Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of "Waters of the United States"

U.S. Environmental Protection Agency

and

Department of the Army

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Appendices are separate

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Acronyms

Agencies	U.S. Environmental Protection Agency and the Department of the Army
AJD	Approved Jurisdictional Determination
Army	Department of the Army
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CFR	Code of Federal Regulations
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
DOI	Department of Interior
DOT	Department of Transportation
DWSRF	Drinking Water State Revolving Fund
EA	Economic Analysis
E.O.	Executive Order
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act
FY	Fiscal Year
ICIS	Integrated Compliance Information System
ICR	Information Collection Request
JD	Jurisdictional Determination
MS4	Municipal Separate Storm Sewer System
NEPA	National Environmental Policy Act
NHD	National Hydrography Dataset
NOAA	National Oceanic and Atmospheric Administration
NPDES	National Pollutant Discharge Elimination System
NRCS	Natural Resources Conservation Service
NWI	National Wetlands Inventory
OPA	Oil Pollution Act
ORM2	Operation and Maintenance Business Information Link, Regulatory Module
Rapanos	*Rapanos v. United States*, 547 U.S. 715 (2006)
RPA	Resource and Programmatic Assessment
RCRA	Resource Conservation and Recovery Act
SDWA	Safe Drinking Water Act
SWANCC	*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001)

TAS	Treatment in a Manner Similar to a State
TNW	Traditional Navigable Water
TMDL	Total Maximum Daily Load
USDA	U.S. Department of Agriculture
USCG	U.S. Coast Guard
USFWS	U.S. Fish and Wildlife Service
USGS	U.S. Geological Survey

I. INTRODUCTION

On February 28, 2017, the President of the United States issued Executive Order (E.O.) 13778 directing the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) ("the agencies") to reconsider the scope of the term "waters of the United States." Consistent with the E.O., the agencies are now finalizing a revised definition of "waters of the United States." The Clean Water Act (CWA) prohibits the discharge of pollutants to "navigable waters," defined in the Act itself as "waters of the United States, including the territorial seas," except in compliance with the Act. Thus, "waters of the United States" is a foundational term establishing the jurisdictional scope of the CWA regulatory programs.

In the Navigable Waters Protection Rule revising the definition of "waters of the United States," the agencies have established four categories of jurisdictional waters and defined twelve exclusions for waters and features that are not subject to jurisdiction under the CWA. The categories of jurisdictional waters include the territorial seas and traditional navigable waters (TNWs); tributaries; lakes, ponds, and impoundments of jurisdictional waters; and adjacent wetlands. The final rule excludes from the definition of "waters of the United States" certain waters and features, such as ephemeral features, certain ditches, prior converted cropland, and waste treatment systems.

This Resource and Programmatic Assessment (RPA) complements the Economic Analysis (EA) for the final rule and describes the agencies' assessment of the potential effects of the revised definition on the federal regulation of aquatic resources across the country, as well as the potential effects of the revised definition on CWA programs and certain other programs under other federal statutes. The RPA also provides snapshots of the applicable regulatory and legal framework currently in place in states and some tribes to provide context for how aquatic resources are regulated. The two documents together present an assessment of the final rule's potential impacts. The agencies have not relied upon the information presented in the RPA and EA as an independent basis for their revised definition of "waters of the United States."

In this RPA, the agencies evaluate the way in which the revised definition addresses categories of aquatic resources across the country. On October 22, 2019, the agencies published the 2019 Rule, which repealed the 2015 "Clean Water Rule: Definition of 'Waters of the United States'" (hereafter, the "2015 Rule") and recodified the pre-2015 regulations which include the 1986 and 1988 defining "waters of the United States," as well as the 1993 regulation that included prior converted cropland. The 2019 Rule became effective on December 23, 2019.[1] The pre-2015 Rule regulatory structure remained in effect in a majority of the states given the legal challenges to the 2015 Rule. In this document, references to the baseline of the 2019 Rule are intended to mean the 2019 Rule as that rule is and has been implemented consistent with Supreme Court decisions and informed by applicable agency guidance and longstanding agency practice; the term "2019 Rule" is a shorthand for the sake of simplicity.

[1] 84 FR 56626 (October 22, 2019).

As described in Chapter II, the agencies conducted two analyses to evaluate the potential change in the geographic scope of CWA jurisdiction.[2] In one analysis for the proposed rule, despite prior administration positions that it was not possible to map the national scope of CWA jurisdictional waters with any accuracy, the agencies attempted to use publicly-available data from national datasets (the National Hydrography Dataset at High Resolution and the National Wetlands Inventory) in an effort to assess the potential extent of types of waters whose jurisdictional status might change as a result of a change in the definition of "waters of the United States." While the National Hydrography Dataset (NHD) and National Wetlands Inventory (NWI) datasets are widely used and recognized as the most comprehensive national datasets of their kind, they nonetheless have technical limitations that present significant challenges for the purpose of determining potential effects of the final rule with regard to the baseline, as more fully described in Chapter II and in the preamble to the final rule. Therefore, the agencies did not attempt to use these datasets to assess the potential effects of the final rule.

In a second analysis, the agencies examined data records in the U.S. Army Corps of Engineers' (Corps) Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database that documents Corps decisions regarding the jurisdictional status of various aquatic resource types (*i.e.*, jurisdictional determinations, or JDs). The aquatic resource types used in ORM2 generally track the *Rapanos* Guidance (*Rapanos v. United States*, 547 U.S. 715 (2006)) but do not directly correlate to the terms used in the final rule. Nevertheless, the agencies examined the ORM2 data through the lens of the revised definition of "waters of the United States" in an effort to assess the potential differences between the 2019 Rule baseline and the final rule.

In Chapter III, the agencies describe existing state and tribal authorities and programs, recognizing that under current practice states and tribes may already address waters potentially affected by the revised definition, may develop or expand programs to cover certain waters not regulated under the final rule, or may choose not to regulate certain waters. These programs are characterized generally across all states and certain tribes. In addition, the agencies attempted to capture the breadth of individual state and certain tribal programs in Appendices A and B of this document.

In Chapter IV, the agencies have indicated where changes in the definition of "waters of the United States" could affect CWA programs and other statutory programs. Some CWA programs are implemented by the federal government, and others are implemented by state or tribal governments where the CWA provides for the state or tribe to administer those programs. The RPA assesses potential effects of the revised definition of "waters of the United States" on the core CWA regulatory programs that depend on the scope of CWA jurisdiction as implemented through that definition—including section 303(c) water quality standards; section 303(d) impaired waters and total maximum daily loads; section 311 oil spill prevention, preparedness and response programs; section 401 state and tribal water quality certification programs; section 402 National Pollutant Discharge Elimination System (NPDES) permit programs; and section 404 dredged and fill permit programs.

[2] The Economic Analysis draws on the same aquatic resource assessment as the RPA and uses it as a baseline for analyzing costs and benefits of the final rule.

Finally, in Chapter V, the agencies discuss the potential effects of the revised definition of "waters of the United States" on other statutory and regulatory programs beyond the CWA.

Descriptions of state programs are provided in Appendix A, and descriptions of tribal programs are provided in Appendix B. A list of references used throughout this RPA is included in Appendix C.

II. CWA JURISDICTION OVER CERTAIN AQUATIC RESOURCES

Introduction

The agencies evaluated existing data, maps, tools, and related resources that may help describe – either quantitatively or qualitatively – the potential change in scope of aquatic resources subject to CWA jurisdiction based on a revised definition of "waters of the United States." The goal of this RPA is to describe the aquatic resources that are regulated under the CWA, and potential resource and programmatic effects that may result with a change in jurisdiction. This Chapter describes potential changes in the aquatic resources subject to federal jurisdiction, and the remaining chapters examine the potential programmatic implications of the jurisdictional change.

For the proposed rule, the agencies attempted to use publicly available data from national datasets, including the National Hydrography Dataset (NHD) and the National Wetlands Inventory (NWI), to quantitatively estimate the potential extent of aquatic resources across the country that may be subject to CWA jurisdiction. But after careful consideration, the agencies concluded that the limitations of the available datasets preclude using the information to quantify the potential extent of waters whose CWA jurisdictional status could change with any reliable accuracy. Due to these limitations, the agencies did not use the datasets to assess the potential effects of the proposed or final rule. This is consistent with the approach the agencies took during the 2015 rulemaking, where the agencies acknowledged that they "do not have maps depicting waters of the United States under either present regulatory standards or those in the final [2015] rule."[3] This remains true today; the agencies do not have maps depicting "waters of the United States" under the 2015 Rule, under the 2019 Rule, or under this final rule. Given the public interest in mapping and the desire to want to quantify the unknown, a robust description of the limitations in the available datasets is described below.

The agencies instead turned to another dataset to harvest existing information that could be used to qualitatively describe the potential change in CWA jurisdiction over aquatic resources based on the definition of "waters of the United States" finalized in this rule, with some quantitative analysis to supplement the discussion. As explained below, the agencies examined data records in the U.S. Army Corps of Engineers (Corps) database that documents Corps jurisdictional determinations (JDs) associated with various aquatic resource types. The agencies then describe the various categories of aquatic resources subject to regulation under the 2019 Rule, using approved JD (AJD) data to illustrate the relative magnitude of regulated waters across the various categories for which the agencies have data. The agencies complete the discussion by summarizing the scope of CWA jurisdiction under the final rule and indicating whether the scope of jurisdiction over aquatic resource categories is expected to remain the same or change under the final rule.

The agencies solicited comment on the analytical approaches taken and the datasets used in the analyses. The agencies also solicited comment regarding other datasets and sources that they

[3] *See Response to Comments for the Clean Water Rule*, Clean Water Rule Comment Compendium Topic 8: Tributaries, Docket ID. No. EPA-HQ-OW-2011-0880-20872, p. 442, https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20872.

could consider for the aquatic resources analyses to quantify the potential change in jurisdiction between the proposed rule and the two baselines that were applicable at the time of proposal.[4] The agencies determined that due to data limitations of the national datasets and because the jurisdictional status of certain waters (*e.g.*, ephemeral streams and some intermittent streams, and wetlands adjacent thereto) under the 2019 Rule baseline must be determined according to a case-specific significant nexus analysis, they remain unable to quantify the change in jurisdiction, and therefore must describe the change qualitatively. No additional national dataset was identified through the comment period that would enable an accurate and reliable quantification of potential changes in the scope of jurisdiction as a result of revising the definition of "waters of the United States." A summary of the comments received on the aquatic resources analyses and the agencies' response to comments regarding their analyses can be found in Section 11 of the *Response to Comments for the Navigable Waters Protection Rule: Definition of "Waters of the United States."*

Aquatic Resource Analysis

The results of the aquatic resource analysis presented in this RPA are not meant to represent quantitively waters that are or are not jurisdictional under the final rule as compared to prior jurisdictional tests. Data do not exist to calculate the extent of such waters. Instead, in this section, the agencies describe potential changes to the jurisdictional status of categories of waters under the final rule as compared to the 2019 Rule baseline. To support the discussion, the agencies examined AJD data records associated with various aquatic resource types from the Corps' database and use that data to illustrate the relative magnitude of regulated waters across the various categories for which the agencies have data. Below, the agencies describe the data used to inform the analysis, summarize the key provisions of the 2019 Rule and final rule, and then discuss the scope of CWA jurisdiction under the final rule and whether the scope of jurisdiction over aquatic resource categories is expected to remain the same or change under the final rule.

