is important to control the seepage to prevent internal erosion and instability. Proper dam construction, and maintenance and monitoring of seepage provide control.

Berm-like landforms known as natural levees occur naturally and do not isolate adjacent wetlands from the streams that form them. Natural levees and the wetlands and waters behind them are part of the floodplain, including along some small streams and streams in the Arid West. C.A. Johnston, et al., "Nutrient Dynamics in Relation to Geomorphology of Riverine

Wetlands," *Soil Science Society of America Journal* 65(2):557-577 (2001). Every flowing watercourse transports not only water, but sediment—eroding and rebuilding its banks and floodplains continually. Federal Interagency Stream Restoration Working Group, *Stream Corridor Restoration: Principles, Processes and Practices*, USDA National Engineering Handbook Part 653 (1999). Different deposition patterns occur under varying levels of streamflow, with higher flows having the most influence on the resulting shape of streambanks and floodplains. *Id.* In relatively flat landscapes drained by low-gradient streams, this natural process deposits the most sediment on the bank immediately next to the stream channel while floodplains farther from the channel are usually lower-lying wetlands ("backswamps" or "backwater wetlands") that receive less sediment. See, e.g., C.A. Johnston, et al., "The Potential Role of Riverine Wetlands as Buffer Zones," in N.E. Haycock, et al., ed., *Buffer Zones Their Processes and Potential in Water Protection* (Quest International, 1997), pp. 155-170. The somewhat elevated land thus built up at streamside is called a natural levee, and this entirely natural landform is physically and hydrologically similar to narrow, man-made berms. See, e.g., L.B. Leopold, et al., *Fluvial Processes in Geomorphology* (Toronto: General Publishing Co. Ltd., 1964). Natural levees are discontinuous, which allows for a hydrologic connection to the stream or river via openings in the levees and thus the periodic mixing of river water and backwater. C.A. Johnston, et al., "Nutrient Dynamics in Relation to Geomorphology of Riverine Wetlands," *Soil Science Society of America Journal* 65(2): 557-577 (2001). In addition, streams with natural levees, in settings with no human interference whatsoever, retain hydrologic connection with their wetlands behind the levees by periodic flooding during high water and via seepage through and under the levee. Similarly, man-made berms are typically periodically overtopped with water from the near-by stream, and as previously mentioned, are connected via seepage.

Waters, including wetlands, separated from a stream by a natural or man-made berm serve many of the same functions as those discussed above on other adjacent waters. Furthermore, even in cases where a hydrologic connection may not exist, there are other important considerations, such as chemical and biological factors, that result in a significant nexus between the adjacent wetlands or waters and the nearby "waters of the United States," and (a)(1) through (a)(3) waters.

The movement of surface and subsurface both over berms and through soils and berms adjacent to rivers and streams is a hydrologic connection between wetlands and flowing watercourses. The intermittent connection of surface waters over top of, or around, natural and manmade berms further strengthens the evidence of hydrologic connection between wetlands and flowing watercourses. Both natural and man-made barriers can be topped by occasional floods or storm events. See, e.g., R.E. Turner, et al., "Wetland Sedimentation from Hurricanes Katrina and

Rita," *Science* 314(5798): 449-452 (2006); P.A. Keddy, et al., "The Wetlands of Lakes Pontchartrain and Maurepas: Past, Present and Future," *Environmental Reviews* 15: 43-77 (2007). When berms are periodically overtopped by water, wetlands and waters behind the barriers are directly connected to and interacting with the nearby stream and its downstream waters. In addition, surface waters move to and from adjacent soils (including adjacent wetland soils) continually. Along their entire length, streams alternate between effluent (water-gaining) and influent (water-losing) zones as the direction of water exchange with the streambed and banks varies. Federal Interagency Stream Restoration Working Group, *Stream Corridor Restoration: Principles, Processes and Practices*, USDA National Engineering Handbook Part 653 (1999). The adjacent areas involved in this surface water exchange with a stream or river are known as the hyporheic zone. Hyporheic zone waters are part of total surface waters temporarily moving through soil or sediment. Like within-channel waters, these waters are oxygenated and support living communities of organisms in the hyporheic zone.

Because a hydrologic connection between adjacent wetlands and waters and downstream waters still exists despite the presence of a berm or the like, the chemical and biological connections that rely on a hydrologic connection also exist. For instance, adjacent waters behind berms can still serve important water quality functions, serving to filter pollutants and sediment before they reach downstream waters. Wetlands behind berms can function to filter pollutants before they enter the nearby tributary, with the water slowly released to the stream through seepage or other hydrological connections. See, e.g., L.L. Osborne and D.A. Kovacic, "Riparian Vegetated Buffer Strips in Water-Quality Restoration and Stream Management," *Freshwater Biology* 29(2): 243-258 (1993); D.A. Kovacic, et al., "Effectiveness of Constructed Wetlands in Reducing Nitrogen and Phosphorus Export from Agricultural Tile Drainage," *Journal of Environmental Quality* 29(4): 1262-1274 (2000). Their ability to retain sediment and floodwaters may be enhanced by the presence of the berm. For instance, some backwater wetlands in floodplain/riparian areas exhibit higher sedimentation rates than streamside locations. E.J. Kuenzler, et al., "Distributions and Budgets of Carbon, Phosphorus, Iron and Manganese in a Floodplain Swamp Ecosystem," *Water Resources Research Institute Report 157* (Chapel Hill, NC: University of North Carolina, 1980); C.A. Johnston, et al., "Nutrient Dynamics in Relation to Geomorphology of Riverine Wetlands," *Soil Science Society of America Journal* 65(2): 557-577 (2001). The presence of manmade levees can actually increase denitrification rates, meaning that the adjacent waters can more quickly transform nitrogen. SE. Gergel, et al., "Do Dams and Levees Impact Nitrogen Cycling? Simulating the Effects of Flood Alterations on Floodplain Denitrification," *Global Change Biology* 11(8): 1352-1367 (2005). However, the presence of manmade berms does limit

the ability of the river to connect with its adjacent wetlands through overbank flooding and thus limits sediment, water and nutrients transported from the river to the adjacent waters. *Id.*; J.L. Florsheim and J.F. Mount, "Changes in Lowland Floodplain Sedimentation Processes: Pre-disturbance to Post-rehabilitation, Cosumnes River, CA," *Geomorphology* 56(3-4):305-323 (2003). However, the presence of a berm does not completely eliminate the transport of sediments and water from the river to the nearby adjacent wetland, as suspended sediments and water can overflow both natural and man-made levees, though the transport is usually more pronounced in settings with natural levees. *See, e.g.*, R.E. Turner, *et al.*, "Wetland Sedimentation from Hurricanes Katrina and Rita," *Science* 314(5798):449-452 (2006); P.A. Keddy, *et al.*, "The Wetlands of Lakes Pontchartrain and Maurepas: Past, Present and Future," *Environmental Reviews* 15:43-77 (2007). Sediment deposition over levees is particularly enhanced by extreme events like hurricanes. *Id.*; D.J. Reed, *et al.*, "Reducing the Effects of Dredged Material Levees on Coastal Marsh Function: Sediment Deposition and Nekton Utilization," *Environmental Management* 37(5):671-685 (2006). Wetlands behind berms, where the system is extensive, can help reduce the impacts of storm surges caused by hurricanes. J.W. Day, *et al.*, "Restoration of the Mississippi Delta: Lessons from Hurricanes Katrina and Rita," *Science* 315(5819):1679-1684 (2007).

Adjacent waters, including wetlands, separated from water bodies by berms and the like maintain ecological connection with those water bodies. Though a berm may reduce habitat functional value and may prevent some species from moving back and forth from the wetland to the river, many major species that prefer habitats at the interface of wetland and stream ecosystems remain able to utilize both habitats despite the presence of such a berm. Additional species that are physically isolated in either stream or wetlands habitat still interact ecologically with species from the other component. Thus, adjacent wetlands with or without small berms can retain numerous similarities in ecological function. For example: Wetland bird species such as wading birds are able to utilize both wetland and adjacent stream/ditch habitats; wetland amphibians would be able to bypass the berm in their adult stage; aquatic invertebrates and fish would still interact with terrestrial/wetland predators and prey in common food web relationships despite the presence of a berm. *See, e.g.*, G.S. Butcher, and B. Zimpel, "Habitat Value of Isolated Waters to Migratory Birds," Prepared by Cornell Laboratory of Ornithology and The Cadmus Group, Inc. for U.S. Environmental Protection Agency Office of Wetlands Protection, (Washington, DC: Cornell and Cadmus, 1991); M.F. Willson and K.C. Halupka, "Anadromous Fish as Keystone Species in Vertebrate Communities," *Conservation Biology* 9(3):489-497 (1995); C.J. Cederholm, *et al.*, "Pacific Salmon Carcasses: Essential Contributions of Nutrients and Energy for Aquatic and

Terrestrial Ecosystems," *Fisheries* 24(10):6-15 (1999); S.S. Schwartz and D.G. Jenkins, "Temporary Aquatic Habitats: Constraints and Opportunities," *Aquatic Ecology* 34:3-8 (2000); D.T. Bilton, *et al.*, "Dispersal in Freshwater Invertebrates," *Annual Review of Ecology and Systematics* 32:159-81 (2001).

One example of adjacent waters behind berms and the like are interdunal wetlands located in coastal areas, including some areas of the Great Lakes and along barrier islands. Interdunal wetlands form in swales or depressions within open dunes or between beach ridges along the coast and experience a fluctuating water table seasonally and yearly in synchrony with sea or lake level changes. W.E. Odum, "Non-Tidal Freshwater Wetlands in Virginia," *Virginia Journal of Natural Resources Law* 7: 421-434 (1988); D.A. Albert, *Borne of the Wind: An Introduction to the Ecology of Michigan Sand Dunes* (Lansing, MI: Michigan Natural Features Inventory, 2000), 63 pp.; D.A. Albert, *Between Land and Lake: Michigan's Great Lakes Coastal Wetlands*, Bulletin E-2902 (East Lansing, MI: Michigan Natural Features Inventory, Michigan State University Extension, 2003), 96 pp.; D.A. Albert, *Natural Community Abstract for Interdunal Wetland* (Lansing, MI: Michigan Natural Features Inventory, 2007), 6 pp. For those along the ocean coast, they are typically formed as a result of oceanic processes where the wetlands establish behind relict dune ridges (dunes that were formed along a previously existing coast line). Wetlands in the interdunal system are in close proximity to each other and to the surrounding (a)(1) through (a)(3) waters. Their proximity to one another and to the (a)(1) through (a)(3) waters indicates a close physical relationship between interdunal wetland systems and the traditional navigable waters, interstate waters, or the territorial seas. Despite the presence of the beach dunes, interdunal wetlands have chemical, physical, or biological connections that greatly influence the integrity of the nearby (a)(1) through (a)(3) waters. The wetlands are hydrologically connected to these (a)(1) through (a)(3) waters through unconfined, directional flow and shallow subsurface flow during normal precipitation events and extreme events. As previously noted, they are linked to the rise and fall of the surrounding tides—the water-level fluctuations of the nearby (a)(1) through (a)(3) waters are important for the dynamics of the wetlands. D.A. Albert, *Between Land and Lake: Michigan's Great Lakes Coastal Wetlands*, Bulletin E-2902 (East Lansing, MI: Michigan Natural Features Inventory, Michigan State University Extension, 2003), 96 pp. The wetlands provide floodwater storage and attenuation, retaining and slowly releasing floodwaters before they reach the nearby (a)(1) through (a)(3) waters. Like other adjacent wetlands, interdunal wetlands also have important chemical connections to the nearby (a)(1) through (a)(3) waters, as they serve important water quality benefits. The wetlands store sediment and pollutants that would otherwise reach the surrounding (a)(1) through (a)(3) waters. The wetlands are biologically connected to the surrounding (a)(1) through (a)(3) waters. For instance, they

provide critical habitats for species that utilize both the wetlands and the nearby (a)(1) through (a)(3) waters, supporting high diversity and structure. Habitat uses include basic food, shelter, and reproductive requirements. Aquatic insects, amphibians, and resident and migratory birds all use interdunal wetlands as critical habitat, and the wetlands provide better shelter than the nearby exposed beach. D.A. Albert, *Borne of the Wind: An Introduction to the Ecology of Michigan Sand Dunes* (Lansing, MI: Michigan Natural Features Inventory, 2000), 63 pp.; S.M. Smith, *et al.*, "Development of Vegetation in Dune Slack Wetlands of Cape Cod National Seashore (Massachusetts, USA)," *Plant Ecology* 194(2): 243-256 (2008). In marine coastal areas, the wetlands are often the only freshwater system in the immediate landscape, thus providing critical drinking water for the species that utilize both the wetlands and the nearby (a)(1) through (a)(3) waters, although some interdunal wetlands are brackish in nature. *See, e.g.*, C.M. Heckscher and C.R. Bartlett, "Rediscovery and Habitat Associations of Photuris Bethaniensis McDermott (Coleoptera: Lampyridae)," *The Coleopterists Bulletin* 58(3): 349-353 (2004).

Wetlands behind the extensive levee system in the Yazoo Basin are an example of adjacent waters behind man-made barriers. A regional hydrogeomorphic approach guidebook for the Yazoo Basin of the Lower Mississippi River Alluvial Valley assesses the functions of these wetlands. R.D. Smith and C.V. Klimas, *A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Selected Regional Wetland Subclasses, Yazoo Basin, Lower Mississippi River Alluvial Valley*, Prepared for the U.S. Army Corps of Engineers, ERDC/EL TR-02-4 (2002). An extensive levee system was built along the river system to prevent flooding of the Mississippi River, resulting in drastic effects to the hydrology of the basin. *Id.* at 47. Despite the alteration of hydrology in the basin, extensive wetlands systems still exist behind the man-made and natural levees and maintain a hydrologic connection to the river system. These wetlands detain floodwater, detain precipitation, cycle nutrients, export organic carbon, remove elements and compounds, maintain plant communities, and provide fish and wildlife habitat. *Id.* The functions in turn provide numerous and substantial benefits to the nearby river.

#### 4. Conclusions Regarding Adjacent Waters

The scientific literature documents that waters which are adjacent to (a)(1) through (a)(5) waters, including wetlands, oxbow lakes and adjacent ponds, are integral parts of tributary networks to (a)(1) through (a)(3) waters because they are directly connected to streams via permanent surface features that concentrate, mix, transform, and transport water and other materials, including food resources, downstream to larger rivers. Adjacent wetlands and other adjacent waters filter pollutants before they enter the tributary system, they attenuate flow during flood events, they regulate flow rate and timing, they trap sediment, and they input organic material into rivers and streams, providing the basic building blocks for their

healthy functioning. These waters also are biologically connected to downstream waters by providing habitat and refuge to many species, and storing and releasing food sources. The scientific literature demonstrates that adjacent waters in a watershed together exert a strong influence on the character and functioning of rivers, streams and lakes.

Adjacent waters, as defined, alone or in combination with other adjacent waters in a watershed, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Based on studies of waters in riparian areas, flood plains, and their hydrologic connections through the tributary system there is sufficient scientific evidence regarding the important functions of these adjacent wetlands to demonstrate that, alone or in combination with similarly situated waters in the region, wetlands and open waters adjacent to any tributary have a significant effect on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. The reviewed scientific literature supports the conclusion that adjacent waters generally play a larger role in the ecological condition of smaller tributary systems, which, in turn, determines the effects on the chemical, physical, and biological health of larger downstream waters.

### iii. "Other Waters"

The Report includes a focused evaluation of the connections and effects to downstream waters for several regional types of streams and wetlands: Prairie streams, southwest intermittent and ephemeral streams, oxbow lakes, Carolina and Delmarva bays, prairie potholes, and vernal pools. These regional types were chosen for evaluation because they represent a broad geographic area as well as a diversity of water types based on their origin, landscape setting, hydrology, and other factors. Most prairie streams and southwest intermittent and ephemeral streams are likely to be considered tributaries to (a)(1) through (a)(3) waters (with the exception of streams, for example, located in closed basins, which lack an (a)(1) through (a)(3) water or a connection thereto); similarly, most oxbow lakes are likely to be considered adjacent to (a)(1) through (a)(5) waters. Carolina and Delmarva bays, prairie potholes, and vernal pools may or may not be considered adjacent to (a)(1) through (a)(5) waters. Where waters are not considered tributaries (e.g. waters in a solely intrastate closed basin that does not contain a traditional navigable water, interstate water, or a territorial sea, or a connection thereto) or where waters, including wetlands, do not meet the proposed regulatory definition of adjacent, they should be evaluated to determine whether they are (a)(7) waters. The agencies seek comment on establishing such categories, as well as on other options for addressing "other waters."

The term "other waters" refers to waters that cannot be considered "adjacent" to downstream jurisdictional waters and that are not tributaries of such waters. "Other waters" are found outside the riparian zone and the floodplain, as waters within these

areas are considered to be "adjacent." As such, wetlands that are "other waters" typically will have unidirectional flow. As mentioned in Part II, section 2.B. above, many unidirectional wetlands are considered adjacent and interact with downstream jurisdictional waters through channels, shallow subsurface flow, or by providing additional functions such as storage and mitigating peak flows. Unidirectional wetlands that lack a confined surface connection or a shallow subsurface connection to downstream waters and are surrounded by uplands will typically fall under the definition of "other waters," and are often referred to in scientific literature and policy as "geographically isolated waters." The term "geographically isolated" should not be used to implicate the lack of connectivity to downstream waters, as these wetlands are often connected to downstream waters through deeper groundwater connections, biological connections, or spillage. The degree of connectivity of such wetlands will vary depending on landscape features such as distance from downstream waters and proximity to other wetlands of similar nature that as a group connect to jurisdictional downstream waters. Report at 3-43, 5-2.

