

PROPOSED Clean Water Rule: Definition of "Waters of the United States" 40 CFR 230.3¹
PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL.

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§230.3 Definitions.

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(o) The term *waters of the United States* means:

- a. For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term "waters of the United States" includes only:
 1. Those interstate waters that are navigable-in-fact and currently used or susceptible to use in interstate or foreign commerce. These waters include the territorial seas.
 2. Relatively permanent, standing or continuously flowing streams, rivers, and lakes having an indistinguishable surface connection with navigable-in-fact waters described in a.1.²
 3. Those wetlands that directly abut and are indistinguishable from the waters described in a.1. and a.2. Wetlands are those areas 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 are indistinguishable from the waters described in a.1. and a.2.³
 4. The following are never "waters of the United States":⁴
 - A. Groundwater or channels through which waters flow intermittently or ephemerally.⁵
 - B. Ditches, conveyances, and other structures, manmade or otherwise, used for agricultural, flood abatement or storm-water control purposes.
 5. The following definitions apply to terms used under this section:
 - A. Indistinguishable means that the waters have merged so there is no clear demarcation between the two.⁶
 - B. Relatively permanent waters are those waters that flow for at least three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards, and have an indistinguishable surface connection with navigable-in-fact waters described in a.1.

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¹ The Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) have requested, pursuant to Exec. Order No. 13778, 82 Fed. Reg. 41 (Mar. 3, 2017), substantive comments from state and local governments to help develop a new "Waters of the United States" definition under the Clean Water Act (CWA) Section 404 permit program based on Supreme Court Justice Antonin Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*). This proposed definition is the result of a collaborative effort to capture Justice Scalia's plurality opinion in *Rapanos*.

² The EPA and Corps have asked about three potential approaches to the term "relatively permanent" waters: (1) Perennial plus streams with "seasonal" flow (Current practice: seasonal flow = about 3 months (varies regionally)); (2) Perennial plus streams with another measure of flow; and (3) Perennial streams only. The language in (a)(2) and (a)(5)(B) adopts the first approach, and codifies the three-month period of time as a minimal flow requirement and relies on USGS standards for determining extreme drought or precipitation. Relatively permanent waters are catered towards arid regions, especially those with snowmelt or hyporheic

connections. This approach would address concerns within the arid regions, and avoids the regional variations which often swallow the rule and provides the brightest line for the regulators and regulated public.

This definition directly addresses Justice Scalia's explanation of "relatively permanent":

"By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months – such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent. Common sense and common usage distinguish between a wash and seasonal river. Though scientifically precise distinctions between "perennial" and "intermittent" flows are no doubt available, . . . , we have no occasion in this litigation to decide exactly when the drying-up of a stream-bed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.' It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's 'intermittent' and 'ephemeral' streams, that is, streams whose flow is '[c]oming and going at intervals. . . [b]roken, fitful,' Webster's Second 1296, or 'existing only, or no longer than, a day; diurnal. . . short lived,' are not." *Rapanos*, 547 U.S. at 733 FN 5.

³ The EPA and Corps have asked about three potential approaches to the term "Continuous Surface Connection": (1) Surface connection even though non-jurisdictional feature; (2) Some degree of connectivity; or (3) Wetland must directly touch jurisdictional waters. The only approach consistent with Justice Scalia's opinion is the third approach, that the "wetland must directly touch jurisdictional waters." According to Justice Scalia, the two must be "indistinguishable" like the wetlands that literally merged with the Black River in *Riverside Bayview*.

"Since the wetlands at issue in *Riverside Bayview* actually abutted waters of the United States, the case could not possibly have held that merely 'neighboring' wetlands came within the Corps' jurisdiction. *Obiter* approval of that proposition might be inferred, however, from the opinion's quotation without comment of a statement by the Corps describing covered 'adjacent' wetlands as those 'that form the border of *or are in reasonable proximity* to other waters of the United States.' The opinion immediately reiterated, however, that adjacent wetlands could be regarded as 'the waters of the United States' in view of 'the inherent difficulties of defining precise bounds to regulable waters,' a rationale that would have no application to physically separated 'neighboring' wetlands. Given that the wetlands at issue in *Riverside Bayview* themselves "actually abut[ted] on a navigable waterway;' given that our opinion recognized that unconnected wetlands could not naturally be characterized as 'waters' at all; and given the repeated reference to the difficulty of determining where waters end and wetlands begin; the most natural reading of the opinion is that a wetlands' mere 'reasonable proximity' to waters of the United states is not enough to confer Corps jurisdiction. In any event, as discussed in our immediately following text, any possible ambiguity has been eliminated by *SWANCC*." *Rapanos*, 547 U.S. at 741 FN 10 (citations excluded).

"Therefore, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos*, 547 U.S. at 741.

Thus, the proposed verbiage does not use the term "continuous surface connection" and instead adopts the term "indistinguishable" to reduce confusion as it might be applied both to sections (a)(2) and (a)(3). In *Rapanos*, Justice Scalia only used the term "continuous surface connection" to identify the connection between a wetland and a covered water and as described in the previous paragraph it means "indistinguishable." The term "indistinguishable" was selected over "continuous surface connection" because that term is more exact and it was used by Justice Scalia to describe what he meant by "continuous surface connection." This also reduces any potential confusion with the term "continuously flowing."

This approach adopts the Corps 1987 Manual which responds to the debate over "adjacent" and precludes the EPA from regulating land or other features between the wetlands and the covered waters. US Army Corps of Engineers. *Corps of Engineers Wetlands Delineation Manual: Technical Report Y-87-1*. U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. 1987. This again avoids the regional variations which often swallow the rule and provides the brightest line for the regulators and regulated public.

⁴ (a)(4) is meant to capture all of the examples listed by Justice Scalia in *Rapanos* which are not "Waters of the United States." We request that the EPA and Corps include in the preamble to their rule Justice Scalia's list of exclusions, as well as those examples provided in individual comment letters to help illustrate various scenarios. This will provide necessary clarity and intent during implementation to show clearly what is not "Waters of the United States". The list as provided by Justice Scalia's plurality in *Rapanos* includes:

Ditches, including roadside ditches, manmade ditches, and irrigation ditches; Drains; Channels that provide only drainage, such as from rainfall; Conduits; Highly artificial, manufactured, enclosed conveyance systems; Discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, main, pipe, hydrant, machinery, building, and other appurtenances and incidents of systems of water works; Ephemeral streams; Wet meadows; Storm sewers; Culverts; Directional sheet flow during storm events; Drain tiles; Storm drains systems; Man-made drainage ditches; Typically dry land features such as arroyos, coulees, washes, and channels; Transitory puddles; Floods and inundations; and Intrastate waters, whether navigable or not.

⁵ Groundwater should include groundwater drained through subsurface drainage systems and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters.

⁶ This definition directly addresses Justice Scalia's explanation for when wetlands are covered by the rule:

"Therefore, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in SWANCC." *Rapanos*, 547 U.S. at 741.