ORM2 Database

The Operation and Maintenance Business Information Link, Regulatory Module (ORM2) is the Corps' internal database that documents CWA section 404 application and permit data, including information on JDs.[5] A JD is a written Corps determination that a water is subject to regulatory jurisdiction under section 404 of the CWA (33 U.S.C. 1344) or a written determination that a water is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).[6] JDs are identified as either preliminary or approved, and both types are recorded in ORM2. An approved jurisdictional determination (AJD) is an official Corps document stating the presence or absence of "waters of the United States" on a parcel or a written statement and map identifying the limits of "waters of the United States" on a parcel. A

[4] As discussed further the "Baseline" section of this chapter, the agencies utilized two baselines for the proposed rule: the 2015 Rule and pre-2015 practice. With the 2019 Rule, the baseline became the 2019 Rule, which is equivalent to pre-2015 practice.
[5] The public interface for the Corps' ORM2 Database is *available at*: https://permits.ops.usace.army.mil/orm-public.
[6] 33 CFR 331.2.

preliminary jurisdictional determination (PJD) is a non-binding written indication that there may be "waters of the United States" on a parcel; an applicant can elect to use a PJD to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site and thus move forward assuming all waters will be treated as jurisdictional without making a formal determination.

In ORM2, the aquatic resource data records include the following categories for JDs made under the Corps' 1986 regulations that were recodified in 2019 and applicable guidance documents (*i.e.*, the baseline of the 2019 Rule):

- Traditional navigable waters
- Relatively permanent waters
- Non-relatively permanent waters
- Wetlands associated with these categories
- Uplands
- Impoundments
- Isolated waters

The isolated waters category is used in the Corps' ORM2 database to represent intrastate, nonnavigable[7] waters which do not meet the requirements under the (a)(3) category of the Corps' 1986 regulations consistent with the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). These waters may include lakes, ponds, streams, and ditches that lack a direct surface connection to other waterways, as well as non-adjacent wetlands. These waters are hereinafter referred to as "other waters." The Corps also has a category for "uplands," which is used for features that the Corps determined were uplands or dry lands on a site. The upland category also includes waters found to be non-jurisdictional due to the regulatory exclusions from the definition of "waters of the United States" or because the waters are generally considered to not be "waters of the United States" per the 1986 preamble language[8] or per the *Rapanos* Guidance developed following *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*).[9]

To examine how assertion of jurisdiction could change under the final rule compared to the 2019 Rule, the agencies reviewed CWA AJDs from ORM2[10] in fiscal years (FYs)[11] 2013 through

[7] Nonnavigable as used in this context refers to waters that are not navigable-in-fact.
[8] *See* 51 FR 41206, 41217 (Nov. 13, 1986). The EPA included identical language for waters generally considered non-jurisdictional in its preamble language for the 1988 regulation amending 40 CFR 232.2. *See* 53 FR 20764, 20765 (June 6, 1988).
[9] *See* "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*," (hereinafter "*Rapanos* Guidance"), first issued on June 6, 2007 and revised on December 2, 2008. Available at https://www.epa.gov/sites/production/files/201602/documents/cwa_jurisdiction_following_rapanos120208.pdf.
[10] This includes only those JDs completed under *Rapanos* Guidance practice, not any completed under the 2015 Rule.
[11] The fiscal year is the accounting period for the federal government which begins on October 1 and ends on September 30. The fiscal year is designated by the calendar year in which it ends; for example, fiscal year 2014 begins on October 1, 2013, and ends on September 30, 2014.

2018 that were conducted under *Rapanos* Guidance practice.[12] As the agency that manages day-to-day implementation of the CWA section 404 program, the Corps conducts tens of thousands of preliminary and approved JDs each year.[13] For other federal CWA programs, the EPA typically does not conduct JDs, except for enforcement purposes. Thus, most of the nation's JDs for CWA purposes originate from the Corps. Corps AJDs are generally valid for five years unless new information warrants a revision or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-issuance on a more frequent basis.[14] For the proposed rule, the agencies analyzed AJD data from FY2013-2017. For this final rule, the agencies updated the AJD data to include data from FY2018, the latest FY for which complete data are available.[15] During this period, the Corps conducted AJDs for 97,060 aquatic resources in the ten categories that are described below in the "2019 Rule Baseline" section of this chapter. Of these AJDs, 66,053 aquatic resources were determined to be jurisdictional. In addition, the Corps conducted 18,068 upland determinations in that same period. A single AJD may include multiple aquatic resources.

For the ORM2 analysis, the agencies generally did not review hardcopy AJD forms to analyze which aquatic resources might change jurisdictional status under the final rule. Instead, the agencies reviewed the FY2013-2018 ORM2 data to collect summary statistics regarding whether the Corps had made positive or negative JDs for the various categories of aquatic resources in ORM2.

2019 Rule Baseline

When the agencies proposed the rule that they are now finalizing, the 2015 Rule applied in 22 states, the District of Columbia, and the U.S. territories, while the pre-2015 Rule regulations remained the status quo in 28 states that had preliminary injunctions enjoining implementation of the 2015 Rule. The Resource and Programmatic Assessment for the proposed rule therefore utilized two baselines: the 2015 Rule and the pre-2015 Rule regulations. The agencies published a final rule repealing the 2015 Rule and recodifying the agencies' pre-existing regulations defining "waters of the United States" on October 22, 2019.[16] The 2019 Rule became effective on December 23, 2019 and reestablished the pre-2015 Rule regulations as the definition of "waters of the United States" nationwide. The agencies' implementation of the 2019 Rule differs from the straight text of their recodified longstanding regulations and is the same practice that was implemented nationwide prior to the 2015 Rule and during the October 9, 2015 nationwide stay of the 2015 Rule. After the nationwide stay of the 2015 Rule was lifted, the agencies also

[12] Because the 2019 Rule recodifies the pre-2015 Rule regulatory regime, as implemented pursuant to Supreme Court decisions, agency guidance, and longstanding practice, the analysis of these AJDs is appropriate. The Corps has made no changes in ORM2 specifically as a result of the rule change or to the *Rapanos* AJD form to accommodate the 2019 Rule.

[13] Only New Jersey and Michigan have assumed the CWA 404 program, although the Corps retains permitting authority over certain waters in those states.

[14] *See* Regulatory Guidance Letter 05-02 for more information. Available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1246.

[15] The Corps is still working to update data records from FY2019 in the ORM data system as of the date of signature on the final rule. The agencies are not utilizing AJD data from FY2019 in this analysis for that reason.

[16] "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules, 84 FR 56626, 84 FR 56626 (October 22, 2019).

utilized this implementation in the states where the 2015 Rule was preliminary enjoined by district courts prior to finalization of the 2019 Rule.[17]

When finalizing the 2019 Rule, the agencies clarified that they would continue to implement the scope of "waters of the United States" as they did prior to the 2015 Rule, that is, informed by applicable agency guidance documents and consistent with Supreme Court decisions (*United States v. Riverside Bayview Homes*,[18] *SWANCC*, and *Rapanos*) and longstanding agency practice. The agencies thus utilized a baseline of the 2019 Rule for assessing potential changes in CWA jurisdiction due to this final rule. When this document refers to categories used in the 2019 Rule, the agencies are specifically referring to the categories as they are implemented under the pre-2015 Rule regulatory regime that was restored by the 2019 Rule. For example, when discussing "tributary" under the 2019 Rule, the agencies are using that term as it is implemented under the recodified 1980s regulations and subsequent guidance and do not mean to use the term as it is defined in the revised definition of "waters of the United States" finalized in this rule.

The agencies currently assert jurisdiction over the following waters without need for a significant nexus analysis:

- Traditional navigable waters (TNWs);
- Wetlands adjacent to TNWs;
- Non-navigable tributaries of TNWs that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (*e.g.*, typically three months); and
- Wetlands that directly abut such tributaries.

Under the *Rapanos* Guidance, the agencies currently assess whether the following waters are jurisdictional based on a case-specific analysis to determine whether they have a significant nexus with a TNW:

[17] At the time of the finalization of the 2019 Rule, the 2015 Rule was subject to a preliminary injunction issued by the U.S. District Court for the District of North Dakota as to 12 states: Alaska, Arizona, Arkansas, Idaho, Iowa, Missouri, Montana, Nebraska, Nevada, North Dakota, South Dakota, and Wyoming. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1055–56 (D.N.D. 2015); *North Dakota v. EPA*, No. 3:15-cv-00059 (D.N.D. Sept. 18, 2018). (At the time of signature of the 2019 Rule, the applicability of the North Dakota district court's preliminary injunction to New Mexico was unclear.) The 2015 Rule was also subject to a preliminary injunction issued by the U.S. District Court for the Southern District of Georgia as to 11 more states: Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin, *see Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); a preliminary injunction issued by the U.S. District Court for the Southern District of Texas as to three states: Louisiana, Mississippi, and Texas, *see Texas v. United States EPA*, No. 3:15-cv-00162, 2018 WL 4518230 (S.D. Tex. Sept. 12, 2018); and a preliminary injunction issued by the U.S. District Court for the District of Oregon covering the state of Oregon, *Or. Cattlemen's Ass'n v. EPA*, No. 19-cv-00564 (D. Or. July 26, 2019).

[18] *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

- Non-navigable tributaries that are not relatively permanent;
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent; and
- Wetlands adjacent to, but that do not directly abut, a relatively permanent non-navigable tributary.

A significant nexus analysis performed according to the *Rapanos* Guidance assesses the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary, including consideration of hydrologic and ecologic factors, to determine if they significantly affect the chemical, physical, and biological integrity of downstream TNWs.

Relatively permanent waters are interpreted in the guidance documents as tributaries[19] that typically flow year-round or have continuous flow at least seasonally (*e.g.*, typically three months).[20] Wetlands that have a "continuous surface connection" are those that are directly abutting (*e.g.*, they are not separated by uplands, a berm, dike, or similar feature from the "water of the United States" to which they are adjacent). The agencies' *Rapanos* Guidance recognizes that the plurality's "continuous surface connection" is a "physical-connection requirement" and "does not require surface water to be continuously present between the wetland and the tributary."[21]

The agencies have long defined TNWs or (a)(1) waters as "[a]ll 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." Under the 2019 Rule, the agencies interpret TNWs to encompass tidal waters, including tidally-influenced ditches and wetlands. The agencies issued guidance in 2007 regarding TNWs that helped inform the application of pre-2015 Rule practice and is used under the 2019 Rule.[22]

The agencies' 2019 Rule includes wetlands that are adjacent to other jurisdictional waters as jurisdictional, defining "adjacent" to mean "bordering, contiguous, or neighboring." The 2019 Rule also states, "Wetlands separated from other waters of the United States by man-made dikes

[19] For purposes of the *Rapanos* Guidance, a tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water. Furthermore, a tributary, for the purposes of the guidance, is the entire reach of the stream that is of the same order (*i.e.*, from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary generally will be evaluated at the farthest downstream limit of such tributary (*i.e.*, the point the tributary enters a higher order stream), unless data indicate the flow regime at the downstream limit is not representative of the entire tributary.

[20] The agencies have further clarified that three months for seasonal flow was provided as an example in the guidance, and the agencies have flexibility under the guidance to determine what seasonally means in a specific case. For instance, in one case, the agencies found that two months of continuous flow was seasonal at a particular site in a particular region of the country. *See* "Memorandum to Assert Jurisdiction for NWP-2007-945," *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll5/id/1437.

[21] *Rapanos* Guidance at n.28.

[22] *See* "U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, Appendix D, 'Traditional Navigable Waters,'" *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2316.

or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" In the *Rapanos* Guidance, the agencies clarified that they consider wetlands adjacent if they meet one of three criteria: 1) there is an unbroken surface or shallow sub-surface connection to jurisdictional waters; 2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or 3) their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. Under the guidance, non-jurisdictional ditches and other features like swales can contribute to a surface hydrologic connection between a wetland and the water to which it is adjacent.