For purposes of assessing whether a particular water is a "water of the United States" because it, alone or in combination with other similarly situated waters, has a significant nexus to an (a)(1) through (a)(3) water, the agencies are proposing to define each of the elements of Justice Kennedy's significant nexus standard in the definition of "significant nexus."

#### A. In the Region

The agencies have determined that because the movement of water from watershed drainage basins to river networks and lakes shapes the development and function of these systems in a way that is critical to their long term health, the watershed is a reasonable and technically appropriate interpretation of Justice Kennedy's standard. See, e.g., D.R. Montgomery, "Process Domains and the River Continuum," *Journal of the American Water Resources Association* 35:397-410 (1999).

Using a watershed as the framework for conducting significant nexus evaluations is scientifically supportable. Watersheds are generally regarded as the most appropriate spatial unit for water resource management. See, e.g., J.M. Omernik and R.G. Bailey, "Distinguishing Between Watersheds and Ecoregions," *Journal of the American Water Resources Association* 33.5: 939-40 (1997); D.R. Montgomery, "Process Domains and the River Continuum," *Journal of the American Water Resources Association* 35: 397-410 (1999); T.C. Winter "The Concept of Hydrologic Landscapes," *Journal of the American Water Resources Association* 37: 335-49 (2001); J.S. Baron, et al., "Meeting Ecological and Societal Needs for Freshwater," *Ecological Applications* 12: 1247-60 (2002); J.D. Allan, "Landscapes and Riverscapes: The Influence of Land Use on Stream Ecosystems," *Annual Review of Ecology and Systematics* 35: 257-84 (2004); United States, EPA 841-B-08-002: U.S. Environmental Protection Agency,

*Handbook for Developing Watershed Plans to Restore and Protect Our Waters: Planning & Implementation Steps* (Washington D.C.: U.S. EPA, March 2008); P.J. Wigington, et al., "Oregon Hydrologic Landscapes: A Classification Framework," *Journal of the American Water Resources Association* 49.1:163-82 (2013). Anthropogenic actions and natural events can have widespread effects within the watershed that collectively impact the quality of the relevant traditional navigable water, interstate water or territorial sea. United States, U.S. EPA and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/2330462008: *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest* (Washington, D.C.: U.S. EPA and USDA/ARS Southwest Watershed Research Center, Levick et al., 2008) (Levick, et al.). For these reasons, it is more appropriate to conduct a significant nexus determination at the watershed scale than to focus on a specific site, such as an individual stream segment. The watershed size reflects the specific water management objective, and is scaled up or down as is appropriate to meet that objective. If the objective is to manage the water quality in a particular receiving water body (the "target" water body), the watershed should include all those waters that are contributing to that target water since they will primarily determine the quality of the receiving water.

The watershed that drains to the single point of entry to a traditional navigable water, interstate water or territorial sea is a logical spatial framework for the evaluation of the nexus. This is because, from a water quality management perspective, the (a)(1), (a)(2) or (a)(3) water is the downstream affected water whose quality is dependent on the condition of the contributing upstream waters, including streams, lakes, and wetlands. To restore or maintain the health of the downstream affected water, it is standard practice to evaluate the condition of the waters that are in the contributing watersheds and to develop a plan to address the issues of concern. The functions of the contributing waters are inextricably linked and have a cumulative effect on the integrity of the downstream traditional navigable water, interstate water or territorial sea. The size of that watershed can be determined by identifying the geographic area that drains to the nearest traditional navigable water, interstate water or the territorial seas, and then using that point of entry watershed to conduct a significant nexus evaluation. P.E. Black, "Watershed Functions," *Journal of the American Water Resources Association* 33.1:1-11 (1997).

The Corps is organized based on watersheds and has used watershed framework approaches for water sources, navigation approaches for over 100 years, and in the regulatory program since its inception. Also, using a watershed framework is consistent with over two decades of practice by EPA and many other governmental, academic, and other entities which recognize that a watershed approach is the most effective framework to address water resource challenges. U.S. Environmental Protection Agency, *The*

*Watershed Protection Approach Framework* (Oct. 1991). The agencies both recognize the importance of the watershed approach by investing in opportunities to advance watershed protection and in developing useful watershed tools and services. For example, EPA is allowing states that are reorganizing programs to function on a watershed basis to have short-term backlogs on CWA section 402 National Pollution Discharge Elimination System (NPDES) permit review—without penalty. This flexibility gives states time to synchronize the reissuance of major and minor permits within a watershed. By managing NPDES permits on a watershed basis, all the permits for discharges to the water body can be coordinated and the most efficient and equitable allocation of pollution control responsibility can be made. U.S. Environmental Protection Agency, *Why Watersheds?*, EPA 800-F-96-001 (February 1996). Applying a watershed approach continues to be a priority of EPA, and is one of the three key strategies the agency is using to drive progress toward the Agency's health and environmental goals over the next five years. U.S. Environmental Protection Agency, *FY 2011–2015 Strategic Plan: Achieving Our Vision*, 2010.

#### B. Similarly Situated

Scientists routinely aggregate the effects of groups of waters, multiplying the known effect of one water by the number of similar waters in a specific geographic area, or to a certain scale. This kind of functional aggregation of non-adjacent (and other types of waters) is well-supported in the scientific literature. See, e.g., R.J. Stevenson and F.R. Hauer, "Integrating Hydrogeomorphic and Index of Biotic Integrity Approaches for Environmental Assessment of Wetlands," *Journal of the North American Benthological Society* 21(3): 502–513 (2002); S.G. Leibowitz, "Isolated Wetlands and Their Functions: An Ecological Perspective," *Wetlands* 23:517–531 (2003); D. Gamble, et al., *An Ecological and Functional Assessment of Urban Wetlands in Central Ohio*, Ohio EPA Technical Report WET/2007–3B (Columbus, OH: Ohio Environmental Protection Agency, 2007); C.R. Lane and E. D'Amico, "Calculating the Ecosystem Service of Water Storage in Isolated Wetlands using LiDAR in North Central Florida, USA," *Wetlands* 30:967–977 (2010); B.P. Wilcox, et al., "Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands," *Wetlands* 31(3):451–8 (2011). Similarly, streams and rivers are routinely aggregated by scientists to estimate their combined effect on downstream waters in the same watershed. This is because chemical, physical, or biological integrity of downstream waters is directly related to the aggregate contribution of upstream waters that flow into them, including any tributaries and connected wetlands. As a result, the scientific literature and the Report consistently documents that the 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.

In the aggregate, similarly situated wetlands may have significant effects on the quality of water many miles away, particularly in circumstances where numerous similarly situated waters are located in the region and are performing like functions that combine to influence downstream waters. See, e.g., A. Jansson et al., "Quantifying the Nitrogen Retention Capacity of Natural Wetlands in the Large-Scale Drainage Basin of the Baltic Sea," *Landscape Ecology* 13:249–262 (1998); W.J. Mitsch et al., "Reducing Nitrogen Loading to the Gulf of Mexico from the Mississippi River Basin: Strategies to Counter a Persistent Ecological Problem," *BioScience* 51(5): 373–388 (2001); M.G. Forbes, et al., "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," *Wetlands* 32(4):705–15 (2012). Cumulatively, many small wetlands can hold a large amount of snowmelt and precipitation, reducing the likelihood of flooding downstream. Report at 5–25 (citing D.E. Hubbard and R.L. Linder, "Spring Runoff Retention in Prairie Pothole Wetlands," *Journal of Soil and Water Conservation* 41(2):122–125 (1986)).

Scientists can and do routinely classify similar waters and wetlands into groups for a number of different reasons; because of their inherent physical characteristics, because they provide similar functions, because they were formed by similar geomorphic processes, and by their level of biological diversity, for example. Classifying wetlands based on their functions is also the basis for the U.S. Army Corps of Engineers hydrogeomorphic (HGM) classification of wetlands. M.M. Brinson, *A Hydrogeomorphic Classification for Wetlands* (Washington, D.C.: U.S. Army Corps of Engineers, 1993). The HGM method is a wetlands assessment approach pioneered by the Corps in the 1990s, and extensively applied via regional handbooks since then. The Corps HGM method uses a conceptual framework for identifying broad wetland classes based on common structural and functional features, which includes a method for using local attributes to further subdivide the broad classes into regional subclasses. Assessment methods like the HGM provide a basis for determining if waters provide similar functions based on their structural attributes and indicator species. Scientists also directly measure attributes and processes taking place in particular types of waters during in-depth field studies that provide reference information that informs the understanding of the functions performed by many types of aquatic systems nationwide.

These waters, primarily depressional wetlands, small open waters and peatlands, are known to have important hydrologic, water quality, and habitat functions which vary as a result of the diverse settings in which they exist across the country. For example, a report that reviewed the results of multiple scientific studies concluded that depressional wetlands lacking a surface outlet functioned together to significantly reduce or attenuate flooding. Report at 5–26 (citing A. Bullock and M. Acreman, "The

Role of Wetlands in the Hydrological Cycle," *Hydrology and Earth System Sciences* 7:358–389 (2003)). Some of the important factors which influence the variability of their functions and connectivity include the topography, geology, soil features, antecedent moisture conditions, and seasonal position of the water table relative to the wetland. Report at 5–25.

When proposing that "other waters" are sufficiently close and should be considered similarly situated, it is recognized that they are more likely to have similar influence with regard to their effect on the chemical, physical, or biological integrity of a downstream water identified in paragraphs (a)(1) through (a)(3). If a water is a great distance from a group of similar "other waters," it may be performing some of the same functions as those in the group, but their distance from each other or from downstream (a)(1) through (a)(3) waters will decrease the probability that it has some kind of chemical, physical, or biological connectivity to the downstream water, assuming that conditions governing the type and quantity of flows (e.g. slope, soil, and aquifer permeability, etc.) are similar. *Id.* at 5–2, 5–41.

Consideration of the aggregate effects of wetlands and other waters often gives the most complete information about how such waters influence the chemical, physical, or biological integrity of downstream waters. In many watersheds, wetlands have a disproportionate effect on water quality relative to their surface area because wetland plants slow down water flow, allowing suspended sediments, nutrients, and pollutants to settle out. They filter these materials out of the water received from large areas, absorbing or processing them, and then releasing higher quality water. National Research Council, *Wetlands: Characteristics and Boundaries* (Washington, D.C.: National Academy Press, 1995), p. 38. For an individual wetland, this is most pronounced where it lies immediately upstream of a drinking water intake, for example. See, e.g., C.A. Johnston, et al., "The Cumulative Effect of Wetlands on Stream Water Quality and Quantity," *Biogeochemistry* 10:105–141 (1990).

The structure and function of a river are highly dependent on the constituent materials that are stored in, or transported through the river. Most of the materials found in rivers originate outside of them. Thus, the fundamental way that "other waters" are able to affect river structure and function is by providing or altering the materials delivered to the river. Report at 1–13. Since the alteration of material fluxes depends on the functions within these waters and the degree of connectivity, it is appropriate to consider both these factors for purposes of significant nexus under this provision.

Numerous factors affect chemical, physical, and biological connectivity, operating at multiple spatial and temporal scales, and interacting with each other in complex ways, to determine where components of aquatic systems fall on the connectivity-isolation gradient at a given time. Some of these factors include climate, watershed characteristics, spatial distribution

patterns, biota, and human activities and alterations. *Id.* at 3–33. Recognizing the limits on the ability to observe or document all of these interacting factors, it is reasonable to look for visible patterns in the landscape and waters that are often indicative of the connectivity factors, in determining what waters to aggregate. Due to relative similarity of soils, topography, or groundwater connections, for example, there may be a group of wetlands scattered throughout a watershed, at similar distances from the tributaries in the watershed and performing similar functions. It is appropriate to assess the significance of the nexus of those waters in the aggregate, consistent with Justice Kennedy's standard.

#### C. Significant Nexus

The scientific literature regarding "other waters" documents their functions, including the chemical, physical, and biological impact they can have downstream. Available literature indicates that "other waters" have important hydrologic, water quality, and habitat functions that have the ability to affect downstream waters if and when a connection exists between the "other water" and downstream waters. Report at 6–1. "Other waters" generally fit into the category of unidirectional waters as described in the Report. However, there are some unidirectional waters that are in fact adjacent under (a)(6) to (a)(1) through (a)(5) waters (e.g., neighboring waters that are outside of the riparian area and/or floodplain but that have a surface or shallow subsurface hydrologic connection to (a)(1) through (a)(5) waters). Connectivity of "other waters" to downstream waters that do not meet the definition of adjacent will vary within a watershed and over time, which is why a case-specific significant nexus determination for "other waters" is necessary under (a)(7). See, e.g., *id.* at 6–2. The types of chemical, physical, and biological connections between "other waters" and downstream waters are described below for illustrative purposes. As described in the preamble above, when the agencies are conducting a case-specific determination for significant nexus under (a)(7), they examine the connections between the water (including any similarly situated waters in the region) and downstream waters and determine if those connections significantly affect the chemical, physical, or biological integrity of the downstream water, using any available site-information and field observations where available, relevant scientific studies or data, or other relevant jurisdictional determinations that have been made on similar resources in the region.

The hydrologic connectivity of "other waters" to downstream waters occurs on a gradient and can include waters that have groundwater or occasional surface water connections (through overland flow) to the tributary network and waters that have no hydrologic connection to the tributary network. *Id.* at 5–1. The connectivity of "other waters" to downstream waters will vary within a watershed as a function of local factors (e.g. position, topography, and soil characteristics). *Id.* at 3–41 to 3–43. Connectivity also varies over time, as the tributary network and water table expand and contract in response to local climate. *Id.*

at 3–31 to 3–33. Lack of connection does not necessarily translate to lack of impact; even when lacking connectivity, waters can still impact chemical, physical, and biological conditions downstream. *Id.* at 3–29, 3–31.

The physical effect that "other waters" have downstream is less obvious than the physical connections of waters that are adjacent or waters that are tributary, due to the physical distance of "other waters" from the stream network. Despite this physical distance, they are frequently connected in some degree through either surface water or groundwater systems; over time, impacts in one part of the hydrologic system will be felt in other parts. T.C. Winter and J.W. LaBaugh, "Hydrologic Considerations in Defining Isolated Wetlands," *Wetlands* 23:532–540 (2003) at 538. For example, "other waters" that overflow into downstream water bodies during times of abundant precipitation are connected over the long term. *Id.* at 539. Wetlands that lack surface connectivity in a particular season or year can, nonetheless, be highly connected in wetter seasons or years. Report at 5–22 to 5–25. Many "other waters" interact with groundwater, either by receiving groundwater discharge (flow of groundwater to the "other water"), contributing to groundwater recharge (flow of water from the "other water" to the groundwater), or both. *Id.* at 5–23 (citing R.F. Lide, *et al.*, "Hydrology of a Carolina Bay Located on the Upper Coastal Plain of Western South Carolina," *Wetlands* 15:47–57 (1995); K.J. Devito, *et al.*, "Groundwater Surface-Water Interactions in Headwater Forested Wetlands of the Canadian Shield," *Journal of Hydrology* 181:127–47 (1996); R.K. Matheny and P.J. Gerla, "Environmental Isotopic Evidence for the Origins of Ground and Surface Water in a Prairie Discharge Wetland," *Wetlands* 16:109–120 (1996); D.O. Rosenberry and T.C. Winter, "Dynamics of Water-Table Fluctuations in an Upland between Two Prairie-Pothole Wetlands in North Dakota," *Journal of Hydrology* 191:266–289 (1997); J.E. Pyzoha, *et al.*, "A Conceptual Hydrologic Model for a Forested Carolina Bay Depressional Wetland on the Coastal Plain of South Carolina, USA," *Hydrological Processes* 22:2689–2698 (2008)). Factors that determine whether a water recharges groundwater or is a site of groundwater discharge include topography, geology, soil features, and seasonal position of the water table relative to the water. *Id.* at 5–24 (citing P.J. Phillips and R.J. Shedlock, "Hydrology and Chemistry of Groundwater and Seasonal Ponds in the Atlantic Coastal-Plain in Delaware, USA," *Journal of Hydrology* 141:157–78 (1993); R.J. Shedlock, *et al.*, "Interactions between Ground-Water and Wetlands, Southern Shore of Lake-Michigan, USA," *Journal of Hydrology* 141:127–55 (1993); D.O. Rosenberry and T.C. Winter, "Dynamics of Water-Table Fluctuations in an Upland Between two Prairie-Pothole Wetlands in North Dakota," *Journal of Hydrology* 191:266–89 (1997); J.E. Pyzoha, *et al.*, "A Conceptual Hydrologic Model for a Forested Carolina Bay Depressional Wetland on the Coastal Plain of South Carolina, USA," *Hydrological Processes* 22: 2689–98 (2008)). Similarly, the magnitude and transit time of groundwater

flow from an "other water" to downstream waters depend on several factors, including the intervening distance and the properties of the rock or unconsolidated sediments between the water bodies (*i.e.*, the hydraulic conductivity of the material). *Id.* at 5–24. Surface and groundwater hydrological connections are those generating the capacity for "other waters" to affect downstream waters, as water from the "other water" may contribute to baseflow or stormflow through groundwater recharge. *Id.* at 5–25. Contributions to baseflow are important for maintaining conditions that support aquatic life in downstream waters. As discussed further below, even in cases where waters lack a connection to downstream waters, they can influence downstream water through water storage and mitigation of peak flows. *Id.* at 5–36.