Under the 2019 Rule baseline, ditches are "waters of the United States" where they meet the criteria under one of the categories for jurisdiction (*e.g.*, TNWs, interstate waters, relatively permanent waters).

The *Rapanos* Guidance does not address waters not at issue in the *Rapanos* case, including interstate waters, the territorial seas, and the "(a)(3)" provision for nonnavigable, isolated, intrastate waters. The (a)(3) provision was addressed in the 2001 *SWANCC* decision and the agencies' subsequent 2003 *SWANCC* guidance.[23] Since the 2001 decision in *SWANCC*, the agencies are not aware of assertions of jurisdiction over nonnavigable, isolated, intrastate waters using the (a)(3) portion of the regulations by the agencies.

The 2019 Rule defines "waters of the United States" to include interstate waters, including interstate wetlands. Under the 2019 Rule, interstate waters are "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. In ORM2, these waters are generally captured under other categories in the approved jurisdictional determination (AJD) form, including categories for TNWs, tributaries (relatively permanent waters or non-relatively permanent waters), adjacent wetlands (those adjacent to a TNW, directly abutting a relatively permanent water, adjacent to but not directly abutting a relatively permanent water, or adjacent to non-relatively permanent waters), and impoundments of jurisdictional waters.

The CWA[24] and the agencies' 2019 Rule include "the territorial seas" as "waters of the United States." The territorial seas are also considered to be TNWs under the 2019 Rule and are portrayed as such in the ORM2 database. Under the 2019 Rule, impoundments of jurisdictional waters remain jurisdictional. Impoundments were not addressed directly by the *Riverside Bayview, SWANCC,* or *Rapanos* Supreme Court decisions.

Under the 2019 Rule, certain waters are excluded from the definition of "waters of the United States" in rule language or are generally not considered "waters of the United States" per the *Rapanos* Guidance or preamble language from the 1980s regulations, which the agencies utilize as part of implementation of the 2019 Rule. Excluded waters are non-jurisdictional and not subject to the regulatory programs of the CWA. Prior converted cropland and waste treatment systems have been excluded from the regulatory definition of "waters of the United States" since

[23] *See* 68 FR 1991, 1995 (January 15, 2003).
[24] *See* 33 U.S.C. 1362(7), defining "navigable waters" as "the waters of the United States, including the territorial seas."

1993 and 1979, respectively, and those exclusions were recodified in the 2019 Rule. In preamble language explaining the 1980s regulations[25] and in the *Rapanos* Guidance, the agencies have also interpreted certain waters to be non-jurisdictional. The 1986 and 1988 preamble language states that the agencies do not consider certain waters, such as artificially irrigated areas which would revert to upland if the irrigation ceased or certain artificial stock watering ponds created by excavating and/or diking dry land, to be "waters of the United States." The *Rapanos* Guidance states that the agencies generally will not assert jurisdiction over the following features: swales or erosional features (*e.g.*, gullies, small washes characterized by low volume, infrequent, or short duration flow) and ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. The Corps documents when they find aquatic resources under the 2019 Rule/*Rapanos* Guidance practice to be non-jurisdictional as a category in ORM2. The database, however, does not record the reason for such determinations.

The Final Rule

The agencies' revised definition of "waters of the United States" encompasses the following waters:

- The territorial seas and TNWs (paragraph (a)(1) waters);
- Tributaries (paragraph (a)(2) waters);
- Lakes, ponds, and impoundments of jurisdictional waters (paragraph (a)(3) waters); and
- Adjacent wetlands (paragraph (a)(4) waters).

With the final rule, the agencies continue to include the territorial seas and TNWs (including water which are subject to the ebb and flow of the tide) as "waters of the United States." The rule incorporates "the territorial seas" into the (a)(1) category to simplify the regulation. The final rule is consistent with how the Corps captures these types of waters on its *Rapanos* AJD form and in its ORM2 database under the 2019 Rule/*Rapanos* Guidance practice. The rule eliminates interstate waters as a separate, standalone category of jurisdictional waters. Interstate waters remain jurisdictional if they meet another category of jurisdictional waters under the final rule (territorial seas or TNWs, tributaries, lakes, ponds, and impoundments of jurisdictional waters, and adjacent wetlands). These waters did not have a separate category on the *Rapanos* AJD form or in the ORM2 database.

The agencies include tributaries of the territorial seas and TNWs as "waters of the United States" in the final rule. The rule defines "tributary" to mean:

> A river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a paragraph (a)(1) water in a typical year either directly or indirectly through one or more paragraph (a)(2) through (4) waters. A tributary must be

[25] *See* 51 FR 41206, 41217 (Nov. 13, 1986) and 53 FR 20764, 20765 (June 6, 1988).

> perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. The term tributary includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.

"Perennial" is defined as "surface water flowing continuously year-round." "Intermittent" is defined as "surface water flowing continuously during certain times of the year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts)." "Ephemeral" is defined as "surface water flowing or pooling only in direct response to precipitation (*e.g.*, rain or snow fall)." The final rule's definition of "tributary" includes only those rivers and streams with perennial and intermittent surface water flow. The agencies are using the term "reach" in the final rule to mean a section of a stream or river along which similar hydrologic conditions exist, such as discharge, depth, area, and slope.

Ditches are not a standalone category in the final rule, but they are jurisdictional if they are TNWs (including tidal ditches) or if they are tributaries. The term "tributary," as defined, includes those ditches that either relocate a tributary, are constructed in a tributary, or are constructed in adjacent wetlands as long as those ditches satisfy the flow conditions of the "tributary" definition. The term "ditch" is defined as "a constructed or excavated channel used to convey water." Portions of ditches constructed in adjacent wetlands may also be jurisdictional as adjacent wetlands under certain circumstances.

The final rule includes lakes, ponds, and impoundments of jurisdictional waters as a separate category of "waters of the United States." "Lakes and ponds, and impoundments of jurisdictional waters" is defined to mean standing bodies of open water that contribute surface water flow to a territorial sea or TNW in a typical year either directly or through one or more jurisdictional waters. A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. A lake or pond, or impoundment of a jurisdictional water is also jurisdictional if it is inundated by flooding from a territorial sea, a TNW, a tributary, or another jurisdictional lake, pond, or impoundment of a jurisdictional water in a typical year.

A lake, pond, or impoundment of a jurisdictional water is jurisdictional under the final rule if it is a TNW (*e.g.*, Lake Michigan or Lake Mead), though it would be identified as jurisdictional under that category of the final rule, not the "lakes and ponds, and impoundments of jurisdictional waters" category.

The fourth and final category of "waters of the United States" in the final rule is adjacent wetlands. The final rule defines "adjacent wetlands" as those wetlands that: (i) abut, meaning to touch at least at one point or side of, a territorial sea, a TNW, a tributary, or a lake, pond, or

impoundment of a jurisdictional water; (ii) are inundated by flooding from a territorial sea, a TNW, a tributary, or a lake, pond, or impoundment of a jurisdictional water in a typical year; (iii) are physically separated from a territorial sea, a TNW, a tributary, or a lake, pond, or impoundment of a jurisdictional water only by a natural berm, bank, dune, or similar natural feature; or (iv) are physically separated from a territorial sea, a TNW, a tributary, or a lake, pond, or impoundment of a jurisdictional water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the jurisdictional water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

The final rule lists 12 types of non-jurisdictional waters, also known as excluded waters, one of which makes clear that waters or water features that are not explicitly included as "waters of the United States" are not jurisdictional. The agencies retain two existing exclusions for prior converted cropland and waste treatment systems, though they are defining those categories in regulatory text for the first time. The agencies define "prior converted cropland" in the regulatory text as:

> Any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(16) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

Thus, the agencies are clarifying that a designation of "prior converted cropland" for purposes of the CWA no longer applies if the area has been abandoned and reverted to wetlands. In the final rule, the agencies define "waste treatment systems" to include "all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)."

Also excluded from the definition of "waters of the United States" under the final rule are groundwater, including groundwater drained through subsurface drainage systems; ephemeral features, including ephemeral streams, swales, gullies, rills, and pools; diffuse stormwater run-off and directional sheet flow over upland; ditches that are not specifically included as the territorial seas, TNWs, or tributaries, as well as those portions of ditches that have been constructed in adjacent wetlands that do not satisfy the conditions of the "adjacent wetlands" definition; artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease; artificial lakes and ponds including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as

those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of the definition of "lakes and ponds, and impoundments of jurisdictional waters;" water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel; stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off; and groundwater recharge basins, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters.

The final rule includes definitions for "high tide line," "ordinary high water mark," "snowpack," "tidal waters and waters subject to the ebb and flow of the tide," "typical year," "upland," and "wetlands." The definition for "wetlands" remains unchanged from the 2019 Rule baseline. The terms "high tide line" and "ordinary high water mark" also are unchanged from the Corps' regulation in the baseline. The agencies add the term "upland" to their regulations for the first time. "Upland" is defined in the final rule as any land area that under normal circumstances does not satisfy all three wetland factors (*i.e.*, hydrology, hydrophytic vegetation, hydric soils) identified in the definition of "wetland" and that does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.

Discussion

In this section, the agencies describe potential changes to the CWA jurisdictional status of categories of waters under the final rule. The agencies describe these potential changes compared to the 2019 Rule baseline.

Traditional Navigable Waters

Under the final rule, the agencies continue the regulation of TNWs, or (a)(1) waters, including waters subject to the ebb and flow of the tide. The final rule modifies the regulatory text compared to the baseline by adding the territorial seas to the (a)(1) category, but this change in the regulatory text does not have an effect on which waters would be regulated as TNWs. The agencies discuss in the preamble the caselaw and their principles for determining TNWs. The agencies generally determine whether a water is a TNW for purposes of a specific AJD (*i.e.*, on a "case-specific" basis) based on tests established by the courts reaching all the way back to the late 1800s. The agencies' application of those tests evolves as the case law evolves, and the agencies will continue this practice under the final rule as it applies to the baseline.

A "case-specific" determination does not designate the upper and lower extents of the TNW; a water is only designated a TNW for that one AJD and only in the specified review area. In addition, under the 2019 Rule/*Rapanos* Guidance practice some Corps Districts have chosen to document an aquatic resource as a perennial relatively permanent water instead of a case-specific TNW for ease of documentation and workload. Some AJDs for relatively permanent waters therefore are TNWs, so the ORM2 data on TNWs under the 2019 Rule/*Rapanos* Guidance practice likely underestimate the number of TNWs. However, those aquatic resources would be captured in the relatively permanent waters category described in the "Tributaries" section below. According to ORM2 data for FY13-FY18, 18,204 waters were determined to be

jurisdictional as TNWs under the *Rapanos* Guidance practice, which the 2019 Rule re-established. This number includes any tidal wetlands that the Corps has determined are (a)(1) waters, but the agencies are unable to parse out how many of these determinations may have been for such wetlands.

Interstate Waters

The final rule removes interstate waters as a separate category of "waters of the United States," which is a change from the baseline. With this change, interstate waters are jurisdictional if they meet one of the categories of "waters of the United States" under the final rule (TNWs, tributaries, lakes, ponds, impoundments of jurisdictional waters, adjacent wetlands). Under the 2019 Rule, any waters that are part of a state or international boundary or that cross state or international boundaries may be considered jurisdictional as interstate waters regardless of whether they are TNWs or actually connect to a TNW or other jurisdictional water. For example, a wetland straddling a state line would be considered jurisdictional without satisfying any of the conditions for adjacency described in either the *Rapanos* plurality or concurring opinions. The final rule may therefore reduce the number of waters, including wetlands, considered to be jurisdictional compared to the baseline where they would not meet one of the categories of jurisdictional waters under the final rule, but the agencies lack sufficient data to quantify the difference.

The *Rapanos* AJD form and the associated ORM2 data do not indicate whether a water is jurisdictional because it is an "interstate water." Instead, these waters are generally represented by other ORM2 categories of aquatic resources. Because "interstate waters" are not identified on the *Rapanos* AJD form or in the associated ORM2 data, the agencies are unable to quantify the potential change in jurisdiction under the final rule relative to the baseline with respect to interstate waters. The agencies are not aware of any database that identifies the jurisdictional status of interstate waters (including any interstate wetlands or interstate ephemeral waters) based solely on the fact that they cross state lines or any other resource that would identify these waters and therefore lack the analytical ability to perform a comparative analysis with precision.

Territorial Seas

Under the final rule, the agencies continue the regulation of "the territorial seas" as "waters of the United States," but combine the territorial seas in (a)(1) with TNWs. The agencies anticipate that there will be no change in the jurisdictional status of these waters compared to the baseline. The ORM2 database does not record under the 2019 Rule/*Rapanos* Guidance practice whether a water is a "territorial sea." Territorial seas would all be categorized as TNWs in AJDs conducted under the 2019 Rule/*Rapanos* Guidance practice.

Tributaries

The agencies include "tributaries" as categorically jurisdictional in the final rule. As finalized, tributaries may be perennial or intermittent, while ephemeral features are not considered tributaries, nor jurisdictional. To be jurisdictional as a tributary under the final rule, a river,

stream, or similar naturally occurring surface water channel must contribute surface water flow to a territorial sea or a TNW in a typical year[26] either directly or through other jurisdictional waters, through certain artificial features (including non-jurisdictional ditches, culverts, dams, or tunnels), through subterranean rivers, or through certain natural features (including non-jurisdictional ephemeral features debris piles or boulder fields). Ditches that are jurisdictional as tributaries under the rule include those constructed in a tributary or that relocate a tributary and ditches constructed in an adjacent wetland as long as those ditches satisfy the flow conditions of the tributary definition. Ditches are also jurisdictional where they meet the requirements to be TNWs. If a ditch is constructed in an adjacent wetland and wetlands within the ditch meet the definition of "adjacent wetlands," those portions may be jurisdictional as adjacent wetlands under the final rule. All other ditches are excluded from the definition of "waters of the United States."

Under the 2019 Rule, all tributaries that are relatively permanent waters and non-relatively permanent tributaries that have a significant nexus with a TNW are jurisdictional. Relatively permanent waters include waters that are perennial as well as intermittent waters that are seasonal. Non-relatively permanent waters include non-seasonal intermittent tributaries and ephemeral tributaries. Perennial relatively permanent waters are jurisdictional without the need for further analysis under the 2019 Rule. Seasonal relatively permanent waters are also jurisdictional under the 2019 Rule, but as a matter of policy the Corps conducts a significant nexus determination for such waters for documentation purposes. Under the 2019 Rule, ephemeral streams which flow only in response to precipitation and non-seasonal intermittent streams which do not have continuous flow at least seasonally are not categorically jurisdictional; rather, these non-relatively permanent waters are evaluated according to the significant nexus standard.[27] Ditches are not explicitly excluded from "waters of the United States" under the 2019 Rule; however, ditches (including roadside ditches) excavated wholly in and draining only upland and that do not carry a relatively permanent flow of water are generally not jurisdictional consistent with the *Rapanos* Guidance.

Under the baseline, the unit of analysis of the significant nexus evaluation is the individual tributary (*i.e.,* the entire reach of the stream that is of the same order) and any wetlands that are adjacent to that reach of the tributary. Note that the term "reach" under the 2019 Rule as addressed in the *Rapanos* Guidance differs from implementation of the term "reach" under the final rule. Under the 2019 Rule, the agencies implemented the term "reach" using a stream order approach, while the final rule identifies the term "reach" with respect to similar flow characteristics.

[26] In the final rule, the term *typical year* means when precipitation and other climatic variables are within the normal periodic range (*e.g.,* seasonally, annually) for a geographic area of the applicable aquatic resource based on a rolling thirty-year period.

[27] Ephemeral features, including ephemeral streams, are not categorically jurisdictional under the 2019 Rule. As described in the agencies' *Rapanos* Guidance, under the baseline the agencies conduct a significant nexus analysis for certain types of waters referred to as "non-relatively permanent waters," which includes ephemeral streams and some intermittent streams. *See Rapanos* Guidance at 7 ("'[R]elatively permanent' waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard[.]"). The *Rapanos* Guidance also notes that "[t]he agencies generally will not assert jurisdiction over . . . small washes characterized by low volume, infrequent, or short duration flow." *Id*. at 1.

Compared to the 2019 Rule, the final rule does not regulate any ephemeral streams, including those ephemeral streams found to be jurisdictional based on a case-specific significant nexus evaluation. The final rule will regulate non-seasonal intermittent tributaries that meet the definitions of "intermittent" and "tributary" under the final rule, while some intermittent streams may not have satisfied the significant nexus standard. In addition, although the final rule allows for ephemeral streams to serve as a non-jurisdictional connection between upstream and downstream jurisdictional tributaries, it does not regulate perennial or intermittent streams that flow into ephemeral features that do not contribute surface water flow in a typical year to a downstream jurisdictional water. Under the 2019 Rule and *Rapanos* Guidance practice, such upstream perennial and intermittent streams would be jurisdictional if they are relatively permanent waters regardless of the frequency of a connection to downstream jurisdictional waters, and ephemeral streams would be jurisdictional if they have a significant nexus to a TNW.

There may be some ditches that drain wetlands that would be considered jurisdictional under the 2019 Rule that will not be jurisdictional under the final rule. Under the 2019 Rule, a ditch may be jurisdictional if it is either a relatively permanent water or is a non-relatively permanent tributary that has a case-specific significant nexus to a TNW. Under the baseline, a ditch does not need to relocate a tributary, be constructed in a tributary, or be constructed in an adjacent wetland and have perennial or intermittent flow to be jurisdictional. Under the final rule, however, a ditch must satisfy one of these three criteria to be jurisdictional as a tributary.

Although the agencies are unable to quantify the change in jurisdiction for tributaries compared to the 2019 Rule on a national scale due to the lack of information on the extent of ephemeral streams and the fact that ephemeral and some intermittent streams are not categorically jurisdictional under the 2019 Rule, the agencies expect that in portions of the country where ephemeral streams are more prevalent (*e.g.*, the arid West), the change in jurisdiction for tributaries will be greater relative to other parts of the country. The agencies are also unable to quantify how many perennial or intermittent streams have downstream ephemeral reaches that do not contribute any flow to a jurisdictional water in a typical year (which likely would render such waters non-jurisdictional under the final rule).

Tributaries evaluated under the 2019 Rule/*Rapanos* Guidance practice are categorized as either relatively permanent waters or non-relatively permanent waters. In ORM2, relatively permanent waters are not further categorized into seasonal intermittent or perennial relatively permanent waters, so separating these two components of relatively permanent waters to identify a subset for the baseline would be impracticable. In ORM2 from FY13-FY18, 17,496 waters were determined to be jurisdictional as relatively permanent waters under *Rapanos* Guidance practice. The agencies anticipate that the final rule will not change the jurisdictional status of many of these relatively permanent waters, and that they will continue to be jurisdictional. There may be some relatively permanent waters that will no longer be jurisdictional under the final rule because they do not contribute surface water flow to a territorial sea or TNW in a typical year.

Data from ORM2 indicate that many but not all non-relatively permanent waters are jurisdictional under *Rapanos* Guidance practice. From FY13-FY18, 4,078 waters in ORM2 were determined to be jurisdictional non-relatively permanent waters after a case-specific significant nexus evaluation, while 2,426 non-relatively permanent waters were determined to be non-jurisdictional after a case-specific significant nexus evaluation. The agencies are unable to

approximate what percentage of currently jurisdictional non-relatively permanent waters are ephemeral streams that will no longer be jurisdictional under the revised definition of "waters of the United States." In addition, the agencies are not able to quantify the extent of non-relatively permanent waters that are intermittent tributaries that were determined to be non-jurisdictional under the 2019 Rule/*Rapanos* Guidance practice after a case specific significant nexus evaluation that could be included as "waters of the United States" under the final rule. There may be some intermittent non-relatively permanent waters found to have a significant nexus under the 2019 Rule/*Rapanos* Guidance practice that will no longer be jurisdictional under the final rule because they do not contribute surface water flow to a territorial sea or TNW in a typical year. ORM2 does not track ditches separately as a category for jurisdiction, so the data cannot be used to determine which ditches the agencies have found to be jurisdictional under the 2019 Rule/*Rapanos* Guidance practice will not be jurisdictional under the final rule.

Lakes and Ponds

Under the final rule, the agencies have combined the "lakes and ponds" category from the proposed rule with the "impoundments" category into a single category, and have provided a definition for this category of "lakes and ponds, and impoundments of jurisdictional waters." Because impoundments are their own category under the baseline, they are discussed separately in this document. The following lakes and ponds are jurisdictional under the final rule: lakes and ponds that contribute surface water flow to a territorial sea or TNW in a typical year either directly or through one or more tributaries, other jurisdictional lakes and ponds or jurisdictional impoundments, or adjacent wetlands; lakes and ponds that contribute surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature; and lakes and ponds that are inundated by flooding from a territorial sea, TNW, tributary, or jurisdictional lake, pond, or impoundment in a typical year. Open waters that are TNWs (*e.g.*, Lake Michigan, Lake Champlain) are not included in the rule's definition of "lakes and ponds, and impoundments of jurisdictional waters," but would be treated as jurisdictional TNWs under the final rule as discussed previously.

Under the 2019 Rule and *Rapanos* Guidance, TNW lakes and ponds, interstate lakes and ponds, and all relatively permanent lakes and ponds that are considered tributaries are regulated as "waters of the United States," and most would continue to be jurisdictional under the final rule. TNWs and interstate waters are discussed previously. The agencies anticipate that most relatively permanent lakes and ponds that are considered tributaries under the 2019 Rule will be jurisdictional under the final rule because they contribute surface water flow to a territorial sea or TNW in a typical year either directly or indirectly through an otherwise jurisdictional water or through a non-jurisdictional channel, artificial feature, or natural feature that conveys surface water flow downstream. In addition, under the 2019 Rule, non-relatively permanent lakes and ponds that are considered tributaries undergo a case-specific significant nexus evaluation to determine their jurisdictional status. These non-relatively permanent lakes and ponds would include both non-seasonal intermittent waters as well as ephemeral waters. Some ephemeral lake and pond tributaries may be jurisdictional under the 2019 Rule/*Rapanos* Guidance practice. Those ephemeral lakes and ponds will be non-jurisdictional under the final rule. Non-seasonal intermittent lakes and ponds that contribute surface water flow to a territorial sea or TNW in a

typical year will be jurisdictional under the final rule. Some but not all of these non-seasonal intermittent lake and pond tributaries may be jurisdictional under the 2019 Rule/*Rapanos* Guidance practice.

The final rule also includes as "waters of the United States" lakes and ponds that are inundated by flooding from a territorial sea, a TNW, a tributary, or a jurisdictional lake, pond, or impoundment in a typical year, such as certain oxbow lakes. Such waters may have been considered jurisdictional under the 2019 Rule as tributaries, although some may not be part of the stream network and may not have been considered jurisdictional under the paragraph (a)(3) "other waters category." Some of these lakes and ponds may be jurisdictional under the final rule that had not been found jurisdictional under the baseline. Thus, the agencies assume that there may be a change in jurisdiction between the 2019 Rule and the final rule, but these changes cannot be quantified.