The chemical effects that "other waters" have on downstream waters are linked to their hydrologic connection downstream, though a surface connection is not needed for a water to influence the chemical integrity of the downstream water. Because the majority of "other waters" are hydrologically connected to downstream waters via surface or groundwater connections, most "other waters" can affect water quality downstream (although these connections do not meet the definition of adjacency). D.F. Whigham and T. E. Jordan, "Isolated Wetlands and Water Quality," *Wetlands* 23:541–549 (2003) at 542. "Other waters" can act as sinks and transformers for nitrogen and phosphorus, metals, pesticides, and other contaminants that could otherwise negatively impact downstream waters. Report at 5–30 (citing R.R. Brooks, *et al.*, "Cobalt and Nickel Uptake by the Nyssaceae," *Taxon* 26:197–201 (1977); H.F. Hemond, "Biogeochemistry of Thoreau's Bog, Concord, Massachusetts," *Ecological Monographs* 50:507–526 (1980); C.B. Davis, *et al.*, "Prairie Pothole Marshes as Traps for Nitrogen and Phosphorus in Agricultural Runoff," in B. Richardson, ed., *Selected Proceedings of the Midwest Conference on Wetland Values and Management, June 17–19, 1981, St. Paul, MN*, (St. Paul, MN: The Freshwater Society, 1981), pp. 153–163; H.F. Hemond, "The Nitrogen Budget of Thoreau's Bog," *Ecology* 64:99–109 (1983); K.C. Ewel and H.T. Odum, ed., *Cypress Swamps*, (Gainesville, Florida: University of Florida Press, 1984); J.T. Moraghan, "Loss and Assimilation of 15N-nitrate Added to a North Dakota Cattail Marsh," *Aquatic Botany* 46:225–234 (1993); C.M. Kao, *et al.*, "Non-point Source Pesticide Removal by a Mountainous Wetland," *Water Science and Technology* 46:199–206 (2002); P.I. Boon, "Biogeochemistry and Bacterial Ecology of Hydrologically Dynamic Wetlands," in D.P. Batzer and R.R. Sharitz, ed., *Ecology of Freshwater and Estuarine Wetlands* (Berkeley, CA: University of California Press, 2006), pp. 115–176; E.J. Dunne, *et al.*, "Phosphorus Release and Retention by Soils of Natural Isolated Wetlands," *International Journal of Environment and Pollution* 28:496–516 (2006); T.E. Jordan, *et al.*, "Comparing Functional Assessments of Wetlands to Measurements of Soil Characteristics and Nitrogen Processing," *Wetlands* 27:479–497

(2007); S.L. Whitmire and S.K. Hamilton, "Rates of Anaerobic Microbial Metabolism in Wetlands of Divergent Hydrology on a Glacial Landscape," *Wetlands* 28:703–714 (2008). Also see, e.g., T.M. Isenhardt, *Transformation and Fate of Nitrate in Northern Prairie Wetlands*, Ph.D. Dissertation (Ames, Iowa: Iowa State University, 1992). The body of published scientific literature and the Report indicate that sink removal of nutrients and other pollutants by "other waters" is significant and geographically widespread. Report at 5–30. Water quality characteristics of "other waters" are highly variable, depending primarily on the sources of water, characteristics of the substrate, and land uses within the watershed. D.F. Whigham and T.E. Jordan, "Isolated Wetlands and Water Quality," *Wetlands* 23:541–549 (2003) at 541. These variables inform whether an "other water" has a significant nexus to an (a)(1) through (a)(3) water. For instance, some prairie potholes may improve water quality and may efficiently retain nutrients that might otherwise cause water quality problems downstream; in such systems it may be their lack of a direct hydrologic connection that enables the prairie potholes to more effectively retain nutrients. *Id.* at 543.

"Other waters" can be biologically connected to each other and to downstream waters through the movement of seeds, macroinvertebrates, amphibians, reptiles, birds, and mammals. Report at 5–31 to 5–33; S.G. Leibowitz, "Isolated Wetlands and Their Functions: An Ecological Perspective," *Wetlands* 23:517–531 (2003) at 519. The movement of organisms between "other waters" and downstream waters is governed by many of the same factors that affect movement of organisms between adjacent wetlands and downstream waters (See Part II Section 2.A.d.). Report at 5–31. Generally, "other waters" are further away from stream channels than adjacent waters, making hydrologic connectivity less frequent, and increasing the number and variety of landscape barriers over which organisms must disperse. *Id.* Plants, though non-mobile, have evolved many adaptations to achieve dispersal over a variety of distances, including water-borne dispersal during periodic hydrologic connections, "hitchhiking" on or inside highly mobile animals, and more typically via wind dispersal of seeds and/or pollen. *Id.* at 5–31 (citing S.M. Galatowitsch and A.G. van der Valk, "The Vegetation of Restored and Natural Prairie Wetlands," *Ecological Applications* 6:102–112 (1996); H.R. Murkin and P.J. Caldwell, "Avian Use of Prairie Wetlands," in H.R. Murkin, et al., ed., *Prairie Wetland Ecology: The Contribution of the Marsh Ecology Research Program*, (Ames, IA: Iowa State University Press, 2000), pp. 249–286; J.M. Amezcaga, et al., "Biotic Wetland Connectivity—Supporting a New Approach for Wetland Policy," *Acta Oecologica-International Journal of Ecology* 23:213–222 (2002); J. Figuerola and A.J. Green, "Dispersal of Aquatic Organisms by Waterbirds: A Review of Past Research and Priorities for Future Studies," *Freshwater Biology* 47:483–494 (2002); M.B. Soons and G.W. Heil, "Reduced Colonization Capacity in

Fragmented Populations of Wind-Dispersed Grassland Forbs," *Journal of Ecology* 90:1033–1043 (2002); M.B. Soons, "Wind Dispersal in Freshwater Wetlands: Knowledge for Conservation and Restoration," *Applied Vegetation Science* 9:271–278 (2006); C. Nilsson, et al., "The Role of Hydrochory in Structuring Riparian and Wetland Vegetation," *Biological Reviews* 85:837–858 (2010). Mammals that disperse overland can also contribute to connectivity and can act as transport vectors for hitchhikers such as algae. *Id.* at 5–32 (citing C.E. Shanks and G.C. Arthur, "Muskrat Movements and Population Dynamics in Missouri Farm Ponds and Streams," *Journal of Wildlife Management* 16:138–148 (1952); J.P. Roscher, "Alga Dispersal by Muskrat Intestinal Contents," *Transactions of the American Microscopical Society* 86:497–498 (1967); W.R. Clark, "Ecology of Muskrats in Prairie Wetlands," in H. R. Murkin, et al., ed., 2000, pp. 287–313). Invertebrates also utilize birds and mammals to hitchhike, and these hitchhikers can be an important factor structuring invertebrate metapopulations in "other waters" and in aquatic habitats separated by hundreds of kilometers. *Id.* (citing J. Figuerola and A.J. Green, "Dispersal of Aquatic Organisms by Waterbirds: A Review of Past Research and Priorities for Future Studies," *Freshwater Biology* 47:483–494 (2002); J. Figuerola, et al., "Invertebrate Eggs Can Fly: Evidence of Waterfowl-Mediated Gene Flow in Aquatic Invertebrates," *American Naturalist* 165:274–280 (2005); M.R. Allen, "Measuring and Modeling Dispersal of Adult Zooplankton," *Oecologia* 153:135–143 (2007); D. Frisch, et al., "High Dispersal Capacity of a Broad Spectrum of Aquatic Invertebrates Via Waterbirds," *Aquatic Sciences* 69:568–574 (2007). Numerous flight-capable insects use both "other waters" and downstream waters; these insects move outside the tributary network to find suitable habitat for overwintering, refuge from adverse conditions, hunting, foraging, or breeding, and then can return back to the tributary network for other lifecycle needs. *Id.* at 5–33 (citing D.D. Williams, "Environmental Constraints in Temporary Fresh Waters and Their Consequences for the Insect Fauna," *Journal of the North American Benthological Society* 15:634–650 (1996); A.J. Bohonak and D.G. Jenkins, "Ecological and Evolutionary Significance of Dispersal by Freshwater Invertebrates," *Ecology Letters* 6:783–796 (2003)). Amphibians and reptiles also move between "other waters" and downstream waters to satisfy part of their life history requirements. *Id.* at 5–33. Alligators in the Southeast, for instance, can move from tributaries to shallow, seasonal limesink wetlands for nesting, and also use these wetlands as nurseries for juveniles; sub-adults then shift back to the tributary network through overland movements. *Id.* (citing A.L. Subalusky, et al., "Ontogenetic Niche Shifts in the American Alligator Establish Functional Connectivity between Aquatic Systems," *Biological Conservation* 142:1507–1514 (2009); A.L. Subalusky, et al., "Detection of American Alligators in Isolated, Seasonal Wetlands," *Applied Herpetology* 6:199–210 (2009)). Similarly,

amphibians and small reptile species, such as frogs, toads, and newts, commonly use both tributaries and "other waters," during one or more stages of their life cycle, and can at times disperse over long distances. *Id.* (citing V.S. Lamoureux and D.M. Madison, "Overwintering Habitats of Radio-Implanted Green Frogs, *Rana clamitans*," *Journal of Herpetology* 33:430–435 (1999); K.J. Babbitt, et al., "Patterns of Larval Amphibian Distribution along a Wetland Hydroperiod Gradient," *Canadian Journal of Zoology-Revue Canadienne De Zoologie* 81:1539–1552 (2003); S.B. Adams, et al., "Instream Movements by Boreal Toads (*Bufo boreas boreas*)," *Herpetological Review* 36:27–33 (2005); D.M. Green, "Bufo americanus, American Toad," in M. Lannoo, ed., *Amphibian Declines: The Conservation Status of the United States Species* (Berkeley, CA: University of California Press, 2005), pp. 692–704; T.W. Hunsinger and M. J. Lannoo, "Notophthalmus viridescens, Eastern Newt," in M. Lannoo, ed., 2005, pp. 912–914; J.W. Petranka and C.T. Holbrook, "Wetland Restoration for Amphibians: Should Local Sites Be Designed to Support Metapopulations or Patchy Populations?," *Restoration Ecology* 14:404–411 (2006)).

Even when a surface or groundwater hydrologic connection between a water and a downstream water is visibly absent, many waters still have the ability to substantially influence the integrity of downstream waters. However, such circumstances would be uncommon. *Id.* at 5–22 to 5–25. Aquatic systems that may seem disconnected hydrologically are often connected but at irregular timeframes or through subsurface flow, and perform important functions that can be vital to the chemical, physical, or biological integrity of downstream waters. Some wetlands that are not adjacent may be hydrologically disconnected most of the time but connected to the stream network during rare high-flow events. The lack of a hydrologic connection also allows for water storage in "other waters," attenuating peak streamflows, and, thus, downstream flooding, and also reducing nutrient and soil pollution in downstream waters. Report at 5–25 to 5–26, 5–36. Prairie potholes a great distance from any tributary, for example, are thought to store significant amounts of runoff. *Id.* at 5–36 (citing R.P. Novitzki, "Hydrologic Characteristics of Wisconsin's Wetlands and Their Influence on Floods," in P. Greeson, et al., ed., *Wetland Functions and Values: The Status of Our Understanding*, Proceedings of the National Symposium on Wetlands (Minneapolis, MN: American Water Resources Association, 1979), pp. 377–388; D.E. Hubbard and R.L. Linder, "Spring Runoff Retention in Prairie Pothole Wetlands," *Journal of Soil and Water Conservation* 41:122–125 (1986); J. Jacques and D.L. Lorenz, "Techniques for Estimating the Magnitude and Frequency of Floods in Minnesota," *Water Resources Investigations Report* 87–4170, (St. Paul, MN: U.S. Geological Survey, 1988); K.C. Vining, "Simulation of Streamflow and Wetland Storage, Starkweather Coulee Subbasin, North Dakota, Water Years 1981–98," *Water-Resources Investigations Report* 02–4113 (Bismarck, North Dakota: U.S. Geological

Survey, 2002); R.A. Gleason, *et al.*, *Estimating Water Storage Capacity of Existing and Potentially Restorable Wetland Depressions in a Subbasin of the Red River of the North*, U.S. Geological Survey Open-File Report 2007-1159 (Reston, VA: U.S. Geological Survey, 2007); D.L. Lorenz, *et al.*, "Techniques for Estimating the Magnitude and Frequency of Peak Flows on Small Streams in Minnesota Based on Through Water Year 2005," *USGS Scientific Investigations Report 2009-5250*, (Reston, VA: U.S. Geological Survey, 2010)). Filling wetlands reduces water storage capacity in the landscape and causes runoff from rainstorms to overwhelm the remaining available water conveyance system. See, e.g., C.A. Johnston, *et al.*, "The Cumulative Effect of Wetlands on Stream Water Quality and Quantity," *Biogeochemistry* 10:105-141 (1990); A.L. Moscrip and D.R. Montgomery, "Urbanization, Flood Frequency, and Salmon Abundance in Puget Lowland Streams," *Journal of the American Water Resources Association* 33:1289-1297 (1997); N.E. Detenbeck, *et al.*, "Evaluating Perturbations and Developing Restoration Strategies for Inland Wetlands in the Great Lakes Basin," *Wetlands* 19(4): 789-820 (1999); N.E. Beck, *et al.*, "Relationship of Stream Flow Regime in the Western Lake Superior Basin to Watershed Type Characteristics," *Journal of Hydrology* 309(1-4): 258-276 (2005). Wetlands, even when lacking a hydrologic connection downstream, improve downstream water quality by accumulating nutrients, trapping sediments, and transforming a variety of substances. See, e.g., National Research Council, *Wetlands: Characteristics and Boundaries* (Washington, DC: National Academy Press, 1995), p. 38.

Under today's proposal, on a case-specific basis, "other waters" that have a significant nexus to an (a)(1) through (a)(3) water are "waters of the United States" under (a)(7). The scientific literature and data in the Report and elsewhere support that some "other waters" (including some of those in the case studies), along with other similarly situated waters in the region, do greatly affect the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters, and thus would be jurisdictional under (a)(7).

Though much of the literature cited in the Report relates to "other waters" that are wetlands, the Report indicates that non-wetland waters that are not (a)(1) through (a)(6) waters also can have chemical, physical, or biological connections that significantly impact downstream waters. For instance, non-adjacent ponds or lakes that are not part of the tributary network can still be connected to downstream waters through chemical, physical, and biological connections. Lake storage has been found to attenuate peak streamflows in Minnesota. *Id.* at 5-25 (citing J. Jacques and D.L. Lorenz, *Techniques for Estimating the Magnitude and Frequency of Floods of Ungauged Streams in Minnesota*, USGS Water-Resources Investigations Report 84-4170 (Washington, DC: U.S. Geological Survey, 1988); D.L. Lorenz, *et al.*, *Techniques for Estimating the Magnitude and Frequency of Peak Flows on Small Streams in Minnesota Based on Data through Water Year 2005*, U.S.

Geological Survey Scientific Investigations Report 2009-5250 (Reston, VA: U.S. Geological Survey, 2010)). Similar to wetlands, ponds are often used by invertebrate, reptile, and amphibian species that also utilized downstream waters for various life history requirements, particularly because many ponds, particularly temporary ponds, are free of predators, such as fish, that prey on larvae. The American toad and Eastern newt are widespread habitat generalists that can move among streams, wetlands, and ponds to take advantage of each aquatic habitat, feeding on aquatic invertebrate prey, and avoiding predators. See, e.g., *Id.* at 5-33 (citing K.J. Babbitt *et al.*, "Patterns of Larval Amphibian Distribution along a Wetland Hydroperiod Gradient," *Canadian Journal of Zoology-Revue Canadienne De Zoologie* 81:1539-1552 (2003); D.M. Green, "Bufo americanus, American Toad," in M. Lannoo, ed., *Amphibian Declines: The Conservation Status of United States Species*, (Berkeley, CA: University of California Press, 2005), pp. 692-704; T.W. Hunsinger and M.J. Lannoo, "Notophthalmus viridescens, Eastern Newt," in M. Lannoo, ed., *Amphibian Declines: The Conservation Status of United States Species*, (Berkeley, CA: University of California Press, 2005), pp. 912-914; J.W. Petranka and C.T. Holbrook, "Wetland Restoration for Amphibians: Should Local Sites Be Designed to Support Metapopulations or Patchy Populations?," *Restoration Ecology* 14:404-411 (2006)). Additionally, stream networks that are not part of the tributary system (e.g., streams in closed basins without an (a)(1) through (a)(3) water or losing streams and other streams that cease to flow before reaching downstream (a)(1) through (a)(3) waters) may likewise have a significant impact on the chemical, physical, or biological integrity of downstream waters. Non-tributary streams may be connected via groundwater to downstream waters. Such streams may also provide habitat to insect, amphibian, and reptile species that also use the tributary network.