Available FY13-FY18 data from ORM2 on the status of lakes and ponds that are tributaries under *Rapanos* Guidance practice is discussed in the "Tributaries" section above. The agencies are not able to parse out from the available AJD data under the 2019 Rule/*Rapanos* Guidance practice if the tributary at issue is a lake, a pond, or a stream, as there is no field in ORM2 for the Corps to note this status. Thus, the agencies are not able to estimate the percentage of non-relatively permanent lake and pond tributaries which are deemed jurisdictional under the baseline. In addition, as discussed above in the "Tributaries" section, the agencies do not indicate if a non-relatively permanent water is a non-seasonal intermittent water or ephemeral, further complicating any quantification of potential change for this category of waters. The agencies are also unable to quantify how many lakes and ponds are upstream of ephemeral reaches that do not contribute surface water flow to a downstream jurisdictional water in a typical year and thus would render those lakes and ponds non-jurisdictional under the final rule.

Impoundments of Jurisdictional Waters

The agencies include certain impoundments of jurisdictional waters in the definition of "waters of the United States," with some changes from the baseline. This category has been combined with lakes and ponds, which had been proposed as their own separate category, into a single category of jurisdictional waters, and the category is defined in the regulatory text. In order to be "waters of the United States" under the final rule, impoundments must be impoundments of jurisdictional waters and must contribute surface water flow to a territorial sea or TNW in a typical year either directly or through one or more jurisdictional waters or through a channelized non-jurisdictional surface water feature (*e.g.*, an ephemeral stream or non-jurisdictional ditch), through a culvert, dike, spillway or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. An impoundment of a jurisdictional water is also jurisdictional if it is inundated by flooding from a territorial sea, a TNW, or a jurisdictional lake, pond, or impoundment in a typical year. Impounded waters that are themselves TNWs (*e.g.*, Lake Mead, Lake Powell) are jurisdictional under the final rule under the (a)(1) category.

The number of impounded waters that are jurisdictional may change under the final rule because certain waters (*e.g.*, streams not meeting the final rule's definition of "tributary") that are impounded would be no longer jurisdictional and because certain impoundments of jurisdictional waters may not meet the requirement to contribute surface water flow in a typical year to a

territorial sea or TNW. For example, impoundments of those ephemeral streams determined to be jurisdictional under the 2019 Rule via a significant nexus analysis would have also been jurisdictional themselves. Such impoundments would not be jurisdictional under the final rule, however, because ephemeral streams are non-jurisdictional. Other impoundments of jurisdictional waters that are disconnected from the tributary system will not be jurisdictional under the final rule if they do not contribute surface water flow to a TNW or territorial sea in a typical year. In addition, certain other wetlands will no longer be jurisdictional under the final rule that may have been jurisdictional under the 2019 Rule. Therefore, impoundments of such wetlands would not be jurisdictional under the final rule. Under the baseline, generally, an impoundment of a "water of the United States" does not affect the water's jurisdictional status.

According to ORM2 data from FY13-FY18, 874 waters were determined to be jurisdictional impoundments under *Rapanos* Guidance practice. Based on these ORM2 data, 7.5 percent of impoundments were located on non-relatively permanent waters. However, non-relatively permanent waters as implemented under the 2019 Rule/*Rapanos* Guidance practice do not directly correlate with ephemeral streams, as previously discussed. Some percentage of non-relatively permanent waters are intermittent streams that are not seasonal but that would be included as jurisdictional waters under the final rule. ORM2 data are not available for impoundments of interstate waters that might not be jurisdictional under the final rule because interstate waters themselves were not tracked separately in ORM2 for AJDs made under the 2019 Rule/*Rapanos* Guidance. The agencies are unable to determine if any of the impoundments that were found to be jurisdictional under the baseline would no longer be considered jurisdictional because they do not contribute surface water flow in a typical year to a territorial sea or TNW. Thus, the agencies cannot quantify the change in jurisdiction of impoundments compared to the baseline.

Adjacent Wetlands

Under the final rule, the following are adjacent wetlands:

- wetlands that abut jurisdictional waters;
- wetlands that are inundated by flooding from a jurisdictional water in a typical year;
- wetlands that are physically separated by a jurisdictional water only by a natural berm, bank, dune, or similar natural feature; and
- wetlands that are physically separated from a jurisdictional water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the jurisdictional water in a typical year, such as through a culvert, flood or tide gate, pump, or similar feature.

An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

Under the 2019 Rule, wetlands that are adjacent include wetlands that are bordering, contiguous,

or neighboring a "water of the United States," including wetlands behind a natural river berm, beach dunes, constructed dikes or barriers, and the like. Not all "adjacent" wetlands are jurisdictional under the 2019 Rule. The *Rapanos* Guidance states that adjacent wetlands are evaluated differently depending on the water to which they are adjacent (TNWs, relatively permanent waters, and non-relatively permanent waters). Under the 2019 Rule, wetlands adjacent to relatively permanent waters are analyzed in different ways, depending on whether or not they are directly abutting. Adjacent wetlands that directly abut a relatively permanent water are jurisdictional without the need for further analysis under the 2019 Rule. Wetlands adjacent to but not directly abutting a relatively permanent water require a case-specific significant nexus analysis to determine their jurisdictional status under the 2019 Rule. Similarly, all wetlands adjacent to non-relatively permanent waters require a case-specific significant nexus evaluation to determine their jurisdictional status under the 2019 Rule. The 2019 Rule includes more streams (such as certain ephemeral streams) as jurisdictional tributaries than the final rule, and therefore, likely includes more wetlands adjacent to those tributaries as jurisdictional. However, because many of the additional streams the 2019 Rule regulates compared to the final rule are likely ephemeral, the jurisdictional status of wetlands adjacent to such streams must be determined according to a significant nexus test; such wetlands are not categorically jurisdictional under the 2019 Rule.

Non-abutting adjacent wetlands under the 2019 Rule include those with an unbroken surface or shallow sub-surface connection to jurisdictional waters. Some of these wetlands may be adjacent under the final rule, for example, where they are inundated by flooding from a jurisdictional water in a typical year, but others may not, including, for example, those wetlands that would be adjacent under the 2019 Rule solely due to a hydrological connection to a jurisdictional water via an unbroken shallow subsurface connection. Wetlands physically separated from jurisdictional waters by natural river berms, beach dunes, and the like are also considered adjacent under the 2019 Rule and will continue to be considered adjacent under the final rule. The 2019 Rule also includes wetlands separated from jurisdictional waters by artificial dikes, barriers, or similar artificial structures as adjacent non-abutting wetlands, regardless of whether the wetlands have a direct hydrologic surface connection to those jurisdictional waters in a typical year via a culvert, flood or tide gate, or similar feature. This differs from the final rule which requires a direct hydrologic surface connection in a typical year for such wetlands to be jurisdictional.

Finally, non-abutting adjacent wetlands under the 2019 Rule also include wetlands that are physically proximate (*i.e.*, reasonably close) to jurisdictional waters, either categorically or through a significant nexus test. Such wetlands would only be adjacent under the final rule if they are inundated in a typical year by a jurisdictional water, if they are physically separated from a jurisdictional water only by a natural berm or similar natural structure, or if they are physically separated from jurisdictional water only by an artificial structure so long as that structure allows for a direct hydrologic surface connection in a typical year. Other proximate wetlands will not be considered adjacent under the final rule that may have been found jurisdictional under the 2019 Rule. Under the 2019 Rule such non-abutting wetlands that are adjacent to TNWs are *per se* jurisdictional, while such non-abutting wetlands that are adjacent to relatively permanent waters and non-relatively permanent waters are jurisdictional only if they have significant nexus to a TNW.

Changes in the "adjacent wetlands" category compared to the baseline are due to both the revised

definition for "adjacent wetlands" in the final rule as well as revisions to the other categories of waters that are considered jurisdictional as tributaries and as jurisdictional lakes and ponds, and impoundments of jurisdictional waters. Thus, the final rule will likely include fewer wetlands as "waters of the United States" than the 2019 Rule. The final rule will likely regulate wetlands adjacent to non-seasonal intermittent tributaries that may have been found to be non-jurisdictional under the 2019 Rule after a case-specific significant nexus evaluation. The agencies are unable to quantify this change.

The agencies analyzed data in ORM2 from FY13-18 for AJDs for adjacent wetlands conducted under *Rapanos* Guidance practice, which the 2019 Rule reinstated nationwide. The ORM2 database under the 2019 Rule/*Rapanos* Guidance practice includes the following categories of adjacent wetlands: wetlands adjacent to TNWs, wetlands that directly abut relatively permanent waters, wetlands adjacent to but that do not directly abut relatively permanent waters, and wetlands adjacent to non-relatively permanent waters. Data in ORM2 from FY13-FY18 indicate that 6,170 waters were determined to be jurisdictional as wetlands adjacent to TNWs under *Rapanos* Guidance practice. For these AJDs, the agencies cannot parse out directly from available data whether a wetland is abutting or not abutting, because for TNWs, Corps staff are only required to record that the wetland is adjacent and do not specify which type of adjacency.

To assess the potential effect of the proposed rule on the CWA jurisdiction of wetlands adjacent to TNWs under *Rapanos* Guidance practice, 25 of the 38 Corps Districts examined specific AJD ORM2 data from FY13-FY17 for wetlands adjacent to TNWs (all but 38 of the 5,261 wetlands adjacent to TNWs during this time period were completed in those 25 Corps Districts) to assess whether the wetlands are abutting or not abutting a TNW. Some Corps Districts examined all AJDs for this wetland category from FY13-FY17, while other Corps Districts analyzed a random sample of AJDs. The Corps examined 3,581 of the 5,261 wetlands adjacent to TNWs in the analysis. The Districts used AJD hard copies, information in the administrative file, remote tools, as well as experience with regional resources and the specific review area in this analysis to determine whether the wetlands were adjacent and abutting, or whether they were considered neighboring or were behind a berm or similar feature. Those desktop assessments were compiled in spreadsheets and the agencies used these raw data to calculate the following statistics.

The Corps Districts found that 55 percent of wetlands adjacent to TNWs in the AJDs that were evaluated were abutting (*i.e.*, touching) and 45 percent of wetlands adjacent to TNWs in the AJDs that were evaluated were not abutting.[28] To be clear, such non-abutting wetlands may remain jurisdictional under the final rule. About 10 percent of wetlands adjacent to TNWs in the desktop assessment that do not abut the TNW have a surface connection to the TNW via a culvert or tide gate. Such wetlands would likely meet the agencies' definition of adjacent in the final rule. The agencies do not have additional information to estimate how many of the other non-abutting wetlands adjacent to TNWs would be found jurisdictional under the final rule because they are inundated by flooding from the TNW or are separated from the TNW only by a natural barrier. Because the final rule would include as adjacent wetlands those wetlands that are

[28] The agencies have placed in the docket as a "Supporting Document" a table of the Corps wetlands adjacent to TNW determinations that were evaluated listed by their Department of Army (DA) Number. Docket materials are available at https://www.regulations.gov/ (Docket ID: EPA-HQ-OW-2018-0149).

separated from the jurisdictional water only by a natural berm or similar feature, those that are separated from a jurisdictional water only by an artificial dike or similar artificial feature but that still have a direct hydrologic surface connection to that water in a typical year via a culvert or similar feature, and those that are inundated by flooding from a jurisdictional water in typical year, it is likely that fewer wetlands may be considered jurisdictional compared to the baseline. The agencies, however, are unable to quantify this change based on existing data limitations.