#### i. Additional Request for Public Comment on "Other Waters"

The agencies are considering whether to determine by rule that prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, western vernal pools, and perhaps other categories of waters, either alone or in combination with "other waters" of the same type in a single point of entry watershed have a significant nexus and are jurisdictional. R.W. Tiner, "Geographically Isolated Wetlands of the United States," *Wetlands* 23(3):494-516 (2003); M.G. Forbes, *et al.*, "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," *Wetlands* 32(4): 705-715 (2012). These waters would not require a case-by-case analysis. At the same time, the agencies could determine by rule that playa lakes, and perhaps other categories of waters, do not have a significant nexus and are not jurisdictional. These waters would not be subject to a case-by-case analysis of significant nexus. As the science develops, the agencies may determine that additional categories of "other waters" have a

significant nexus and are thus categorically jurisdictional. The specific categories of "other waters" for which there is currently evidence of a significant nexus are discussed below:

a. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, that are found in the central United States and Canada. Report at 5-57. The vast area they occupy is variable in many aspects, including climatically, topographically, geologically, and in terms of land use and alteration, which imparts variation on the potholes themselves. Prairie potholes demonstrate a wide range of hydrologic permanence, from holding permanent standing water to wetting only in years with high precipitation, which in turn influences the diversity and structure of their biological communities. Owing in large part to their spatial and temporal variability, individual prairie potholes span the entire continuum of connectivity to and isolation from the river network and other bodies of water. Potholes generally accumulate and retain water effectively due to the low permeability of their underlying soil, which can modulate flow characteristics of nearby streams and rivers. Potholes also can accumulate chemicals in overland flow, thereby reducing chemical loading to other bodies of water. When potholes are artificially connected to streams and lakes through drainage, isolation is eliminated and they become sources of water and chemicals. Potholes also support a community of highly mobile organisms, from plants to invertebrates that move among potholes and that can biologically connect the entire complex to the river network. Based on these connections and the strength of their effects, individually or in combination with other prairie potholes in the watershed, on the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water, the agencies could conclude by rule that prairie potholes have a significant nexus and are jurisdictional. The agencies' determination will be informed by the final version of the Report and other available scientific information.

b. Carolina and Delmarva bays are ponded depressional wetlands that occur along the Atlantic coastal plain from northern Florida to New Jersey. *Id.* at 5-49. Most bays receive water through precipitation, lose water through evapotranspiration, and lack natural surface outlets. Both mineral-based and peat-based bays have shown connections to shallow groundwater. Bays typically are in proximity to each other or to open waters, providing the potential for surface water connections in large rain events via overland flow. Fish are reported in bays that are known to dry out, indirectly demonstrating surficial connections. Amphibians and reptiles use bays extensively for breeding and for rearing young. These animals can disperse many meters on the landscape and can colonize, or serve as a food source to, downstream waters. Similarly, bays foster abundant insects that have the potential to become part of the downstream food chain. Humans have ditched and channelized a high percentage of bays, creating new surface connections to "other waters" and allowing

transfer of nutrients, sediment, and other pollutants such as methylmercury. Based on these connections and the strength of their effects, individually or in combination with other Carolina or Delmarva bays in the watershed, on the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water, the agencies could conclude by rule that Carolina and Delmarva bays have a significant nexus and are jurisdictional. The agencies' determination will be informed by the final version of the Report and other available scientific information.

c. Vernal pools are shallow, seasonal wetlands that accumulate water during colder, wetter months and gradually dry up during warmer, drier months. *Id.* at 5–66. Western vernal pools are seasonal wetlands associated with topographic depressions, soils with poor drainage, mild, wet winters and hot, dry summers in western North America from southeastern Oregon to northern Baja California, Mexico (*Id.* at 5–67, citing E.T. Bauder and S. McMillan, "Current Distribution and Historical Extent of Vernal Pools in Southern California and Northern Baja California, Mexico," pp. 56–70 in C.W. Witham, *et al.*, editors, *Ecology, Conservation, and Management*, 1998). Because their hydrology and ecology are so tightly coupled with the local and regional geological processes that formed them, western vernal pools typically occur within "vernal pool landscapes," or complexes of pools in which swales connect pools to each other and to seasonal streams (*Id.* at 5–67 to 5–68, citing W.A. Weitkamp, *et al.*, "Pedogenesis of a Vernal Pool Entisol-Alfisol-Vertisol Catena in Southern California," *Soil Science Society of America Journal* 60:316323 (1996); D.W. Smith and W.L. Verrill, "Vernal Pool-Soil-Landform Relationships in the Central Valley, California," pp. 15–23 in C.W. Witham, *et al.*, editors, *Ecology, Conservation, and Management of Vernal Pool Ecosystems—Proceedings from a 1996 Conference* (California Native Plant Society, Sacramento, CA, 1998); M.C. Rains, *et al.*, "The Role of Perched Aquifers in Hydrological Connectivity and Biogeochemical Processes in Vernal Pool Landscapes, Central Valley, California," *Hydrological Processes* 20:1157–1175 (2008)). Despite differences in geology, climate, and biological communities, some common findings about the hydrologic connectivity of vernal pools in different regions, including Western vernal pools, include evidence for temporary or permanent outlets, frequent filling and spilling of higher pools into lower elevation swales and stream channels, and conditions supporting subsurface flows through pools without perched aquifers to nearby streams. Non-glaciated vernal pools in western states are reservoirs of biodiversity and can be connected genetically to other locations and aquatic habitats through wind- and animal-mediated dispersal. Based on these connections and the strength of their effects, individually or in combination with other western vernal pools in the watershed, on the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water, the agencies could conclude by rule that western vernal pools have a significant nexus and are

jurisdictional. The agencies' determination will be informed by the final version of the Report and other available scientific information. The jurisdictional status of vernal pools located in other areas will be determined on a case-by-case significant nexus analysis with any similar situated waters in the single point of entry watershed. For example, insects and amphibians that can live in streams or permanent pools opportunistically use glaciated vernal pools in the Northeast and Midwest as alternative breeding habitat, refuge from predators or environmental stressors, hunting or foraging habitat, or stepping-stone corridors for dispersal and migration.

d. The word pocosin comes from the Algonquin Native American word for "swamp on a hill," and these evergreen shrub and tree dominated landscapes are found from Virginia to northern Florida, but mainly in North Carolina. (C.J. Richardson, "Pocosins: Hydrologically Isolated or Integrated Wetlands on the Landscape?," *Wetlands* 23(3):563–576 (2003)). Usually, there is no standing water present in these peat-accumulating wetlands, but a shallow water table leaves the soil saturated for much of the year. They range in size from less than an acre to several thousand acres. The slow movement of water through the dense organic matter in pocosins removes excess nutrients deposited by rainwater. The same organic matter also acidifies the water. This pure water is slowly released to downstream waters and estuaries, where it helps to maintain the proper salinity, nutrients, and acidity. (*Id.*) Because pocosins are the topographic high areas on the regional landscape, they serve as the source of water for downstream areas. Pocosins often have seasonal connections to drainageways leading to estuaries or are contiguous with other wetlands draining into perennial streams or estuaries. (R.W. Tiner, "Geographically Isolated Wetlands of the United States," *Wetlands* 23(3):494–516 (2003)). Other pocosins have been ditched and are directly connected to streams. (*Id.*) The draining of pocosins and decreased salinity in estuaries may be having a negative effect on brown shrimp in North Carolina. (*Id.*) Based on these connections and the strength of their effects, individually or in combination with other pocosins in the watershed, on the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water, the agencies could conclude by rule pocosins have a significant nexus and are jurisdictional. The agencies' determination will be informed by the final version of the Report and other available scientific information.

e. Along the Gulf of Mexico from western Louisiana to south Texas, freshwater wetlands occur as a mosaic of depressions, ridges, intermountain flats, and mima mounds. (M.G. Forbes, *et al.*, "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," *Wetlands* 32(4): 705–715 (2012)). These coastal prairie wetlands were formed thousands of years ago by ancient rivers and bayous and once occupied almost a third of the landscape around Galveston Bay, Texas. Texas coastal prairie wetlands are locally

abundant and in close proximity to other coastal prairie wetlands and function together cumulatively. (N. Enwright, *et al.*, "Using Geographic Information Systems (GIS) to Inventory Coastal Prairie Wetlands Along the Upper Gulf Coast, Texas," *Wetlands* 31:687–697 (2011)). Collectively as a complex, Texas coastal prairie wetlands may be geographically and hydrologically connected to each other via swales and connected to downstream waters, contributing flow to those downstream waters. (B.P. Wilcox, *et al.*, "Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands," *Wetlands* 31(3):451–458 (2011)). Cumulatively, these wetlands can control nutrient release levels and rates to downstream waters, as they capture, store, transform and pulse releases of nutrients to those waters. (M.G. Forbes, *et al.*, "Nutrient Transformation and Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas," *Wetlands* 32(4): 705–715 (2012)). Based on these connections and the strength of their effects, individually or in combination with other coastal prairie wetlands in the watershed, on the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water, the agencies could conclude by rule Texas coastal prairie wetlands have a significant nexus and are jurisdictional. The agencies' determination will be informed by the final version of the Report and other available scientific information.

The agencies could also conclude that playa lakes in the Great Plains even in combination with other playa lakes in a single point of entry watershed always lack a significant nexus and therefore are not jurisdictional. Playa lakes are round, shallow wetlands found primarily in the High Plains, a subregion of the Great Plains in the western and Midwestern United States. (D.A. Haukos, and L.M. Smith, "Past and Future Impacts of Wetland Regulations on Playas," *Wetlands* 23(3):577–589 (2003); R.W. Tiner, "Geographically Isolated Wetlands of the United States," *Wetlands* 23(3):494–516 (2003)). Each playa typically occurs within a closed or terminal watershed, where all water in the watershed drains to the playa. (D.A. Haukos, and L.M. Smith, "Past and Future Impacts of Wetland Regulations on Playas," *Wetlands* 23(3):577–589 (2003)). As such, playas typically do not drain to an (a)(1) through (a)(3) water. Most playas are fed by precipitation and associated runoff, though a few are fed by groundwater. (R.W. Tiner, "Geographically Isolated Wetlands of the United States," *Wetlands* 23(3):494–516 (2003)). Most playas fill with water only after spring rainstorms when freshwater collects in the round depressions of the otherwise flat landscape of west Texas, Oklahoma, New Mexico, Colorado, and Kansas. Although playas play a role in groundwater recharge of the Ogallala Aquifer, in local floodwater storage, and in provision of wildlife habitat, available scientific literature indicates that their chemical, physical, or biological connections to and effects on (a)(1) through (a)(3) waters are of a limited and tenuous nature.

The agencies seek comment, data, and information on whether there are

subcategories of "other waters" or specific combinations of characteristics that are "likely, in the majority of cases, to perform important functions for an aquatic ecosystem incorporating navigable waters," and, thus, should be *per se* jurisdictional. For example, if there are additional studies addressing the connectivity of prairie potholes in the Red River Valley, including the factors influencing that connectivity and how it is important to particular downstream waters, that would be relevant information.

## Appendix B

### Legal Analysis

#### Background

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, 86 Stat. 816, as amended, (33 U.S.C. 1251 et seq.) (Clean Water Act or CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).<sup>9</sup> The U.S. Supreme Court first addressed the scope of "waters of the United States" protected by the CWA in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which involved wetlands adjacent to a traditional navigable water in Michigan. In a unanimous opinion, the Court deferred to the Corps' ecological judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." *Id.* at 134. The Court observed that the broad objective of the CWA to restore and maintain the integrity of the Nation's waters "incorporated a broad, systemic view of the goal of maintaining and improving water quality. . . . Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." *Id.* at 132-33 (citing Senate Report 92-414).

The issue of CWA jurisdiction over "waters of the United States" was addressed again by the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). In *SWANCC*, the Court (in a 5-4 opinion) 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 the CWA. The *SWANCC* Court noted that in *Riverside* it had "found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up' with the 'waters of the United States'" and that "it was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA" in that

case. *Id.* at 167. *SWANCC* did not invalidate (a)(3) or other parts of the regulatory definition of "waters of the United States."

Five years after *SWANCC*, the Court again addressed the CWA term "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water . . .," *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a "continuous surface connection . . ." to such water bodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months . . ." *Id.* at 732 n.5 (*emphasis in original*). Justice Kennedy's concurring opinion took a different approach. Justice Kennedy concluded 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." *Id.* at 759 (citing *SWANCC*, 531 U.S. at 167, 172). He concluded that wetlands possess the requisite significant nexus if the wetlands "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. Justice Kennedy's opinion notes that such a relationship with navigable waters must be more than "speculative or insubstantial." *Id.* at 780. In *Rapanos*, the four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, concluded that the term "waters of the United States" encompasses, *inter alia*, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. *Id.* at 810 & n.14 (Stevens, J., dissenting). Neither the plurality nor the Kennedy opinions invalidated any of the regulatory provisions defining "waters of the United States."

The Circuit Courts of Appeals are not uniform as to the controlling standard for "waters of the United States" under *Rapanos*. The First, Third and Eighth Circuits have concluded that CWA jurisdiction exists if either Justice Kennedy's standard or the plurality's standard is met. *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007); *U.S. v. Donovan*, 661 F.3d 174, 176 (3rd Cir. 2011), *cert. denied*, 132 S.Ct. 2409 (2012); *U.S. v. Bailey*, 571 F.3d 791, 798-99 (8th Cir. 2009). The Seventh and Ninth Circuits limited their holdings that the Kennedy standard applied

to the facts of the cases before them, and did not foreclose the possibility that in some cases the plurality's standard might apply. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007), *cert. denied*, 552 U.S. 1180 (2008); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), *cert. denied*, 552 U.S. 810 (2007). The Fifth and Sixth Circuits did not choose a controlling standard because the waters at issue satisfied both standards. *United States v. Lucas*, 516 F.3d 316, 326-27 (5th Cir. 2008), *cert. denied*, 555 U.S. 822 (2008); *United States v. Cundiff*, 555 F.3d 200, 210-13 (6th Cir. 2009), *cert. denied*, 558 U.S. 818 (2009). The Eleventh Circuit has held that only the Kennedy standard determines jurisdiction. *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *cert. denied sub nom United States v. McWane and McWane v. United States*, 555 U.S. 1045 (2008). No Circuit Court has held that only the plurality standard applies.

#### Traditional Navigable Waters

EPA and the Corps are proposing no changes to the existing regulation related to traditional navigable waters and at paragraph (a)(1) will continue to assert jurisdiction over 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. See e.g., 33 CFR 328.3(a)(1); 40 CFR 230.3(s)(1); 40 CFR 122.2 ("waters of the U.S."). These "(a)(1) waters" are the "traditional navigable waters." These (a)(1) waters include all of the waters defined in 33 CFR part 329, which implements sections 9 and 10 of the Rivers and Harbors Act, and by numerous decisions of the Federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).

To determine whether a water body constitutes an (a)(1) water under the regulations, relevant considerations include Corps regulations, prior determinations by the Corps and by the Federal courts, and case law. Corps districts and EPA regions would determine whether a particular water body is a traditional navigable water based on application of those considerations to the specific facts in each case.

As noted above, the (a)(1) waters include, but are not limited to, waters that meet any of the tests set forth in 33 CFR part 329 (e.g., the water body is (a) subject to the ebb and flow of the tide, and/or (b) the water body is presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce). The Corps districts have made determinations in the past under these regulations for purposes of asserting jurisdiction under sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 and 403). Pursuant to 33 CFR 329.16, the Corps maintains lists of final determinations of navigability for purposes of Corps jurisdiction under the Rivers and Harbors Act of 1899. While absence from the list should not be taken as an indication that the water is not navigable (§ 329.16(b)), Corps districts and EPA Regions rely on any final Corps

<sup>9</sup> The 1972 legislation extensively amended the Federal Water Pollution Control Act (FWPCA), which was originally enacted in 1948. Further amendments to the FWPCA enacted in 1977 acknowledged the popular name of the statute as the Clean Water Act. See Public Law 95-217, 91 Stat. 1566; 33 U.S.C. 1251 note.

determination that a water body meets any of the tests set forth in part 329.

If the Federal courts have determined that a water body is navigable-in-fact under Federal law for any purpose, that water body qualifies as a "traditional navigable water" subject to CWA jurisdiction under 33 CFR 328.3(a)(1) and 40 CFR 230.3(s)(1). Corps districts and EPA regions are guided by the relevant opinions of the Federal courts in determining whether such water bodies are "currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce" (33 CFR 328.3(a)(1); 40 CFR 230.3(s)(1)) or "navigable-in-fact."

The definition of "navigable-in-fact" derives from a long line of cases originating with *The Daniel Ball*, 77 U.S. 557 (1870). The Supreme Court stated:

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

*The Daniel Ball*, 77 U.S. at 563.

In *The Montello*, the Supreme Court clarified that "customary modes of trade and travel on water" encompasses more than just navigation by larger vessels:

The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

*The Montello*, 87 U.S. 430, 441–42 (1874). In that case, the Court held that early fur trading using canoes sufficiently showed that the Fox River was a navigable water of the United States. The Court was careful to note that the bare fact of a water's capacity for navigation alone is not sufficient; that capacity must be indicative of the water's being "generally and commonly useful to some purpose of trade or agriculture." *Id.* at 442.

In *Economy Light & Power*, the Supreme Court held that a waterway need not be continuously navigable; it is navigable even if it has "occasional natural obstructions or portages" and even if it is not navigable "at all seasons . . . or at all stages of the water." *Economy Light & Power Co. v. U.S.*, 256 U.S. 113, 122 (1921).

In *United States v. Holt State Bank*, 270 U.S. 49 (1926), the Supreme Court summarized the law on navigability as of 1926 as follows:

The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that

navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

*Holt State Bank*, 270 U.S. at 56.

In *U.S. v. Utah*, 283 U.S. 64 (1931) and *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940), the Supreme Court held that so long as a water is susceptible to use as a highway of commerce, it is navigable-in-fact, even if the water has never been used for any commercial purpose. *U.S. v. Utah*, at 81–83 ("The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question."); *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. at 416 ("Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.") *Appalachian Power* further held that a water is navigable-in-fact even if it is not navigable and never has been but may become so by reasonable improvements. 311 U.S. at 407–08.

In 1971, in *Utah v. United States*, 403 U.S. 9 (1971), the Supreme Court held that the Great Salt Lake, an intrastate water body, was navigable under Federal law even though it "is not part of a navigable interstate or international commercial highway." *Id.* at 10. In doing so, the Supreme Court stated that the fact that the Lake was used for hauling of animals by ranchers rather than for the transportation of "water-borne freight" was an "irrelevant detail." *Id.* at 11. "The lake was used as a highway and that is the gist of the federal test." *Id.*

Most recently, the Supreme Court explained:

The *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds. See, e.g., *ibid.*; *The Montello*, 20 Wall. 430, 439, 22 L.Ed. 391 (1874); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406, and n. 21, 61 S.Ct. 291, 85 L.Ed. 243 (1940) (Federal Power Act); *Rapanos v. United States*, 547 U.S. 715, 730–731, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (plurality opinion) (Clean Water Act); *id.*, at 761, 126 S.Ct. 2208 (KENNEDY, J., concurring in judgment) (same). It has been used as well to determine questions of title to water beds under the equal-footing doctrine. See *Utah*, *supra*, at 76, 51 S.Ct. 438; *Oklahoma v. Texas*, 258 U.S. 574, 586, 42 S.Ct. 406, 66 L.Ed. 771 (1922); *Holt State Bank*, *supra*, at 56, 46 S.Ct. 197. It should be noted, however, that the test for navigability is not applied in the same way in these distinct types of cases.