Under *Rapanos* Guidance practice, from FY13-FY18, 12,889 waters were determined to be jurisdictional wetlands directly abutting a relatively permanent water. The agencies do not anticipate that the final rule will change the jurisdictional status of these wetlands.

Under *Rapanos* Guidance practice, the agencies' data indicate that most wetlands that are adjacent to but that do not directly abut relatively permanent waters are found to be jurisdictional following a significant nexus analysis. In ORM2 from FY13-FY18, there were 4,495 adjacent wetlands that do not directly abut a relatively permanent water, and thus required additional jurisdictional analysis. Of these, 4,359 waters were determined to be jurisdictional because they had a significant nexus to a TNW, and 136 were found non-jurisdictional because they lacked a significant nexus – meaning approximately 97 percent of such wetlands were determined to be jurisdictional under *Rapanos* Guidance practice. Compared to the final rule, these wetlands will be jurisdictional if they are separated from the jurisdictional water only by a natural berm or similar feature, are separated from a jurisdictional water only by an artificial dike or similar artificial feature but have a direct hydrologic surface connection to that water in a typical year via a culvert or similar structure, or are inundated by flooding from a jurisdictional water in a typical year. Thus, compared to the baseline, fewer wetlands may be jurisdictional under the final rule for this category of non-abutting wetlands, as discussed previously in this section, but the agencies are not able to quantify this estimate based on the limits of the available information.

Available data from AJDs indicate that under *Rapanos* Guidance practice, most wetlands adjacent to non-relatively permanent waters have been determined to be jurisdictional after a case-specific significant nexus analysis that considered both the non-relatively permanent water and its adjacent wetlands. In ORM2 from FY13-FY18, 1,983 waters were determined to be jurisdictional wetlands adjacent to a non-relatively permanent water[29] and 181 wetlands adjacent to a non-relatively permanent water were determined to be non-jurisdictional, meaning that 91 percent of wetlands adjacent to non-relatively permanent waters were determined to be jurisdictional. The agencies are not able to further parse out which of these non-relatively permanent waters were intermittent or ephemeral or to parse out which adjacent wetlands were abutting or would meet the final rule's revised definition of "adjacent wetlands." Thus, the agencies are unable to quantify what the change in jurisdiction will be for this category of wetlands compared to the final rule.

Wetlands adjacent to tributaries with intermittent flow will be jurisdictional under the final rule.

[29] The non-relatively permanent waters were also determined to be jurisdictional in these cases because under *Rapanos* Guidance practice, the agencies evaluate the tributary along with any adjacent wetlands for a case-specific significant nexus.

Wetlands adjacent to ephemeral features will not be jurisdictional under the final rule. There may be some wetlands adjacent to intermittent non-relatively permanent waters that would be found non-jurisdictional under the 2019 Rule after a case-specific significant nexus evaluation that will be jurisdictional under the final rule, where such wetlands meet the final rule's definition of "adjacent wetlands." However, the agencies do not have the data to quantify such a change. Because ephemeral features and wetlands adjacent thereto are excluded under the final rule and because fewer wetlands will be considered adjacent under the final rule, compared to the baseline, the agencies anticipate fewer wetlands may be considered jurisdictional under the final rule for wetlands adjacent to non-relatively permanent waters (such as ephemeral streams).

Nonnavigable, Isolated, Intrastate Waters

Nonnavigable, isolated, intrastate waters will not be considered "waters of the United States" under the final rule. They will expressly fall into the rule's first exclusion for waters not identified in the four categories of "waters of the United States." As noted previously, since the Supreme Court's decision in 2001 in *SWANCC*, the agencies are not aware of circumstances where they have determined jurisdiction based on the (a)(3) category of the 1980s regulations, which were recodified with the 2019 Rule.

In ORM2 from FY13-FY18, 28,264 waters were determined to be non-jurisdictional non-navigable, isolated, intrastate waters under *SWANCC* Guidance practice, which the 2019 Rule re-established. Compared to the baseline, the agencies do not anticipate that there will be a change in jurisdiction for nonnavigable, isolated, intrastate waters.

Waters Excluded from the Definition of "Waters of the United States"

The final rule explicitly excludes waters that are not included in the definition of "waters of the United States." This section addresses potential effects of the final rule's exclusions compared to exclusions under the baseline and waters that are generally considered non-jurisdictional under the baseline. Where the agencies assume no changes or limited changes when comparing the exclusions identified in paragraph (b) of the final rule and those waters excluded or generally considered non-jurisdiction under the 2019 Rule, there is no further discussion. For example, many of the water features that are generally not considered "waters of the United States" under the 2019 Rule would not be included in the final rule's definition of "waters of the United States" and therefore would be excluded under paragraph (b)(1) of the revised definition. In addition, groundwater, including groundwater drained through subsurface drainage systems, is excluded in the final rule, and such groundwater is not considered a "water of the United States" under the 2019 Rule and longstanding policy of the agencies. Similarly, diffuse stormwater run-off and directional sheet flow over upland are excluded in the final rule, and such features are not considered "waters of the United States" under the 2019 Rule and longstanding policy of the agencies.

Under the 2019 Rule/*Rapanos* Guidance practice, the agencies do not record in the ORM2 database if a water is excluded from the definition of "waters of the United States" due to one of the regulatory exclusions. Such waters may be entered into the database as "uplands." However, other aquatic resources or features that the Corps determines do not meet the definition of "waters of the United States" are also categorized as "uplands" in the database. The Corps

conducted 18,068 upland determinations in FY13-18 under *Rapanos* Guidance practice, which the 2019 Rule reestablished. The agencies are unable to query ORM2 to determine how many waters have been determined to meet an exclusion from the definition of "waters of the United States" under the 2019 Rule/*Rapanos* Guidance practice and are unable to quantify the magnitude of the changes in jurisdiction due to these exclusions. Therefore, the following section is a qualitative discussion.

Ephemeral Features

The final rule excludes ephemeral features, including ephemeral streams, swales, gullies, rills, and pools, from the definition of "waters of the United States." As previously discussed, the exclusion for all ephemeral features represents a change from the 2019 Rule. For example, the 2019 Rule includes those ephemeral streams, lakes, and ponds that contribute surface water flow to downstream TNWs as jurisdictional when they have a case-specific significant nexus. Features like non-wetland swales, gullies,[30] and rills would generally be considered non-jurisdictional under the 2019 Rule because they are not tributaries or because they do not have a significant nexus to a downstream TNW. For such features that are non-jurisdictional under the baseline, the final rule's exclusion does not represent a change. The exclusion for diffuse stormwater runoff does not represent a change, as diffuse stormwater water run-off (including directional sheet flow over upland) is not considered jurisdictional under the baseline.

Ditches

All ditches that are not subject to jurisdiction as a territorial sea, TNW, or tributary, as well as those portions of ditches that have been constructed in an adjacent wetland that do not satisfy the conditions of the "adjacent wetlands" definition are excluded in the final rule. Some of the ditches that will be excluded under the final rule are generally considered non-jurisdictional under the 2019 Rule, such as ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. In addition, non-relatively permanent ditches that lack a case-specific significant nexus are also non-jurisdictional under the 2019 Rule. Thus, the ditch exclusion in the final rule does not represent a change for ditches that are non-jurisdictional under the 2019 Rule. Other ditches, however, that are excluded under the final rule may have been jurisdictional under the 2019 Rule if they crossed state lines regardless of any connection to a TNW, are relatively permanent waters, or are non-relatively permanent waters with a case-specific significant nexus to a TNW. The discussion of the change from the baseline for those ditches that are considered jurisdictional tributaries under the 2019 Rule is included in the "Tributaries" section above. Due to data limitations and the non-categorical jurisdictional treatment of certain ditches subject to a case-specific significant nexus analysis under the baseline, the agencies are unable to quantify potential changes in jurisdiction as a result of the final rule's ditch exclusion.

Prior Converted Cropland

[30] Some ephemeral streams are colloquially called "gullies." Regardless of the name they are given locally, some such ephemeral streams may have been found jurisdictional under the 2019 Rule if they crossed state lines regardless of any connection to a TNW or if they satisfied a significant nexus evaluation.

The agencies anticipate that there may be a change from the baseline for the final rule's exclusion for prior converted cropland with the codification of the "abandonment" principle, as well as changes to the categories of jurisdictional waters including the definition of "adjacent wetlands;" however, the agencies are unable to quantify what that change will be. Not all prior converted cropland that has been officially designated by U.S. Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS) has been mapped throughout the country. In addition, all land that qualifies under the Food Security Act of 1985 as prior converted cropland may not have been formally designated as such. Further, the agencies note that NRCS is statutorily prohibited from sharing data and information on program participants and their land, even with other federal agencies.[31] Therefore, the agencies cannot obtain certain information from NRCS, which may help in identifying potential effects or changes in jurisdiction. Estimates of the acreage of prior converted croplands have been made (*e.g.*, 53 million acres[32]) in the past, but the agencies cannot verify the accuracy of these estimates. In addition, the agencies have not documented in ORM2 when waters meet the prior converted cropland exclusion under the 2019 Rule/*Rapanos* Guidance practice, so no agency data exist to provide estimates on the current extent of prior converted cropland.

Finally, in order to establish a baseline and estimate the potential effect of the final rule language, the agencies would need to have estimates of the acreage of prior converted cropland that could lose the prior converted designation if it were subject to the "abandonment" principles versus the acreage of prior converted cropland that could lose the designation if it were subject to the "change in use" principles. To establish a baseline, the agencies would need data on how frequently the agencies applied these two principles in the field. In addition to being "abandoned" or having a "change in use," such areas would also need to meet the federal regulatory definition of "wetlands" as well as the definition of "waters of the United States."

The preamble to the EPA and the Corps' 1993 regulations, which the agencies utilize to implement the 2019 Rule, provides that land would lose its prior converted status if it is abandoned and it exhibits wetland characteristics (abandonment).[33] Subsequently, a 2005 Memorandum to the Field issued by the Corps and USDA stated that a certified prior converted cropland determination remains valid as long as the area is devoted to an agricultural use.[34] The memorandum further stated that if the land changes to a non-agricultural use, the prior converted determination no longer applies and a new JD is required (change in use). In that memorandum, the status of prior converted cropland that lies fallow was not clear. The change in use policy was

[31] Section 1619 of the Food, Conservation, and Energy Act of 2008 prohibits USDA, its contractors, and cooperators, from disclosing information provided by an agricultural producer or owner of agricultural land concerning the agricultural operation, farming or conservation practices, or the land itself, in order to participate in a USDA program, as well as geospatial information maintained by USDA with respect to such agricultural land or operations, subject to certain exceptions and authorized disclosures. Covered information may only be shared with other federal agencies outside USDA for specific purposes under a cooperative program, *i.e.*, not for general regulatory or enforcement purposes. *Available at* https://www.agriculture.senate.gov/imo/media/doc/110-246%20-%20Food,%20Conservation,%20And%20Energy%20Act%20Of%202008.pdf.

[32] *See* the 1993 report entitled, "Protecting America's Wetlands: A Fair, Flexible, and Effective Approach."

[33] 58 FR 45034 (August 25, 1993), *available at* https://www.loc.gov/item/fr058163/.