Among the differences in application are the following. For state title under the equal-footing doctrine, navigability is determined at the time of statehood, see *Utah*, *supra*, at 75, 51 S.Ct. 438, and based on the "natural and ordinary condition" of the water, see

*Oklahoma*, *supra*, at 591, 42 S.Ct. 406. In contrast, admiralty jurisdiction extends to water routes made navigable even if not formerly so, see, e.g., *Ex parte Boyer*, 109 U.S. 629, 631–632, 3 S.Ct. 434, 27 L.Ed. 1056 (1884) (artificial canal); and federal regulatory authority encompasses waters that only recently have become navigable, see, e.g., *Philadelphia Co. v. Stimson*, 223 U.S. 605, 634–635, 32 S.Ct. 340, 56 L.Ed. 570 (1912), were once navigable but are no longer, see *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123–124, 41 S.Ct. 409, 65 L.Ed. 847 (1921), or are not navigable and never have been but may become so by reasonable improvements, see *Appalachian Elec. Power Co.*, *supra*, at 407–408, 61 S.Ct. 291. With respect to the federal commerce power, the inquiry regarding navigation historically focused on interstate commerce. See *The Daniel Ball*, 1229\*1229 *supra*, at 564. And, of course, the commerce power extends beyond navigation. See *Kaiser Aetna v. United States*, 444 U.S. 164, 173–174, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). In contrast, for title purposes, the inquiry depends only on navigation and not on interstate travel. See *Utah*, *supra*, at 76, 51 S.Ct. 438. This list of differences is not exhaustive. Indeed, "[e]ach application of [the *Daniel Ball*] test . . . is apt to uncover variations and refinements which require further elaboration." *Appalachian Elec. Power Co.*, *supra*, at 406, 61 S.Ct. 291.

*PPL Montana v. Montana*, 565 U.S. \_\_\_ (2012).

Also of note are two decisions from the courts of appeals. In *FPL Energy Marine Hydro*, a case involving the Federal Power Act, the D.C. Circuit reiterated the fact that "actual use is not necessary for a navigability determination" and repeated earlier Supreme Court holdings that navigability and capacity of a water to carry commerce could be shown through "physical characteristics and experimentation." *FPL Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002). In that case, the D.C. Circuit upheld a FERC navigability determination that was based upon three experimental canoe trips taken specifically to demonstrate the river's navigability. *Id.* at 1158–59.

The 9th Circuit has also implemented the Supreme Court's holding that a water need only be susceptible to being used for waterborne commerce to be navigable-in-fact. *Alaska v. Ahtna, Inc.*, 891 F.2d 1404 (9th Cir. 1989). In *Ahtna*, the 9th Circuit held that current use of an Alaskan river for commercial recreational boating was sufficient evidence of the water's capacity to carry waterborne commerce at the time that Alaska became a state. *Id.* at 1405. It was found to be irrelevant whether or not the river was actually being navigated or being used for commerce at the time, because current navigation showed that the river always had the capacity to support such navigation. *Id.* at 1404.

In summary, when determining whether a water body qualifies as a "traditional navigable water" (*i.e.*, an (a)(1) water), relevant considerations include whether the water body meets any of the tests set forth in Part 329, or a Federal court has determined that the water body is

"navigable-in-fact" under Federal law for any purpose, or the water body is "navigable-in-fact" under the standards that have been used by the Federal courts.

## Interstate Waters

### 1. Interstate Waters

The agencies' proposal today makes no change to the interstate waters section of the existing regulations and the agencies would continue to assert jurisdiction over interstate waters, including interstate wetlands. The language of the CWA is clear that Congress intended the term "navigable waters" to include interstate waters, and the agencies' interpretation, promulgated contemporaneously with the passage of the CWA, is consistent with the statute and legislative history. The Supreme Court's decisions in *SWANCC* and *Rapanos* did not address the interstate waters provision of the existing regulation.

A. The Language of the Clean Water Act, the Statute as a Whole, and the Statutory History Demonstrate Congress' Clear Intent To Include Interstate Waters as "Navigable Waters" Subject to the Clean Water Act

While as a general matter, the scope of the terms "navigable waters" and "waters of the United States" is ambiguous, the language of the CWA, particularly when read as a whole, demonstrates that Congress clearly intended to continue to subject interstate waters to Federal regulation. The statutory history of Federal water pollution control places the terms of the CWA in context and provides further evidence of Congressional intent to include interstate waters within the scope of the "navigable waters" protected by the Act. Congress clearly intended to subject interstate waters to CWA jurisdiction without imposing a requirement that they be water that is navigable for purposes of Federal regulation under the Commerce Clause themselves or be connected to water that is navigable for purposes of Federal regulation under the Commerce Clause.<sup>10</sup> The CWA itself is clear that interstate waters that were previously subject to Federal regulation remain subject to Federal regulation. The text of the CWA, specifically the CWA's provision with respect to interstate waters and their water quality standards, in conjunction with the definition of navigable waters, provides clear indication of Congress' intent. Thus, interstate waters are "navigable waters" protected by the CWA.

<sup>10</sup> For purposes of the CWA, EPA and the Corps have interpreted the term "traditional navigable waters" to include all of the "navigable waters of the United States," defined in 33 CFR part 329 and by numerous decisions of the Federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN). This section explains why EPA and the Corps do not interpret the CWA or the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Rapanos v. United States*, 547 U.S. 715 (2006), to restrict CWA jurisdiction over interstate waters to only those interstate waters that are traditional navigable waters or that connect to traditional navigable waters.

(1) The Plain Language of the Clean Water Act and the Statute as a Whole Clearly Indicate Congress' Intent to Include Interstate Waters Within the Scope of "Navigable Waters" for Purposes of the Clean Water Act

Under well settled principles, the phrase "navigable waters" should not be read in isolation from the remainder of the statute. As the Supreme Court has explained:

The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

*Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006); see also *United States Nat'l. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).

While the term "navigable waters" is, in general, ambiguous, interstate waters are waters that are clearly covered by the plain language of the definition of "navigable waters."<sup>11</sup> Congress defined "navigable waters" to mean "the waters of the United States, including the territorial seas." Interstate waters are waters of the several States and, thus, the United States. While the 1972 Act was clearly not limited to interstate waters, it was clearly intended to include interstate waters.

Furthermore, the CWA does not simply define "navigable waters." Other provisions of the statute provide additional textual evidence of the scope of this term of the Act. Most importantly, there is a specific provision in the 1972 CWA establishing requirements for those interstate waters which were subject to the prior Water Pollution Control Acts.

The CWA requires states to establish water quality standards for navigable waters and submit them to the Administrator for review.<sup>12</sup> Under section 303(a) of the Act, *in order to carry out the purpose of this Act*, any water quality standard applicable to *interstate waters* which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of

<sup>11</sup> The Supreme Court has found that the term "waters of the United States" is ambiguous in some respects. *Rapanos*, 547 U.S. at 752 (plurality opinion), 804 (dissent).

<sup>12</sup> Section 303 of the Act requires the states to submit revised and new water quality standards to the Administrator for review. CWA section 303(c)(2)(A). Such revised or new water quality standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters." *Id.* If the Administrator determines that a revised or new standard is not consistent with the Act's requirements, or determines that a revised or new standard is necessary to meet the Act's requirements, and the state does not make required changes, "[t]he Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved." CWA section 303(c)(4).

1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of the Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. If the Administrator makes such a determination he shall, within three months after the date of enactment of the Federal Water Pollution Control Act Amendments of 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). CWA section 303(a)(1) (*emphasis added*).

Under the 1965 Act, as discussed in more detail below, states were directed to develop water quality standards establishing water quality goals for interstate waters. By the early 1970s, all the states had adopted such water quality standards. Advanced Notice of Proposed Rulemaking, Water Quality Standards Regulation, 63 FR 36742, 36745, July 7, 1998. In section 303(a), Congress clearly intended for existing Federal regulation of interstate waters to continue under the amended CWA. Water quality standards for interstate waters were not merely to remain in effect, but EPA was required to actively assess those water quality standards and even promulgate revised standards for interstate waters if states did not make necessary changes. By the plain language of the statute, these water quality standards for interstate waters were to remain in effect "in order to carry out the purpose of this Act." The objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA section 101(a). It would contravene Congress' clearly stated intent for a court to impose an additional jurisdictional requirement on all rivers, lakes, and other waters that flow across, or form a part of, state boundaries ("interstate waters" as defined by the 1948 Act, § 10, 62 Stat. 1161), such that interstate waters that were previously protected were no longer protected because they lacked a connection to a water that is navigable for purposes of Federal regulation under the Commerce Clause. Nor would all the existing water quality standards be "carry[ing] out the purpose of this Act," if the only water quality standards that could be implemented through the Act (through, for example, National Pollutant Discharge Elimination System permits under section 402) were those water quality standards established for interstate waters that are also waters that are navigable for purposes of Federal regulation under the Commerce Clause or that connect to waters that are navigable for purposes of Federal regulation under the Commerce Clause. Nowhere in section 303(a) does Congress make such a distinction.

(2) The Federal Water Pollution Control Statute That Became the Clean Water Act Covered Interstate Waters

In 1972, when Congress rewrote the law governing water pollution, two Federal statutes addressed discharges of pollutants into interstate waters and water that is

navigable for purposes of Federal regulation under the Commerce Clause, and tributaries of each: The Water Pollution Control Act of 1948, as amended, and section 13 of the Rivers and Harbors Act of 1899 (known as the "Refuse Act"). Of the two, the Water Pollution Control Act extended Federal authority over interstate waters and their tributaries. In contrast, the Refuse Act extended Federal jurisdiction over the "navigable waters of the United States" and their tributaries. These two separate statutes demonstrate that Congress recognized that interstate waters and "navigable waters of the United States" were independent lawful bases of Federal jurisdiction.

a. The Federal Water Pollution Control Act Prior to 1972

From the outset, and through all the amendments pre-dating the 1972 Amendments, the Federal authority to abate water pollution under the Water Pollution Control Act, and the Federal Water Pollution Control Act (FWPCA) as it was renamed in 1956, extended to interstate waters. In addition, since first enacted in 1948, and throughout all the amendments, the goals of the Act have been, inter alia, to protect public water supplies, propagation of fish and aquatic life, recreation, agricultural, industrial, and other legitimate uses. See 62 Stat. 1155 and 33 U.S.C. 466 (1952), 33 U.S.C. 466 (1958), 33 U.S.C. 466 (1964), 33 U.S.C. 1151 (1970).

In 1948, Congress enacted the Water Pollution Control Act in connection with the exercise of jurisdiction over the waterways of the Nation and in the consequence of the benefits to public health and welfare by the abatement of stream pollution. See Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948). The Act authorized technical assistance and financial aid to states for stream pollution abatement programs, and made discharges of pollutants into interstate waters and their tributaries a nuisance, subject to abatement and prosecution by the United States. See section 2(d)(1)(4), 62 Stat. at 1156-1157 (section 2(d)(1) of the Water Pollution Control Act of 1948, 62 Stat. at 1156, stated that the "pollution of interstate waters" in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of persons in a State other than that in which the discharge originates, is declared to be a public nuisance and subject to abatement as provided by the Act. (emphasis added)); § 2(a), 62 Stat. 1155 (requiring comprehensive programs for "interstate waters and tributaries thereof"); § 5, 62 Stat. 1158 (authorizing loans for sewage treatment to abate discharges into "interstate waters or into a tributary of such waters"). Under the statute, "interstate waters" were defined as all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. Section 10, 62 Stat. 1161.

In 1956, Congress strengthened measures for controlling pollution of interstate waters and their tributaries. Public Law 84-660, 70 Stat. 498 (1956) (directing further cooperation between the Federal and State

Governments in development of comprehensive programs for eliminating or reducing "the pollution of interstate waters and tributaries" and improving the sanitary condition of surface and underground waters, and authorizing the Surgeon General to make joint investigations with States into the conditions of and discharges into "any waters of any State or States.").

In 1961, Congress amended the FWPCA to substitute the term "interstate or navigable waters" for "interstate waters." See Public Law 87-88, 75 Stat. 208 (1961). Accordingly, beginning in 1961, the provisions of the FWPCA applied to all interstate waters and navigable waters and the tributaries of each, see 33 U.S.C. 466a, 466g(a) (1964).<sup>13</sup>

In 1965, Congress approved a second set of major legislative changes, requiring each state to develop water quality standards for interstate waters within its boundaries by 1967. Public Law 89-234, 79 Stat. 908 (1965).<sup>14</sup> Failing establishment of adequate standards by the state, the Act authorized establishment of water quality standards by Federal regulation. *Id.* at 908. The 1965 Amendments provided that the discharge of matter "into such interstate waters or portions thereof," which reduces the quality of such waters below the water quality standards established under this subsection (whether the matter causing or contributing to such reduction is discharged directly into such waters or reaches such waters after discharge into tributaries of such waters), is subject to abatement through procedures specified in the Act, including (after conferences and negotiations and consideration by a Hearing Board) legal action in the courts. *Id.* at 909.<sup>15</sup>

b. The Refuse Act

Since its original enactment in 1899, the Refuse Act has prohibited the discharge of refuse matter "into any navigable water of the United States, or into any tributary of any navigable water." Ch. 425, 30 Stat. 1152 (1899). It also has prohibited the discharge of such material on the bank of any tributary where it is liable to be washed into a navigable water. *Id.* Violators are subject to fines and imprisonment. *Id.* at 1153 (codified at 33 U.S.C. 412). In 1966, the Supreme Court upheld the Corps' interpretation of the Refuse Act as prohibiting discharges that pollute the navigable waters, and not just those discharges that obstruct navigation. *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966). In 1970, President Nixon

<sup>13</sup> Congress did not define the term "navigable waters" in the 1961 Amendments, or in subsequent FWPCA Amendments, until 1972.

<sup>14</sup> In 1967, the state of Arizona created the Water Quality Control Council (Council) to implement the requirements of the 1965 FWPCA. The Council adopted water quality standards for those waters that were considered "interstate waters" pursuant to the existing Federal law. The Council identified the Santa Cruz River as an interstate water and promulgated water quality standards for the river in accordance with Federal law.

<sup>15</sup> The 1966 Amendments authorized civil fines for failing to provide information about an alleged discharge causing or contributing to water pollution. Public Law 89-753, 80 Stat. 1250 (1966); see also S. Rep. No. 414, 92d Congress, 1st Sess. 10 (1972) (describing the history of the FWPCA).

signed an Executive Order directing the Corps (in consultation with the Federal Water Pollution Control Administration<sup>16</sup>) to implement a permit program under section 13 of the RHA "to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks." E.O. 11574, 35 FR 19627, Dec. 25, 1970. In 1971, the Corps promulgated regulations establishing the Refuse Act Permit Program. 36 FR 6564, 6565, April 7, 1971. The regulations made it unlawful to discharge any pollutant (except those flowing from streets and sewers in a liquid state) into a navigable waterway or tributary, except pursuant to a permit. Under the permit program, EPA advised the Corps regarding the consistency of a proposed discharge with water quality standards and considerations, and the Corps evaluated a permit application for impacts on anchorage, navigation, and fish and wildlife resources. *Id.* at 6566.

c. The Federal Water Pollution Control Act Amendments of 1972

When Congress passed the Federal Water Pollution Control Act Amendments of 1972 (referred to hereinafter as the CWA or CWA), it was not acting on a blank slate. It was amending existing law that provided for a Federal/State program to address water pollution. The Supreme Court has recognized that Congress, in enacting the CWA in 1972, "intended 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 Homes*, 474 U.S. at 133; see also *International Paper Co. v. Ouellette*, 479 U.S. 481, 486, n.6 (1987).

The amendments of 1972 defined the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). While earlier versions of the 1972 legislation defined the term to mean "the navigable waters of the United States," the Conference Committee deleted the word "navigable" and expressed the intent to reject prior geographic limits on the scope of Federal water-protection measures. Compare S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), with H.R. Rep. No. 911, 92 Cong., 2d Sess. 356 (1972) (bill reported by the House Committee provided that "[t]he term 'navigable waters' means the navigable waters of the United States, including the territorial seas"); see also S. Rep. No. 414, 92d Cong., 1st Sess. 77 ("Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. . . . Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries."). Thus, Congress intended the scope of the 1972 Act to include, at a

<sup>16</sup> In December 1970, administration of the Federal Water Pollution Control Administration was transferred from the Secretary of the Interior to EPA. S. Rep. No. 414, 92d Congress, 1st Sess. (1972).

minimum, the waters already subject to Federal water pollution control law—both interstate waters and waters that are navigable for purposes of Federal regulation under the Commerce Clause. Those statutes covered interstate waters, defined interstate waters without requiring that they be a traditional navigable water or be connected to water that is a traditional navigable water, and demonstrated that Congress knew that there are interstate waters that are not navigable for purposes of Federal regulation under the Commerce Clause.

In fact, Congress amended the Federal Water Pollution Control Act in 1961 to substitute the term “interstate or navigable waters” for “interstate waters,” demonstrating that Congress wanted to be very clear that it was asserting jurisdiction over both types of waters: interstate waters even if they were not navigable for purposes of Federal regulation under the Commerce Clause, and traditional navigable waters even if they were not interstate waters. At no point were the interstate waters already subject to Federal water pollution control authority required to be navigable or to connect to a traditional navigable water. Further, as discussed above, the legislative history clearly demonstrates that Congress was expanding jurisdiction—not narrowing it—with the 1972 amendments. Thus, it is reasonable to conclude that by defining “navigable waters” as “the waters of the United States” in the 1972 amendments, Congress included not just traditionally navigable waters, but all waters previously regulated under the Federal Water Pollution Control Act, including non-navigable interstate waters.