[34] "Memorandum to the Field: Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act," February 25, 2005. *Available at* https://prod.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_007869.pdf.

later declared unlawful by one district court because it effectively modified the 1993 preamble language without any rulemaking process.[35]

Under the baseline, prior converted cropland loses its status as an excluded water under the CWA if it is either abandoned or if it is subject to a change in use. The final rule clarifies that the only way for prior converted cropland to lose its status as an excluded water under the CWA is when the area is abandoned and has reverted to wetlands meeting the regulatory definition of "wetlands" and meets the revised definition of "adjacent wetlands." The rule further clarifies that prior converted cropland is abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. The agencies note that most prior converted cropland should not regain wetland status since it is generally manipulated to such a degree that wetland conditions would not return. As is the practice under the baseline, where wetland conditions do not return, the area is not subject to the CWA. However, where wetland conditions do return, a new JD would be required.

Under the 2019 Rule, "change in use" does not require that the area not be used for agricultural purposes at least once in the immediately preceding five years (this time requirement was only in place for the abandonment provision); change from an agricultural to a non-agricultural use could occur immediately thereby making the land potentially subject to CWA jurisdiction. In the final rule, the agencies have clarified abandonment "occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years." This clarification may result in less prior converted cropland being declared abandoned compared to the 2019 Rule.

Artificially Irrigated Areas, Artificial Lakes and Ponds, and Water-Filled Depressions

The final rule has an exclusion for artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease. The text of the exclusion changes somewhat from the 1986 and 1988 preamble language used under the 2019 Rule by adding "including fields flooded for agricultural production" and with a slight modification from "if the irrigation ceased" to "should application of irrigation water to that area cease." Despite the differences in the language for the exclusion in the final rule, the agencies anticipate that there will be no or little change as compared to the baseline.

The final rule includes an exclusion for artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of the "lakes and ponds, and impoundments of jurisdictional waters" definition in the rule. The final rule differs from waters generally considered non-jurisdictional under the 2019 Rule in a few ways, including by identifying water storage reservoirs, farm ponds, and log cleaning ponds as excluded types of artificial lakes and ponds, and does not specifically include settling basins or artificial lakes and ponds used for rice growing in this category of exclusions. Settling ponds are specifically

[35] *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010).

mentioned in the definition of "waste treatment systems" in the final rule, which are discussed below. Artificial lakes and ponds used for rice growing may be excluded under this exclusion or the exclusion for artificially irrigated areas used for agricultural production.

The final rule allows artificial lakes and ponds constructed or excavated in non-jurisdictional waters to be excluded, which represents a change from the 2019 Rule which applied the exclusion to upland. Artificial ponds and lakes constructed or excavated in newly non-jurisdictional waters will now be excluded. For example, under the final rule an artificial pond could be constructed by impounding an ephemeral stream and be excluded, but such a pond would be jurisdictional under the 2019 Rule as an impoundment if the ephemeral stream met the significant nexus test requirements to be jurisdictional under the baseline. Therefore, there are some water features that could be excluded under the final rule that theoretically could have been considered jurisdictional under the baseline for this category. The agencies are unable to quantify this change.

The final rule's exclusion for water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel differs from the text of the 1986 and 1988 preamble language used under the 2019 Rule for waters that are generally not jurisdictional. The 1986 and 1988 preamble language include additional specifications that such waters are generally non-jurisdictional unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of "waters of the United States." Although not included in the regulatory text, in the preamble to the final rule the agencies clarify that once a feature subject to this exclusion is no longer used for its original purpose, it no longer qualifies for the exclusion. Thus, the agencies do not intend for this textual change to represent a difference for such water-filled depressions. The final rule will allow for such features that are constructed or excavated in non-jurisdictional waters to be excluded, which represents a change from the 2019 Rule. Similar to artificial lakes and ponds, water-filled depressions and pits that meet the terms of the exclusion that are constructed or excavated in newly non-jurisdictional waters will be non-jurisdictional under the final rule. The agencies are unable to quantify this change.

Stormwater Control Features

The final rule excludes stormwater control features constructed in upland or in non-jurisdictional waters that convey, treat, infiltrate, or store stormwater run-off. There is no such exclusion for stormwater control features under the 2019 Rule, though some stormwater features were clearly non-jurisdictional under the 2019 Rule. Similar to some of the other exclusions, stormwater control features that meet the terms of the exclusion and are constructed in newly non-jurisdictional waters will be non-jurisdictional under the final rule. The agencies are unable to quantify this change.

Groundwater Recharge, Water Reuse, and Wastewater Recycling Structures

The final rule excludes groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters. The 1986 and 1988 preamble language utilized under the

2019 Rule does not include a similar category of waters generally considered non-jurisdictional. Such waters are likely not considered jurisdictional under the 2019 Rule unless they are connected to the tributary network or are jurisdictional impoundments, and even then, some such waters could be considered excluded under the exclusion for waste treatment systems. Where such waters are jurisdictional under the 2019 Rule, there could be a change in jurisdiction under the final rule. Similar to some of the other exclusions, structures that meet the terms of the exclusion that are constructed in newly non-jurisdictional waters will be non-jurisdictional under the final rule. The agencies are unable to quantify this change.

Waste Treatment Systems

Under the final rule, the agencies continue the exclusion for waste treatment systems but with textual changes from the baseline. The agencies have revised the text in the waste treatment system exclusion to read just "waste treatment systems" and define "waste treatment system" for the first time to include all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge). The agencies do not intend for the final rule to change the application under the 2019 Rule regarding the waste treatment systems exclusion. Thus, the agencies do not anticipate a significant change from the baseline for the exclusion for waste treatment systems, but note that if a system is located on a water whose jurisdictional status changes under the final rule, the application of the exclusion would likewise change.

Data Limitations and Uncertainties

Although the agencies have information on where they have determined on a case-by-case basis if particular waters are or are not "waters of the United States,"[36] they are not aware of any datasets that depict the jurisdictional extent of waters at any point in the long and complicated history of the definition and application of the term "waters of the United States." In addition, all data carry unavoidable uncertainties and associated limitations. The limitations and uncertainties associated with the NHD and NWI as applied to the "waters of the United States" are discussed in detail below.

NHD and NWI

Prior to publishing the proposed rule, the agencies assessed the U.S. Geological Survey's (USGS) NHD at high resolution and the U.S. Fish and Wildlife Service's (USFWS) NWI in an attempt to estimate the extent of certain water types across the country. The agencies have not updated their exploratory analyses using these datasets for the final rule but describe their attempted methodology in this Chapter and in Appendix A to the Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States."

[36] *See, e.g.*, the Corps' ORM2 database and the EPA's Clean Water Act Approved Jurisdictional Determinations website. *Available at*: https://watersgeo.epa.gov/cwa/CWA-JDs/.

The NHD and NWI datasets represent the most comprehensive national datasets of the potential location and extent of streams, rivers, lakes, ponds, and wetlands. The agencies used the NHD to attempt to represent streams and the NWI to attempt represent wetlands for the aquatic resource analysis described in this Chapter. However, even where streams and wetlands are identified in the NHD and the NWI, the maps do not depict the scope of waters regulated under the CWA.[37] In addition, the final rule draws distinctions that, while significant, cannot be distinguished even imperfectly in these datasets. For example, the final rule differentiates between intermittent and ephemeral flow for purposes of federal regulatory jurisdiction under the CWA, but the NHD does not differentiate between streams with intermittent or ephemeral flow for most of the country. Likewise, the NWI uses a different definition of wetlands than the agencies' regulatory definition and does not contain sufficient information that would allow the agencies to identify those wetlands that meet or do not meet the definition of "adjacent wetlands" under either the 2019 Rule baseline or the under the final rule, such as whether there is a natural berm between the wetland and the nearest jurisdictional water. Due to the limitations of the datasets, the agencies did not perform an analysis for the final rule using the NHD and NWI but describe each dataset in more detail below.

National Hydrography Dataset

The USGS created the NHD to assist scientists in modeling hydrologic features and for cartographic mapping purposes.[38] The NHD was not designed for regulatory purposes; rather, it is designed to be used in general mapping and in the analysis of surface water systems.[39] The NHD depicts aquatic resources such as lakes, ponds, streams, rivers, wetlands, and oceans

[37] It is the agencies' consistent position that the NHD and the NWI do not represent the scope of waters subject to CWA jurisdiction. *See, e.g.*, Letter from Nancy Stoner, Acting Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (July 28, 2014) (emphasis added), *available at* https://web.archive.org/web/20180919173837/https://science.house.gov/sites/republicans.science.house.gov/files/documents/epa_releases_maps_letter.pdf. ("[N]o national or statewide maps have been prepared by any agency, including EPA, showing the scope of waters subject to the Clean Water Act. . . . To develop maps of jurisdictional waters requires site-specific knowledge of the physical features of water bodies, and *these data are not available*[.]"); *see also* Letter from Nancy Stoner, Deputy Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (August 6, 2014), *available at* https://web.archive.org/web/20180919173837/https://science.house.gov/sites/republicans.science.house.gov/files/documents/epa_releases_maps_letter.pdf); U.S. EPA, *Mapping the Truth*, THE EPA BLOG (Aug. 28, 2014), *available at* https://blog.epa.gov/2014/08/28/mapping-the-truth/ ("While these [U.S. Geological Survey and Fish & Wildlife Service] maps are useful tools for water resource managers, they cannot be used to determine Clean Water Act jurisdiction – now or ever."); Letter from Kenneth J. Kopocis, Deputy Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (Jan. 8, 2015) ("These [USGS] maps were not prepared for the purpose of, nor do they represent, a depiction of the scope of waters protected under the Clean Water Act."); Impact of the Proposed "Waters of the United States"' Rule on State and Local Governments Before the H. Comm. on Transp. & Infrastructure and the S. Comm. on Env't & Pub. Works, 114th Cong. (2015)(testimony of Gina McCarthy, Adm'r, EPA) (stating that the NHD and NWI maps were "not used to determine jurisdiction and not intended to be used for jurisdiction," "are not relevant to the jurisdiction of the 'waters of the U.S.'," "are not consistent with how we look at the jurisdiction of the Clean Water Act," and have "nothing to do, as far as I know, with any decision concerning jurisdiction of the Clean Water Act").

[38] U.S. Geological Survey. 2014. "Frequently Asked Questions about the NHD & WBD Datasets." *See also*, Simley, Jeff. 2018. *GIS for Surface Water: Using the National Hydrography Dataset.* Redlands, CA: ESRI Press.

[39] *Id.*

throughout the United States (including many canals and ditches). NHD at high resolution is at the 1:24,000 scale[40] or higher. In Alaska, the NHD is available only at the 1:63,360 scale. Stream and river "flowlines" in NHD are characterized as "ephemeral," "intermittent," or "perennial" based on the original pre-digital mapping effort of USGS topographic maps and periodic updates from data stewards. In NHD, perennial reaches are presumed to carry water throughout the year except during drought, whereas intermittent reaches are assumed to lack flow for some duration.[41] The NHD defines ephemeral as having water only during or after a local rainstorm or heavy snowmelt, although the NHD did not start classifying some streams in the digital dataset as "ephemeral" until the 2000s.[42]Although many ephemeral streams are not mapped, those that are mapped are primarily mapped in NHD at high resolution. That said, even in the high-resolution dataset, many ephemeral streams are included in the "intermittent" category, particularly those outside of the arid West. Many, but not all, canals and ditches are also mapped in the NHD.