Based on the statutory definition of navigable waters, the requirement of section 303(a) for water quality standards for interstate waters to remain in effect, the purposes of the Act, and the more than three decades of Federal water pollution control regulation that provides a context for reading those provisions of the statute, the intent of Congress is clear that the term “navigable waters” includes “interstate waters” as an independent basis for CWA jurisdiction, whether or not they themselves are traditional navigable waters or are connected to a traditional navigable water.

#### *B. Supreme Court Precedent Supports CWA Jurisdiction Over Interstate Waters Without Respect to Navigability*

In two seminal decisions, the Supreme Court established that resolving interstate water pollution issues was a matter of Federal law and that the CWA was the comprehensive regulatory scheme for addressing interstate water pollution. *Illinois v. Milwaukee*, 406 U.S. 91 (1972); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). In both of these decisions, the Court held that Federal law applied to interstate waters. Moreover, these cases analyzed the applicable Federal statutory schemes and determined that the provisions of the Federal Water Pollution Control Act and the CWA regulating water pollution applied generally to interstate waters. The holdings of these cases recognized the Federal interest in interstate water quality pollution; and *City of*

*Milwaukee* recognized that CWA jurisdiction extends to interstate waters without regard to navigability.

In *Illinois v. Milwaukee*, the Court considered a public nuisance claim brought by the State of Illinois against the city of Milwaukee to address the adverse effects of Milwaukee's discharges of poorly treated sewage into Lake Michigan, “a body of interstate water.” 406 U.S. at 93. In relevant part, the Court held that the Federal common law of nuisance was an appropriate mechanism to resolve disputes involving interstate water pollution. 406 U.S. at 107 (“federal courts will be empowered to appraise the equities of suits alleging creation of a public nuisance by water pollution”). The Court further noted that in such actions the Court could consider a state's interest in protecting its high water quality standards from “the more degrading standards of a neighbor.” *Id.*

In reaching this conclusion, the Court examined in detail the scope of the Federal regulatory scheme as it existed prior to the October, 1972 FWPCA amendments. In its April, 1972 decision, the Court concluded that the Federal Water Pollution Control Act “makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters.” 406 U.S. at 102 (*emphasis added*). The Court, in this case, concluded that the regulatory provisions of the Federal Water Pollution Control Act did not address the right of a state to file suit to protect water quality. However, this was not because this statute did not reach interstate waters. The Court specifically noted that section 10(a) of the Federal Water Pollution Control Act “makes pollution of interstate or navigable waters subject ‘to abatement’” 406 U.S. at 102 (*emphasis added*). Rather, the Court noted that the plaintiff in this action was seeking relief outside the scope of the Federal Water Pollution Control Act and that statute explicitly provided that independent “state and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action.” 406 U.S. at 104 (*citing* section 10(b) of the Federal Water Pollution Control Act).

In addition, in *Illinois v. Milwaukee*, the Court acknowledged that it was essential for Federal law to resolve interstate water pollution disputes, citing with approval the following discussion from *Texas v. Pankey*: Federal common law and not the varying common law of the individual states is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. . . . Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.

406 U.S. at 107 n. 9, *citing Texas v. Pankey*, 441 F.2d 236, 241–242.

In *City of Milwaukee*, the Court revisited this dispute and addressed the expanded statutory provisions of the CWA regulating

water pollution. The scope of the CWA amendments led the Court to reverse its decision in *Illinois v. Milwaukee*. In reaching this result, the Court concluded that Congress had elected to exercise its authority under Federal law to occupy the field of water pollution regulation. As a result, the Court concluded that there was no basis for maintaining a Federal common law of nuisance.

Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency. The 1972 Amendments to the Federal Water Pollution Control Act were not merely another law “touching interstate waters”. . . . Rather, the Amendments were viewed by Congress as a “total restructuring” and “complete rewriting” of the existing water pollution legislation considered in that case. 451 U.S. at 317.

The Court's analysis in *Illinois v. Milwaukee* made clear that Federal common law was necessary to protect “the environmental rights of States against improper impairment by sources outside its domain.” 406 U.S. at 107, n. 9. In the context of interstate water pollution, nothing in the Court's language or logic limits the reach of this conclusion to only navigable interstate waters. In *City of Milwaukee*, the Court found that the CWA was the “comprehensive regulatory program” that “occupied the field” (451 U.S. 317) with regard to interstate water pollution, eliminating the basis for an independent common law of nuisance to address interstate water pollution. Since the Federal common law of nuisance (as well as the statutory provisions regulating water pollution in the Federal Water Pollution Control Act) applied to interstate waters whether navigable or not, the CWA could only occupy the field of interstate water pollution if it too extended to non-navigable as well as navigable interstate waters.

With regard to the specifics of interstate water pollution, the *City of Milwaukee* Court noted that, in *Illinois v. Milwaukee*, it had been concerned that Illinois did not have a forum in which it could protect its interests in abating water pollution from out of state, absent the recognition of Federal common law remedies. 451 U.S. at 325. The Court then went on to analyze in detail the specific procedures created by the CWA “for a State affected by decisions of a neighboring State's permit-granting agency to seek redress.” 451 U.S. at 326. The Court noted that “any State whose waters may be affected by the issuance of a permit” is to receive notice and the opportunity to comment on the permit. *Id.* (*citing* to CWA section 402(b)(3)(5)). In addition the Court noted provisions giving EPA the authority to veto and issue its own permits “if a stalemate between an issuing and objecting state develops.” *Id.* (*citing* to CWA sections 402(d)(2)(A),(4)). In light of these protections for states affected by interstate water pollution, the court concluded that

[t]he statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process. It would be quite inconsistent with this scheme if federal courts were in effect to "write their own ticket" under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them. 451 U.S. at 326.

Nothing in the language or the reasoning of this discussion limits the applicability of these protections of interstate waters to navigable interstate waters or interstate waters connected to navigable waters. If these protections only applied to navigable interstate waters, a downstream state would be unable to protect many of its waters from out of state water pollution. This would hardly constitute a comprehensive regulatory scheme that occupied the field of interstate water pollution.

For these reasons, the holdings and the reasoning of these decisions establish that the regulatory reach of the CWA extends to all interstate waters without regard to navigability.<sup>17</sup>

*C. The Supreme Court's Decisions in SWANCC and Rapanos Do Not Limit or Constrain Clean Water Act Jurisdiction Over Non-Navigable Interstate Waters*

As noted above, the Supreme Court recognized that Congress, in enacting the CWA, "intended 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 *International Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6, (1987). In *Riverside Bayview*, and subsequently in *SWANCC* and *Rapanos*, the Court addressed the construction of the CWA terms "navigable waters" and "the waters of the United States." In none of these cases did the Supreme Court address interstate waters, nor did it overrule prior Supreme Court precedent which addressed the interaction between the CWA and Federal common law to address pollution of interstate waters. Therefore, the statute, even in light of *SWANCC* and *Rapanos*, does not impose an additional requirement that interstate waters must be water that is navigable for purposes of Federal regulation under the Commerce Clause or connected to water that is navigable for purposes of Federal regulation under the Commerce Clause to be jurisdictional waters for purposes of the CWA.

<sup>17</sup> Nothing in subsequent Supreme Court case law regarding interstate waters in any way conflicts with the agencies' interpretation. See *International Paper v. Ouellette*, 479 U.S. 481 (1987); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). In both of these cases, the Court detailed how the CWA had supplanted the Federal common law of nuisance to establish the controlling statutory scheme for addressing interstate water pollution disputes. Nothing in either decision limits the applicability of the CWA to interstate water pollution disputes involving navigable interstate waters or interstate waters connected to navigable waters.

At the outset, it is worth noting that neither *SWANCC* nor *Rapanos* dealt with the jurisdictional status of interstate waters. Repeatedly in the *SWANCC* decision the Court emphasized that the question presented concerned the jurisdiction status of nonnavigable *intrastate* waters located in two Illinois counties. *SWANCC* 531 U.S. at 165–166, 171 ("we thus decline to . . . hold that isolated ponds, some only seasonal, wholly located within two Illinois counties fall under § 404(a) definition of navigable waters . . .") (*emphasis added*). Nowhere in Justice Rehnquist's majority opinion in *SWANCC* does the Court discuss the Court's interstate water case law.<sup>18</sup> The Court does not even discuss the fact that CWA jurisdictional regulations identify interstate waters as regulated "waters of the United States." In fact, the repeated emphasis on the intrastate nature of the waters at issue can be read as an attempt to distinguish *SWANCC* from the Court's interstate water jurisprudence.

In *Rapanos*, the properties at issue were located entirely within the State of Michigan. 547 U.S. 715, 762–764. Thus, the Court had no occasion to address the text of the CWA with respect to interstate waters or the agencies' regulatory provisions concerning interstate waters. In addition, neither Justice Kennedy nor the plurality discusses the impact of their opinions on the Court's interstate waters jurisprudence. The plurality decision acknowledges that CWA jurisdictional regulations include interstate waters. 547 U.S. 715, 724. However, the plurality did not discuss in any detail its views as to the continued vitality of regulations concerning such waters.

Moreover, one of the analytical underpinnings of the *SWANCC* and *Rapanos* decisions is irrelevant to analysis of regulations asserting jurisdiction over interstate waters. In *SWANCC*, the Court declined to defer to agency regulations asserting jurisdiction over isolated waters because

[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. . . . This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of Congressional authority. . . . This concern is heightened where the administrative interpretation alerts the federal-state framework by permitting federal encroachment upon a traditional state power. 531 U.S. at 172–173 (citations omitted).

However, the Court's analysis in *Illinois v. Milwaukee* and *City of Milwaukee* makes clear that Congress has broad authority to create Federal law to resolve interstate water pollution disputes. As discussed above, the Court in *Illinois v. Milwaukee*, invited further Federal legislation to address interstate water pollution, and in so doing concluded that State law was not an appropriate basis for addressing interstate water pollution issues. 406 U.S. at 107 n. 9 (*citing Texas v. Pankey*,

<sup>18</sup> It is worth noting the Justice Rehnquist was also the author of *City of Milwaukee*.

441 F.2d 236, 241–242). In *City of Milwaukee*, the Court indicated that central to its holding in *Illinois v. Milwaukee* was its concern "that Illinois did not have any forum to protect its interests [in the matters involving interstate water pollution]." 451 U.S. 325. As discussed above, the Court cited with approval the statutory provisions of the CWA regulating water pollution as an appropriate means to address that concern.

The *City of Milwaukee* and *Illinois v. Milwaukee* decisions make clear that assertion of Federal authority to resolve disputes involving interstate waters does not alter "the Federal-State framework by permitting Federal encroachment on a traditional State power." 531 U.S. at 173. "Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, have been recognized as presenting Federal questions." *Illinois v. Milwaukee*, 406 U.S. at 105 (internal quotations and citations omitted).

The Supreme Court's analysis in *SWANCC* and *Rapanos* materially altered the criteria for analyzing CWA jurisdictional issues for wholly *intrastate* waters. However, these decisions by their terms did not affect the body of case law developed to address interstate waters. The holdings in the Supreme Court's interstate waters jurisprudence, in particular *City of Milwaukee*, apply CWA jurisdiction to interstate waters without regard to, or discussion of, navigability. In *City of Milwaukee*, the Court held that the CWA provided a comprehensive statutory scheme for addressing the consequences of interstate water pollution. Based on this analysis, the Court expressly overruled its holding in *Illinois v. Milwaukee* that the Federal common law of nuisance would apply to resolving interstate water pollution disputes. Instead, the Court held that such disputes would now be resolved through application of the statutory provisions of the CWA regulating water pollution.

It would be unreasonable to interpret *SWANCC* or *Rapanos* as overruling *City of Milwaukee* with respect to CWA jurisdiction over non-navigable interstate waters. Such an interpretation would result in no law to apply to water pollution disputes with regard to such waters, unless one were to assume that the Court intended (without discussion or analysis) to restore the Federal common law of nuisance as the law to apply in such matters. Moreover, *SWANCC* and *Rapanos* acknowledge that CWA regulatory jurisdiction extends to at least some non-navigable waters. See, e.g., 547 U.S. at 779 (Kennedy, J.). Neither the *SWANCC* Court nor the plurality or Kennedy opinions in *Rapanos* purports to set out the complete boundaries of CWA jurisdiction. See, e.g., 547 U.S. at 731 ("[w]e need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act.") (plurality opinion).

In addition, as the Supreme Court has repeatedly admonished, if a Supreme Court precedent has direct application in a case yet appears to rest on a rationale rejected in some other line of decisions, lower courts should follow the case which directly controls,

leaving to the Supreme Court the prerogative of overruling its precedents. *Agostino v. Felton*, 521 U.S. 203, 237 (1997); *United States v. Hatter*, 532 U.S. 557, 566–567 (1981). Moreover, when the Supreme Court overturns established precedent, it is explicit. *See, Lawrence v. Texas*, 539 U.S. 558, 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

#### D. The Agencies’ Longstanding Interpretation of the Term “Navigable Waters” To Include “Interstate Waters”

EPA, the agency charged with implementing the CWA, has always interpreted the 1972 Act to cover interstate waters. Final Rules, 38 FR 13528, May 22, 1973 (the term “waters of the United States” includes “interstate waters and their tributaries, including adjacent wetlands”). While the Corps of Engineers initially limited the scope of coverage for purposes of section 404 of the CWA to those waters that were subject to the Rivers and Harbors Act of 1899, after a lawsuit, the Corps amended its regulations to provide for the same definition of “waters of the United States” that EPA’s regulations had always established. In 1975, the Corps’ revised regulations defined “navigable waters” to include “[i]nterstate waters landward to their ordinary high water mark and up to their headwaters.” In their final rules promulgated in 1977, the Corps adopted EPA’s definition and included within the definition of “waters of the United States” “interstate waters and their tributaries, including adjacent wetlands.” The preamble provided an explanation for the inclusion of interstate waters:

The affects [sic] 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.

Final Rules, 42 FR 37122, July 19, 1977.

The legislative history similarly provides support for the agencies’ interpretation. Congress in 1972 concluded that the mechanism for controlling discharges and, thereby abating pollution, under the FWPCA and Refuse Act “has been inadequate in every vital aspect.” S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1972). The Senate Committee on Public Works reported that development of water quality standards, assigned to the states under the 1965 FWPCA Amendments, “is lagging” and the “1948 abatement procedures, and the almost total lack of enforcement,” prompted the search for “more direct avenues of action against water polluters and water pollution.” *Id.* at 5. The Committee further concluded that although the Refuse Act permit program created in 1970 “seeks to establish this direct approach,” it was too weak because it

applied only to industrial polluters and too unwieldy because the authority over each permit application was divided between two Federal agencies. *See id.* at 5; *see also id.* at 70–72 (discussing inadequacies of Refuse Act program).

In light of the poor success of those programs, the Committee recommended a more direct and comprehensive approach which, after amendment in conference, was adopted in the 1972 Act. The text, legislative history and purpose of the 1972 Amendments all show an intent—through the revisions—to broaden, improve and strengthen, not to curtail, the Federal water pollution control program that had existed under the Refuse Act and FWPCA.<sup>19</sup> The 1972 FWPCA Amendments were “not merely another law ‘touching interstate waters’” but were “viewed by Congress as a ‘total restructuring’ and ‘complete rewriting’ of the existing water pollution legislation.”<sup>20</sup>

As the legislative history of the 1972 Act confirms, Congress’ use of the term “waters of the United States” was intended to repudiate earlier limits on the reach of Federal water pollution efforts: “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.” *See S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972)*. The House and Senate Committee Reports further elucidate the Conference Committee’s rationale for removing the word “navigable” from the definition of “navigable waters,” in 33 U.S.C. 1362(7). The Senate report stated:

The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made the navigable waters, portions thereof, and their tributaries.

*See S. Rep. 414, 92d Cong., 1st Sess. 77 (1971); see also H.R. Rep. No. 911, 92d Cong.,*

<sup>19</sup> *See id.* at 9 (“The scope of the 1899 Refuse Act is broadened; the administrative capability is strengthened.”); *id.* at 43 (“Much of the Committee’s time devoted to this Act centered on an effort to resolve the existing water quality program and the separate pollution program developing under the 1899 Refuse Act.”). Congress made an effort “to weave” the Refuse Act permit program into the 1972 Amendments, *id.* at 71, as the statutory text shows. *See* 33 U.S.C. 1342(a) (providing that each application for a permit under 33 U.S.C. 407, pending on October 18, 1972, shall be deemed an application for a permit under 33 U.S.C. 1342(a)).

<sup>20</sup> *City of Milwaukee v. Illinois*, 451 U.S. at 317; *see also id.* at 318 (holding that the CWA precluded Federal common-law claims because “Congress’ intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation”); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1, 22 (1981) (existing statutory scheme “was completely revised” by enactment of the CWA).

2d Sess. 131 (1972) (“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.”). These passages strongly suggest that Congress intended to expand Federal protection of waters. There is no evidence that Congress intended to exclude interstate waters which were protected under Federal law if they were not water that is navigable for purposes of Federal regulation under the Commerce Clause or connected to water that is navigable for purposes of Federal regulation under the Commerce Clause. Such an exclusion would be contrary to all the stated goals of Congress in enacting the sweeping amendments which became the CWA.

The CWA was enacted in 1972. EPA’s contemporaneous regulatory definition of “waters of the United States,” promulgated in 1973, included interstate waters. The definition has been EPA’s interpretation of the geographic jurisdictional scope of the CWA for approximately 40 years. Congress has also been aware of and has supported the Agency’s longstanding interpretation of the CWA. “Where ‘an agency’s statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.’” *North Haven Board of Education v. Bell*, 102 456 U.S. 512, 535 (1982) (quoting *United States v. Rutherford*, 442 U.S. 544 n. 10 (1979) (internal quotes omitted)).

The 1977 amendments to the CWA were the result of Congress’ thorough analysis of the scope of CWA jurisdiction in light of EPA and Corps regulations. The 1975 interim final regulations promulgated by the Corps in response to *NRDC v. Callaway*,<sup>21</sup> aroused considerable congressional interest. Hearings on the subject of section 404 jurisdiction were held in both the House and the Senate.<sup>22</sup> An amendment to limit the geographic reach of section 404 to waters that are navigable for purposes of Federal regulation under the Commerce Clauses and their adjacent wetlands was passed by the House, 123 Cong. Rec. 10434 (1977), defeated on the floor of the Senate, 123 Cong. Rec. 26728 (1977), and eliminated by the Conference Committee, H.R. Conf. Rep. 95–830, 95th Cong., 1st Sess. 97–105 (1977). Congress rejected the proposal to limit the geographic reach of section 404 because it wanted a permit system with “no gaps” in its protective sweep. 123 Cong. Rec. 26707 (1977) (remarks of Sen. Randolph). Rather than alter the geographic reach of section

<sup>21</sup> 40 FR 31320, 31324 (July 25, 1975).

<sup>22</sup> *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works, 94th Cong., 2d Sess. (1976); Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation, 94th Cong., 1st Sess. (1975).*

404, Congress amended the statute by exempting certain *activities*—most notably certain agricultural and silvicultural activities—from the permit requirements of section 404. See 33 U.S.C. 1344(f).

Other evidence abounds to support the conclusion that when Congress rejected the attempt to limit the geographic reach of section 404, it was well aware of the jurisdictional scope of EPA and the Corps' definition of "waters of the United States." For example, Senator Baker stated (123 Cong. Rec. 26718 (1977)):

Interim final regulations were promulgated by the [C]orps [on] July 25, 1975. \* \* \* Together the regulations and [EPA] guidelines established a management program that focused the decisionmaking process on significant threats to aquatic areas while avoiding unnecessary regulation of minor activities. On July 19, 1977, the [C]orps revised its regulations to further streamline the program and correct several misunderstandings. \* \* \* Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource. Earlier jurisdictional approaches under the [Rivers and Harbors Act] established artificial and often arbitrary boundaries. . . .

This legislative history leaves no room for doubt that Congress was aware of the agencies' definition of navigable waters. While there was controversy over the assertion of jurisdiction over all adjacent wetlands and some non-adjacent wetlands, the agencies' assertion of CWA jurisdiction over interstate waters was uncontroversial.

Finally, the constitutional concerns which led the Supreme Court to decline to defer to agency regulations in *SWANCC* and *Rapanos* are not present here where the agency is asserting jurisdiction over interstate waters. In *SWANCC*, the Court declined to defer to agency regulations asserting jurisdiction over non-adjacent, non-navigable, intrastate waters because the Court felt such an interpretation of the statute invoked the outer limits of Congress' power. The Court's concern "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." 531 U.S. at 172–173 (citations omitted). Authority over interstate waters is squarely within the bounds of Congress' Commerce Clause powers.<sup>23</sup> Further, the Federal Government is in the best position to address issues which may arise when waters cross state boundaries, so this interpretation does not disrupt the Federal-State framework in the manner the Supreme Court feared that the assertion of jurisdiction over a non-adjacent, non-navigable, intrastate body of water based on the presence of migratory birds did. The Supreme Court's analysis in

*Illinois v. Milwaukee* and *City of Milwaukee* makes clear that Congress has broad authority to create Federal law to resolve interstate water pollution disputes. Therefore, as discussed in Section II.B above, it is appropriate for the agencies to adopt an interpretation of the extent of CWA jurisdiction over interstate waters that gives full effect to *City of Milwaukee* unless and until the Supreme Court elects to revisit its holding in that case.

Thus, based on the language of the statute, the statutory history, the legislative history, and the caselaw, the agencies' continue their longstanding interpretation of "navigable waters" to include interstate waters.

#### Tributaries

In *Rapanos*, Justice Kennedy reasoned that *Riverside Bayview* and *SWANCC* "establish the framework for" determining whether an assertion of regulatory jurisdiction constitutes a reasonable interpretation of "navigable waters"—"the connection between a non-navigable 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;" and "[a]bsent a significant nexus, jurisdiction under the Act is lacking." 547 U.S. at 767. "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' 33 U.S.C. 1251(a), and it pursued that objective by restricting dumping and filling in 'navigable waters,' sections 1311(a), 1362(12)." *Id.* at 779. "Justice Kennedy concluded that the term 'waters of the United States' encompasses wetlands and other waters that 'possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made.'" *Id.* at 759. He further concluded that wetlands possess the requisite significant nexus: "if the wetlands, either alone or in combination with similarly situated [wetlands] in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

While Justice Kennedy's opinion focused on adjacent wetlands in light of the facts of the cases before him, the agencies determined it was reasonable and appropriate to undertake a detailed examination of the scientific literature to determine whether tributaries, as a category and as the agencies propose to define them, significantly affect the chemical, physical, or biological integrity of downstream navigable waters, interstate waters, or territorial seas into which they flow. Based on this extensive analysis, the agencies concluded that tributaries with bed and banks, and ordinary high water marks, alone or in combination with other tributaries, as defined by the proposed regulation, in the watershed perform these functions and should be considered, as a category, to be "waters of the United States."

The assertion of jurisdiction over this category of waters is fully consistent with Justice Kennedy's opinion in *Rapanos*. "Justice Kennedy concluded that the term

"waters of the United States" encompasses wetlands and other waters that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. With respect to tributaries, Justice Kennedy rejected the plurality's approach that only "relatively permanent" tributaries are within the scope of CWA jurisdiction. He stated that the plurality's requirement of "permanent standing water or continuous flow, at least for a period of 'some months' . . . makes little practical sense in a statute concerned with downstream water quality." *Id.* at 769. Instead, Justice Kennedy concluded that "Congress could draw a line to exclude irregular waterways, but nothing in the statute suggests it has done so;" in fact, he stated that Congress has done "[q]uite the opposite . . ." *Id.* at 769. Further, Justice Kennedy concluded, based on "a full reading of the dictionary definition" of "waters," that "the Corps can reasonably interpret the Act to cover the paths of such impermanent streams." *Id.* at 770 (emphasis added).

Moreover, Justice Kennedy's opinion did not reject the agencies' existing regulations governing tributaries. The consolidated cases in *Rapanos* involved discharges into wetlands adjacent to nonnavigable tributaries and, therefore, Justice Kennedy's analysis focused on the requisite showing for wetlands. Justice Kennedy described the Corps' standard for asserting jurisdiction over tributaries: "the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark . . ." *Id.* at 781, see also *id.* at 761. He acknowledged that this requirement of a perceptible ordinary high water mark for ephemeral streams, 65 FR 12828, March 9, 2000, "[a]ssuming it is subject to reasonably consistent application, . . . 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." 547 U.S. at 781, see also *id.* at 761. With respect to wetlands, Justice Kennedy concluded that the breadth of this standard for tributaries precluded use of adjacency to such tributaries as the determinative measure of whether wetlands adjacent to such tributaries "are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Id.* at 781. He did not, however, reject the Corps' use of "ordinary high water mark" to assert regulatory jurisdiction over tributaries themselves. *Id.*

In the foregoing passage regarding the existing regulatory standard for ephemeral streams, Justice Kennedy also provided a "but see" citation to a 2004 U.S. General Accounting Office (now the U.S. Government Accountability Office) (GAO) report "noting variation in results among Corps district offices." *Id.* In 2005, the Corps issued a regulatory guidance letter (RGL 05–05) to Corps districts on OHWM identification that was designed to ensure more consistent practice. The Corps has also issued documents to provide additional technical assistance for problematic OHWM delineations. See, e.g., R.W. Lichvar and S.M.

<sup>23</sup> In *Illinois v. Milwaukee*, the Supreme Court noted that "Congress has enacted numerous laws touching interstate waters." 406 U.S. at 101.

McColley, U.S. Army Corps of Engineers, *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*, ERDC/CRREL TR-08-12 (2008). Moreover, the agencies propose today for the first time a regulatory definition of "tributary." The definition expressly addresses some of the issues with respect to identification of an OHWM that caused many of the inconsistencies reported by the GAO. For example, this proposed regulation clearly provides that a water that otherwise meets the proposed definition of tributary remains a jurisdictional tributary even if there are natural or man-made breaks in the OHWM. The proposed definition also provides a non-exclusive list of examples of breaks in the OHWM to assist in clearly and consistently determining what meets the definition of tributary.

Most fundamentally, the agencies believe that the scientific literature demonstrates that tributaries, as a category and as the agencies propose to define them, play a critical role in the integrity of aquatic systems comprising traditional navigable waters and interstate waters, and therefore are "waters of the United States" within the meaning of the Clean Water Act.

#### Adjacent Waters

The CWA explicitly establishes authority over adjacent wetlands. Under section 404(g), states are authorized to assume responsibility for administration of the section 404 permitting program with respect to "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*)." 33 U.S.C. 1344(g)(1) (emphasis added). While this provision mainly serves as a limitation on the scope of waters for which states may be authorized to issue permits, it also shows that Congress was concerned with the protection of adjacent wetlands and recognized their important role in protecting downstream traditional navigable waters. Indeed, the existing definition of adjacency was developed in recognition of the integral role wetlands play in broader aquatic ecosystems:

The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . 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.

42 FR 37128, July 19, 1977.

As the Supreme Court found in *United States v. Riverside Bayview Homes, Inc.*, "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." 474 U.S. at 133.

In upholding the Corps' judgment about the relationship between waters and their adjacent wetlands, the Supreme Court in *Riverside Bayview* acknowledged that the agencies' regulations take into account functions provided by wetlands in support of this relationship. "[A]djacent wetlands may 'serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species.'" *Id.* at 133 (citing § 320.4(b)(2)(i)). The Court further stated that the Corps had reasonably concluded 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." 474 U.S. at 135.

Two decades later, a majority of justices in *Rapanos* concluded that the agencies' regulatory definition of adjacent wetlands reasonable. Justice Kennedy stated:

As the Court noted in *Riverside Bayview*, 'the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, 33 CFR 320.4(b)(2)(vii)(1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see § 320.4(b)(2)(iv) and (v).' Where wetlands perform these filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would. . . . In many cases, moreover, filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.

547 U.S. at 775 (citations omitted). The four dissenting justices similarly concluded:

The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision.

*Id.* at 778 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984)).

For those wetlands adjacent to traditional navigable waters, Justice Kennedy concluded in *Rapanos* that the agencies' existing regulation "rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." 547 U.S. at 780. For other adjacent waters, including adjacent wetlands, Justice Kennedy's significant nexus standard provides a framework for establishing categories of waters which are *per se* "waters of the United States." First, he provided that wetlands are jurisdictional if they "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. Next, Justice Kennedy stated that "[t]hrough regulation or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), 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." *Id.* at 780-81.

While the issue was not before the Supreme Court, it 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. The agencies have determined that adjacent waters as defined in today's proposed rule, alone or in combination with other adjacent waters in the region that drains to a traditional navigable water, interstate water or the territorial seas, significantly affect the chemical, physical, and biological integrity of those waters. As explained in more detail in Section H, below, the proposed rule interprets the phrase "in the region" to mean the watershed that drains to the nearest traditional navigable water or interstate water through a single point of entry. The agencies have determined that because the movement of water from watershed drainage basins to river networks and lakes shapes the development and function of these systems in a way that is critical to their long term health, the watershed is a reasonable and technically appropriate reflection of Congressional intent.

The agencies have concluded that all waters that meet the proposed definition of "adjacent" are similarly situated for purposes of analyzing whether they, in the majority of cases, have a significant nexus to an (a)(1) through (a)(3) water. Based on the agencies' review of the scientific literature, we have concluded that these waters, when bordering, contiguous or located in the floodplain or riparian area, or when otherwise meeting the definition of "adjacent," provide many similar functions that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. Further, because the proposed definition generally

focuses on the location of the waters (i.e., those that are located near (a)(1) through (a)(5) waters), interpreting the term “similarly situated” to include all adjacent waters, as defined in the proposed rule, is reasonable and consistent with the science. The geographic position of an “adjacent” water relative to the tributary is indicative of the relationship to it, with many of its defining characteristics resulting from the movement of materials and energy between the categories of waters. The scientific literature documents that waters that are adjacent to (a)(1) through (a)(5) waters, including wetlands, oxbow lakes and adjacent ponds, are integral parts of stream networks because of their ecological functions and how they interact with each other, and with downstream traditional navigable waters, interstate waters, or the territorial seas. In other words, tributaries and their adjacent waters, and the downstream traditional navigable waters, interstate waters, and territorial seas into which those waters flow, are an integrated ecological system, and discharges of pollutants, including discharges of dredged or fill material, into any component of that ecological system, must be regulated under the CWA to restore and maintain the chemical, physical, or biological integrity of these waters.

Based on the science, as summarized below, the agencies have concluded that wetlands and waters adjacent to all tributaries that meet the proposed definition of “tributary” provide vital functions for downstream traditional navigable waters, interstate waters, or the territorial seas. In particular, the scientific literature supports the conclusion that waters adjacent to all tributaries as defined in section (a)(5) have a significant nexus to waters described in paragraphs (a)(1) through (a)(3). Because smaller streams, whether perennial, intermittent, or ephemeral, are much more common than larger streams, the volume of a stream’s flow is not the best measure of its contribution to the chemical, physical, or biological integrity of downstream waters. Report at 4–2, 4–3. As discussed in more detail in Appendix A, small streams cumulatively exert a strong influence on downstream waters, partly by collectively providing a substantial amount of the river’s water, *id.* at 4–3, 4–4 to 4–5, but also by playing unique roles that large streams typically do not, including providing habitat for aquatic macroinvertebrates which help maintain the health of the downstream water. Waters adjacent to those small tributary streams, therefore, also significantly affect (a)(1) through (a)(3) waters through the movement of energy and materials between adjacent waters and those tributaries, resulting ultimately in significant downstream effects on the chemical, physical, and biological integrity of the (a)(1) through (a)(3) waters.

#### “Other Waters”

In *Rapanos*, Justice Kennedy provides an approach for determining what constitutes a “significant nexus” that can serve as a basis for defining “waters of the United States” through regulation. Justice Kennedy

concluded 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.” *Id.* at 759 (citing *SWANCC*, 531 U.S. at 167, 172). Again, the four justices who signed on to Justice Stevens’ opinion would have upheld jurisdiction under the agencies’ existing regulations and stated that they would uphold jurisdiction under either the plurality or Justice Kennedy’s opinion. Justice Kennedy stated that wetlands should be considered to possess the requisite nexus in the context of assessing whether wetlands are jurisdictional: “if the wetlands, either alone or in combination with similarly situated [wetlands] in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780. In light of *Rapanos* and *SWANCC*, the “significant nexus” standard for CWA jurisdiction that Justice Kennedy’s opinion applied to adjacent wetlands also can reasonably be applied to other waters such as ponds, lakes, and non-adjacent wetlands that may have a significant nexus to a traditional navigable water, an interstate water, or the territorial seas.

The proposed rule includes a definition of significant nexus that is consistent with Justice Kennedy’s significant nexus standard. In characterizing the significant nexus standard, Justice Kennedy stated: “The required nexus must be assessed in terms of the statute’s goals and purposes. Congress enacted the [CWA] to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters’ . . .” 547 U.S. at 779. It clear that Congress intended the CWA to “restore and maintain” all three forms of “integrity,” 33 U.S.C. 1251(a), so if any one form is compromised then that is contrary to the statute’s stated objective. It would subvert the intent if the CWA only protected waters upon a showing that they had effects on every attribute of a traditional navigable water, interstate water, or territorial sea. Therefore, a showing of a significant chemical, physical, or biological effect should satisfy the significant nexus standard.

Justice Kennedy’s opinion provides guidance pointing to many functions of waters that might demonstrate a significant nexus, such as sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, and runoff storage. *See* 547 U.S. at 775, 779–80. Furthermore, Justice Kennedy recognized that a hydrologic connection is not necessary to establish a significant nexus, because in some cases the absence of a hydrologic connection would show the significance of a water to the aquatic system, such as retention of flood waters or pollutants that would otherwise flow downstream to the traditional navigable water or interstate water. *Id.* at 775. Finally, Justice Kennedy was clear that the requisite nexus must be more than “speculative or insubstantial” in order to be significant. *Id.* at 780. Justice Kennedy’s standard is consistent with basic scientific principles about how to restore and maintain the integrity of aquatic ecosystems.

#### Similarly Situated

For purposes of analyzing the significant nexus of tributaries and adjacent waters, tributaries that meet the proposed definition of “tributary” in a watershed draining to an (a)(1) through (a)(3) water are similarly situated, and adjacent waters that meet the proposed definition of “adjacent” in a watershed draining to an (a)(1) through (a)(3) water are similarly situated. That is reasonable because the agencies are identifying characteristics of these waters through the regulation and documenting the science that demonstrates that these defined tributaries and defined adjacent waters provide similar functions in the watershed. As stated above, the functions of the tributaries are inextricably linked and have a cumulative effect on the integrity of the downstream traditional navigable water or interstate water. There is also an obvious locational relationship between the (a)(1), (a)(2) or (a)(3) water and the streams, lakes, and wetlands that meet the definition of tributaries and the definition of adjacent waters; these waters have a clear linear relationship resulting from the simple existence of the channel itself and the direction of flow. *See* Appendix A, Scientific Evidence.

“Other waters,” on the other hand, constitute a broad range of different types of waters performing different functions. In light of the range and degree of functions performed by waters that are neither tributaries nor adjacent waters under today’s proposed rule, the agencies propose a definition of similarly situated which takes into account similarity of functions provided and situation in the landscape. Since the focus of the significant nexus standard is on protecting the chemical, physical, and biological integrity of the nation’s waters, the agencies propose to interpret the phrase “similarly situated” in terms of whether the functions provided by the particular “other waters” are similar and, therefore, whether such “other waters” are collectively influencing the chemical, physical, or biological integrity of downstream waters. There are many functions of waters that might demonstrate a significant nexus, such as sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of habitat. *See* 547 U.S. at 775, 779–80. This approach is consistent not only with the significant nexus standard, but with the science of aquatic systems.

The absence of a hydrologic connection between “other waters” and traditional navigable waters, interstate waters, or the territorial seas may demonstrate the presence of a significant nexus between such waters, as Justice Kennedy recognized in his opinion. “Other waters” frequently function alone or cumulatively with similarly situated “other waters” in the region to capture runoff, rain water, or snowmelt and thereby protect the integrity of downstream waters by reducing potential flooding or trapping pollutants that would otherwise reach a traditional navigable water or interstate water. *See id.* at 775. Such waters can be crucial in controlling flooding as well as in maintaining water quality by trapping or transforming

pollutants such as excess nutrients or sediment, for example, or retaining precipitation or snow melt, thereby reducing contamination or flooding of traditional navigable waters, interstate waters, or the territorial seas.

#### Significant Nexus

The agencies propose to define the term "significant nexus" consistent with language in *SWANCC* and *Rapanos*. The proposed definition of "significant nexus" at (c)(7) relies most significantly on Justice Kennedy's *Rapanos* opinion which recognizes that not all waters have this requisite connection to waters covered by paragraphs (a)(1) through (a)(3) of the proposed regulations. Justice Kennedy was clear that the requisite nexus must be more than "speculative or insubstantial. . . ." *Rapanos*, 547 U.S. at 780, in order to be significant and the proposed rule defines significant nexus in precisely those terms. In *Rapanos*, Justice Kennedy stated that in both the consolidated cases before the Court the record contained evidence suggesting the possible existence of a significant nexus according to the principles he identified. *See id.* at 783. Justice Kennedy concluded that "the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid." *Id.* Justice Kennedy remanded the cases because neither the agency nor the reviewing courts properly applied the controlling legal standard—whether the wetlands at issue had a significant nexus. *See id.* Justice Kennedy was clear however, that "[m]uch the same evidence should permit the establishment of a significant nexus with navigable-in-fact waters, particularly if supplemented by further evidence about the significance of the tributaries to which the wetlands are connected." *Id.* at 784.

With respect to one of the wetlands at issue in the consolidated *Rapanos* cases, Justice Kennedy stated:

In *Carabell*, No. 04–1384, the record also contains evidence bearing on the jurisdictional inquiry. The Corps noted in deciding the administrative appeal that "[b]esides the effects on wildlife habitat and water quality, the [district office] also noted that the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology. . . . The Corps' evaluation further noted that by 'eliminat[ing] the potential ability of the wetland to act as a sediment catch basin,' the proposed project 'would contribute to increased runoff and . . . accretion along the drain and further downstream in Auvase Creek.' . . . And it observed that increased runoff from the site would likely cause downstream areas to "see an increase in possible flooding magnitude and frequency."

*Id.* at 785–86. Justice Kennedy also expressed concern that "[t]he conditional language in these assessments—'potential ability,' 'possible flooding'—could suggest an undue degree of speculation." *Id.* at 786.

Justice Kennedy's observations regarding the above case provide guidance as to what it means for a nexus to be more than merely

speculative or insubstantial and inform the proposed definition of "significant nexus." It is important to note, however, that where Justice Kennedy viewed the language "more than speculative or insubstantial" to suggest an undue degree of speculation, scientists do not equate certain conditional language (such as "may" or "could") with speculation, but rather with the rigorous and precise language of science necessary when applying specific findings in another individual situation or more broadly across a variety of situations. Certain terms used in a scientific context do not have the same implications that they have in a legal or policy context. Scientists use cautionary language, such as "may" or "could," when applying specific findings on a broader scale to avoid the appearance of overstating their research results and to avoid inserting bias into their findings (such that the reader may think the results of one study are applicable in all related studies). Words like "potential" are commonly used in the biological sciences, but when viewed under a legal and policy veil, may seem to mean the same as "speculative" or "insubstantial." Instead, potential in scientific terms means ability or capability. For example, when the term "potential" is used to describe how a wetland has the potential to act as a sink for floodwater and pollutants, scientists mean that wetlands in general do indeed perform those functions, but whether a particular wetland performs that function is dependent upon the circumstances that would create conditions for floodwater or pollutants in the watershed to reach that particular wetland to retain and transform. That does not mean, however, that this nexus to downstream waters is "speculative;" indeed the wetland would be expected to provide these functions under the proper circumstances.

Definition of "Waters of the United States" Under the Clean Water Act.

#### List of Subjects

##### 33 CFR Part 328

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

##### 40 CFR Part 110

Environmental protection, Water pollution control.

##### 40 CFR Part 112

Environmental protection, Water pollution control.

##### 40 CFR Part 116

Environmental protection, Water pollution control.

##### 40 CFR Part 117

Environmental protection, Water pollution control.

##### 40 CFR Part 122

Environmental protection, Water pollution control.

##### 40 CFR Part 230

Environmental protection, Water pollution control.

##### 40 CFR Part 232

Environmental protection, Water pollution control.

##### 40 CFR Part 300

Environmental protection, Water pollution control.

##### 40 CFR Part 302

Environmental protection, Water pollution control.

##### 40 CFR Part 401

Environmental protection, Water pollution control.

Dated: March 25, 2014.

**Gina McCarthy,**

*Administrator, Environmental Protection Agency.*

Dated: March 24, 2014.

**Jo Ellen Darcy,**

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

#### Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

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

##### § 328.3 Definitions.

(a) For purposes of all sections 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 identified in paragraphs (a)(1) through (3) and (5) of this section;

(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.

(b) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) 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) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

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

(vii) Gullies and rills and non-wetland swales.

(c) Definitions—

(1) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters.”

(2) *Neighboring*. The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) 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 man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.

(6) *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.

(7) *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 (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a 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. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.

\* \* \* \* \*

#### Title 40—Protection of Environment

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

#### PART 110—DISCHARGE OF OIL

■ 3. The authority citation for part 110 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1321 *et seq.*

■ 4. Section 110.1 is amended by revising the definition of “navigable waters” to read as follows:

#### § 110.1 Definitions.

\* \* \* \* \*

*Navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition.

(v) The following features:

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

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

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

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters."

(ii) *Neighboring*. The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *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.

(vii) *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 (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

\* \* \* \* \*

## PART 112—OIL POLLUTION PREVENTION

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

**Authority:** The Clean Water Act, 33 U.S.C. 1321 *et seq.*

■ 6. Section 112.2 is amended by revising the definition of "navigable waters" to read as follows:

### § 112.2 Definitions.

\* \* \* \* \*

*Navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of all sections 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:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition —

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition.

(v) The following features:

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

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

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

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters."

(ii) *Neighboring*. The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(6) *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.

(7) *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 (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

\* \* \* \* \*

## PART 116—DESIGNATION OF HAZARDOUS SUBSTANCE

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

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

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

### § 116.3 Definitions.

\* \* \* \* \*

*Navigable waters* is defined in section 502(7) of the Act to mean "waters of the United States, including the territorial seas."

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (viii) of this definition—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this section.

(v) The following features:

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

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

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

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters."

(ii) *Neighboring*. The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *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.

(vii) *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 (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

\* \* \* \* \*

#### PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

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

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

■ 10. Section 117.1 is amended by revising the definition of "navigable waters" to read as follows:

##### § 117.1 Definitions.

\* \* \* \* \*

(i) *Navigable waters* means "waters of the United States, including the territorial seas."

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (i)(2) of this section, the term "waters of the United States" means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (i)(1)(i) through (iii) and (v) of this section;

(v) All tributaries of waters identified in paragraphs (i)(1)(i) through (iv) of this section;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (i)(1)(i) through (v) of this section; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(2) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (i)(1)(i) through (vii) of this section—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (i)(1)(i) through (iv) of this section.

(v) The following features:

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

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

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

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters.”

(ii) *Neighboring*. The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (i)(1)(i) through (v) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (i)(1)(i) through (iv) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (i)(1)(i) through (iii) 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 man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (i)(2)(iii) or (iv) of this section.

(vi) *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.

(vii) *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 (i.e., the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (i)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (i)(1)(i) through (iii) of this section.

\* \* \* \* \*

#### PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 11. The authority citation for part 122 continues to read as follows:

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

■ 12. Section 122.2 is amended by revising the definition of “Waters of the United States” and removing the note and editorial note at the end of the section.

The revision reads as follows:

#### § 122.2 Definitions.

\* \* \* \* \*

*Waters of the United States* or *waters of the U.S.* means:

(a) For purposes of all sections 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 definition, 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 identified in paragraphs (a)(1) through (3) and (5) of this definition;

(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this definition;

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this definition; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this definition.

(b) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this definition—

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.<sup>1</sup>

(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) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this definition.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

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

(vii) Gullies and rills and non-wetland swales.

(c) Definitions—

(1) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters."

(2) *Neighboring*. The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this definition.

(6) *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.

(7) *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 (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this definition.

\* \* \* \* \*

<sup>1</sup>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 (48 FR 14153, Apr. 1, 1983) continues that suspension.

**PART 230—SECTION 404(b)(1)  
GUIDELINES FOR SPECIFICATION OF  
DISPOSAL SITES FOR DREDGED OR  
FILL MATERIAL**

■ 13. The authority citation for part 230 continues to read as follows:

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

■ 14. Section 230.3 is amended by revising paragraphs (s) and (t) and adding paragraph (u) to read as follows:

**§ 230.3 Definitions.**

\* \* \* \* \*

(s) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.*

and its implementing regulations, subject to the exclusions in paragraph (t) 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 identified in paragraphs (s)(1) through (3) and (5) of this section;

(5) All tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (s)(1) through (5) of this section; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (s)(1) through (3) of this section.

(t) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (s)(1) through (7) 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) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

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

(vii) Gullies and rills and non-wetland swales.

(u) Definitions—

(1) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters.”

(2) *Neighboring*. The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (s)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (s)(1) through (3) 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 man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (t)(3) or (4) of this section.

(6) *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.

(7) *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 (i.e., the watershed that drains to the nearest water identified in paragraphs (s)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section.

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

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

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

■ 16. Section 232.2 is amended by revising the definition of “Waters of the United States” to read as follows:

#### § 232.2 Definitions.

\* \* \* \* \*

*Waters of the United States or waters* means:

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this section;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this section.

(v) The following features:

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

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

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

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters."

(ii) *Neighboring*. The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *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.

(vii) *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 (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

## PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

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

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

■ 18. Section 300.5 is amended by revising the definition of "navigable waters" to read as follows:

### § 300.5 Definitions.

\* \* \* \* \*

*Navigable waters* as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas.

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition.

(v) The following features:

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

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

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

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters."

(ii) *Neighboring*. The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *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.

(vii) *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 (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

\* \* \* \* \*

■ 19. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of "navigable waters" to read as follows:

#### Appendix E to Part 300—Oil Spill Response.

1.5 Definitions. \* \* \*

*Navigable waters* as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas.

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition.

(v) The following features:

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

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

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

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters."

(ii) *Neighboring*. The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *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.

(vii) *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 (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

\* \* \* \* \*

## PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

■ 20. The authority citation for part 302 continues to read as follows:

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

■ 21. Section 302.3 is amended by revising the definition of "navigable waters" to read as follows:

### § 302.3 Definitions.

\* \* \* \* \*

*Navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition.

(v) The following features:

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

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

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

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters.”

(ii) *Neighboring*. The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary*. The term *tributary* means a water physically characterized

by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

(vi) *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.

(vii) *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 (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

\* \* \* \* \*

## PART 401—GENERAL PROVISIONS

■ 22. The authority citation for part 401 continues to read as follows:

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

■ 23. Section 401.11 is amended by revising paragraph (l) to read as follows:

### § 401.11 General definitions.

\* \* \* \* \*

(l) The term *navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (l)(2) of this section, the term “waters of the United States” means:

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

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (l)(1)(i) through (iii) and (v) of this section;

(v) All tributaries of waters identified in paragraphs (l)(1)(i) through (iv) of this section;

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (l)(1)(i) through (v) of this section; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(2) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (l)(1)(i) through (vii) of this section—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(ii) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(iv) Ditches that do not contribute flow, either directly or through another

water, to a water identified in paragraphs (1)(1)(i) through (iv) of this section.

(v) The following features:

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

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

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

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including 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 waters.”

(ii) *Neighboring*. The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(1)(i) through (v) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area*. The term *riparian area* means an area bordering a water

where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(v) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (1)(1)(i) through (iv) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(1)(i) through (iii) 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 man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or 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 tributary, including wetlands, can be a natural, man-altered, or man-made

water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (1)(2)(iii) or (iv) of this section.

(vi) *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.

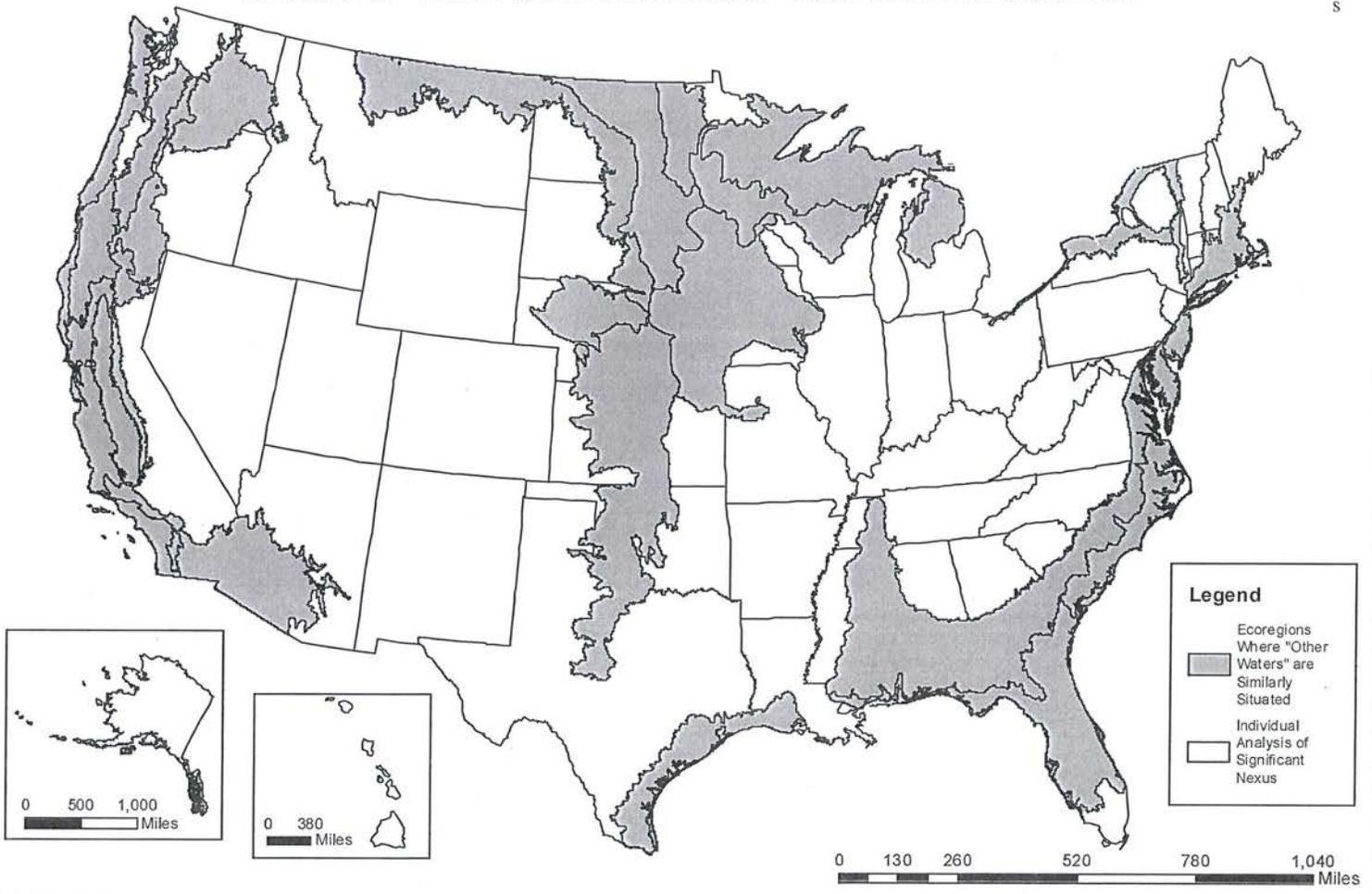
(vii) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(1)(i) through (iii) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(1)(i) through (iii) of this section.

\* \* \* \* \*

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Map A: Level III Ecoregions for Consideration Under "Other Waters" in Section III.H of Definition of "Waters of the United States" Under the Clean Water Act



Note: For display purposes, the borders for ecoregions are displayed only where "other waters" are similarly situated under Option 2 (the shaded areas). Otherwise, state boundaries are displayed.

Source: U.S. Environmental Protection Agency, "Level III Ecoregions of the Continental United States," map scale 1:7,500,000 (Corvallis, OR: U.S. EPA – National Health and Environmental Effects Research Laboratory, 2013), available at [http://www.epa.gov/wed/pages/ecoregions/level\\_iii\\_iv.htm](http://www.epa.gov/wed/pages/ecoregions/level_iii_iv.htm).