Despite being a useful and robust dataset for many purposes, the high resolution NHD data has been demonstrated to underrepresent the upstream-downstream extent of channel networks due to the scale of the data.[43] It does not map all surface waters and sometimes maps streams that do not exist or no longer exist on the ground (*i.e.*, it has errors of omission and commission). Smaller features would generally not be included in the NHD. The dataset also has positional inaccuracies. At high resolution, 90 percent of well-defined features are within 40 feet of their true geographic position. In addition, a designation of perennial, intermittent, or ephemeral in the NHD does not guarantee an accurate depiction of on-the-ground flow conditions. For example, a study comparing the field-verified flow regime (*i.e.*, perennial, intermittent, or ephemeral) of 105 headwater stream reaches in nine mesic forests across the contiguous United States and 178 headwater stream reaches in Oregon to the flow regime documented in various mapping resources found that high resolution NHD misclassified the flow regime 44.8 percent of the time across the mesic forest headwater reaches and 57.9 percent of the time across the Oregon headwater reaches.[44] While the USGS conducted some on-the-ground field inspection 30 to 60 years ago when creating the topographic maps from which the NHD was created, the resulting hydrographic classifications do not necessarily represent current hydrographic conditions. Misclassifications of NHD stream permanence are also known to occur among flow regime types, including field-verified perennial streams identified as ephemeral and field-verified

[40] Scale is the relationship between distance on the map and distance on the ground. If the scale were 1:24,000, for instance, then one inch on the map would represent 24,000 inches or 2,000 feet on the ground. If the scale were 1:63,360, then one inch on the map would represent 63,360 inches or one mile on the ground. See "Map Scales," available at https://pubs.usgs.gov/unnumbered/70039582/report.pdf.

[41] Definitions of terms used in the NHD and additional information on NHD features are available in the National Hydrography Dataset Feature Catalog, available at https://nhd.usgs.gov/userguide.html?url=NHD_User_Guide/Feature_Catalog/NHD_Feature_Catalog.htm.

[42] Simley, Jeff. 2006. "USGS National Hydrography Dataset Newsletter." Vol. 5, No. 4, February 2006. Available at https://www.usgs.gov/core-science-systems/ngp/national-hydrography/newsletters. *See also*, Simley, Jeff. 2015. "USGS National Hydrography Dataset Newsletter." Vol. 14, No. 6, April 2015. Available at https://www.usgs.gov/core-science-systems/ngp/national-hydrography/newsletters.

[43] *See, e.g.*, Fritz, Ken M., *et al.* 2013. "Comparing the Extent and Permanence of Headwater Streams from Two Field Surveys to Values from Hydrographic Databases and Maps. *Journal of the American Water Resources Association* 49(4) 867-882.

[44] *Id.*

ephemeral streams identified as perennial.[45] Misclassifications can occur for a variety of reasons, from changes in land use and/or climate, observational errors, errors in data transcription (from the paper files to digital files), changes in data standards and definitions, inconsistent mapping techniques, differences in source material for creating the original topographic maps, or for cartographic reasons.

The NHD is also not a regulatory dataset and does not indicate whether streams and other features are jurisdictional for CWA purposes. For example, some streams as identified in the NHD would not meet the final rule's definition of "tributary" because they are not perennial or intermittent streams, as defined in the rule, or because they do not contribute surface water flow to a territorial sea or TNW in a typical year. Prior to issuing the proposed rule, the agencies attempted to use the NHD at high resolution in a Geographic Information Systems analysis to provide estimates of the extent of selected waterbody types within the dataset, with a specific focus on NHD mapped rivers and streams identified in the dataset as ephemeral, intermittent, and perennial. The agencies also looked at the extent of unclassified rivers and streams – those rivers and streams that have not been assigned a flow permanence in the dataset – as well as canal and ditch features mapped in the dataset. Estimates of waters in NHD do not correspond to the scope of CWA jurisdiction under either the baseline or the final rule; they indicate the extent and distribution of different stream types throughout the country, as mapped in the dataset. The agencies hoped that at a high level, the dataset could provide insight on how the rule might affect jurisdictional status under the CWA but have concluded that the calculations require too many assumptions to provide accurate quantitative data; therefore, the agencies did not perform an analysis for the final rule using the NHD.

For a detailed discussion of the data limitations of the NHD for use as a standalone tool to determine CWA jurisdiction, see "Limitations of the National Hydrography Dataset at High Resolution and the National Wetlands Inventory and their use for Determining the Scope of Waters Subject to Clean Water Act Jurisdiction" in the docket for the final rule.

National Wetlands Inventory

The USFWS established the NWI to conduct a nationwide inventory of wetlands to provide biologists and others with information on the distribution and type of wetlands to aid in conservation efforts.[46] Today, NWI is used for general mapping of wetlands and deepwater habitats and for purposes of data analyses and modeling. The NWI is a mapping dataset that provides detailed information on the extent, characteristics, functions, and distribution of wetlands and deepwater habitats across the United States. These data are primarily derived from manual aerial image interpretation. The NWI is available as digital data at the 1:24,000 scale or higher throughout the country, except for large portions of Alaska (data in Alaska are at the 1:63,360 scale). Approximately 58 percent of Alaska is not currently available as digital data.

[45] *See, e.g., id*.
[46] U.S. Fish and Wildlife Service. "NWI Program Overview." Available at https://www.fws.gov/wetlands/nwi/overview.html.

Like the NHD, while the NWI is the most comprehensive national dataset of the potential extent of wetlands across the country, it has limitations. The NWI does not map all wetlands and sometimes maps wetlands that do not exist on the ground. At its best, NWI only approximates the location and boundaries of a Cowardin wetland type.[47] The NWI was not intended or designed for regulatory purposes. NWI uses the Cowardin wetland classification system, which is broader in scope than wetlands that meet the CWA regulatory definition of "wetlands." For CWA purposes, a water must have three specific factors to be classified as a wetland: hydric soils, hydrophytic vegetation, and hydrology. Specifically, the longstanding regulations define wetlands as "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."[48] The final rule uses this same definition. In addition, the wetland boundaries as mapped in NWI do not equate to wetland delineation boundaries established pursuant to the 1987 Corps wetland delineation manual.[49] To properly apply the delineation manual for CWA purposes, one must conduct on-the-ground inspections. Wetlands that meet the regulatory definition of wetlands would also need to meet additional regulatory requirements (such as the conditions for applying the term "adjacent wetlands" under either the 2019 Rule baseline or the final rule) before they would be considered "waters of the United States."

In attempt to estimate the NWI wetlands that may abut rivers, streams, lakes, and ponds mapped in the high-resolution NHD, the agencies conducted an exploratory intersection analysis of the two datasets. Because the NWI is one of the largest polygonal datasets in the nation and national analyses of the data are challenging and time-consuming, the agencies determined that they would need to rasterize (*i.e.,* convert into pixels) the NWI data so that the agencies could aggregate vegetated NWI wetlands[50] that are touching each other into one feature. The agencies converted NWI polygon features to raster cells (*i.e.,* grids of pixels) at a 30-meter resolution and then attributed features of the polygon with the maximum combined area of overlap with the raster cell to the entire cell. The agencies then associated vegetated NWI wetlands with the nearest stream category (ephemeral, intermittent, or perennial) derived from the high resolution NHD flowlines. NHD flowlines were also converted into 30-meter raster cells. All "ArtificialPath" features in NHD would have been attributed as "Other" for this analysis. However, prior to finalizing the exploratory analysis, the agencies determined that there were far too many confounders introduced at each step of the analysis such that the analytical results were

[47] Cowardin, L. M., V. Carter, F. C. Golet, and E. T. LaRoe. 1979. Classification of Wetlands and Deepwater Habitats of the United States. U.S. Fish and Wildlife Service. FWS/OBS-79/31. Washington, DC. Available at https://www.fws.gov/wetlands/Documents/Classification-of-Wetlands-and-Deepwater-Habitats-of-the-United-States.pdf.

[48] 33 CFR 328.3(b) and 40 CFR 232.2.

[49] U.S. Army Corps of Engineers. 1987. Corps of Engineers Wetlands Delineation Manual. Wetlands Research Program Technical Report Y-87-1. Department of the Army, Vicksburg, VA. *Available at* https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/4530.

[50] The agencies initially identified vegetated NWI wetlands as a potential surrogate for wetlands that may meet the CWA regulatory definition of "wetland" for the exploratory analysis. These NWI wetland types are more likely to meet the federal regulatory definition of "wetland" than non-vegetated NWI wetlands, but all three delineation factors are needed for wetlands to meet the regulatory definition and the NWI classification was not designed to include that information.

inconclusive for purposes of indicating potential changes in federal jurisdiction. For example, the grid cell size of the raster data is 30 by 30 meters, resulting in pixels representing 900 square meters or approximately 0.22 acres on the ground. The minimum size threshold for a wetland to be included in NWI is 1/20th of an acre or 0.05 acres. That means that the grid size should be large enough to capture all wetlands that are mapped in NWI; however, with raster, the NWI polygons would be converted to coarse grids, so mapped boundaries will most likely be larger than the polygon itself. In addition, the NHD flowlines would also be rasterized into 30-meter grid cells, and the raster layer may not accurately depict the actual size of the stream or river on the ground. Thus, in conducting an overlay analysis, the gridded, generalized NWI data may have captured wetlands as "intersecting" the gridded, generalized NHD flowlines which in fact may not have intersected.

In addition, the terms used in the NHD and NWI datasets are different from terms used in the longstanding regulations and the agencies' implementation, and they do not directly match the terms in the final rule. As discussed above, under the 2019 Rule terms like "relatively permanent waters" in the Corps' ORM2 database do not directly equate to NHD-identified intermittent and perennial streams. Under the final rule, the term "intermittent" does not directly correspond to definition of intermittent used by the NHD. For example, the rule includes in its definition of "intermittent" streams that receive continuous flow during certain times of the year from melting snowpack, whereas such streams would likely fall under the NHD's definition of ephemeral, which is based on the source of water flow.[51] Even if the terms did match, as described above, because the dataset includes some ephemeral streams in the intermittent classification and because a designation of perennial, intermittent, or ephemeral in the NHD does not guarantee an accurate depiction of on-the-ground flow conditions,[52] the NHD-estimated extents of perennial, intermittent, and ephemeral streams are not sufficiently precise on a national level. In addition, the NHD does not include a flow permanence characterization for features that are classified as canals or ditches in the dataset as it does for stream and river features. These problems, in addition to those discussed above, made an intersectional analysis of the two databases impracticable for performing a comparative analysis of the proposed or final rule to other definitions of "waters of the United States," including that codified in the 2019 Rule.

For a detailed discussion of the data limitations of the NWI for use as a standalone tool to determine CWA jurisdiction, see "Limitations of the National Hydrography Dataset at High Resolution and the National Wetlands Inventory and their use for Determining the Scope of Waters Subject to Clean Water Act Jurisdiction" in the docket for the final rule.

ORM2 Database

The ORM2 database used in the aquatic resource analysis discussed above does not track all the categories of "waters of the United States" under the Corps' 1986 regulations, which were recodified with the 2019 Rule. The categories in ORM2 for AJDs made under the 2019

[51] The NHD defines "intermittent" as "[c]ontains water for only part of the year, but more than just after rainstorms and at snowmelt" and "ephemeral" as "[c]ontains water only during or after a local rainstorm or heavy snowmelt." *See* https://nhd.usgs.gov/userguide.html.
[52] *See supra* at footnotes 31-33.

Rule/*Rapanos* Guidance practice are drawn primarily from the 2007 *Rapanos* AJD form.[53] The *Rapanos* AJD form was developed in coordination with the *Rapanos* Guidance following the *Rapanos* decision in 2006. The 2007 AJD form includes the category of waters at issue in *SWANCC*—nonnavigable, isolated, intrastate waters. The ORM2 database lacks a separate category for interstate waters or the territorial seas for AJDs made under the 2019 Rule/*Rapanos* Guidance practice.

For the ORM2 analysis, it is important to note the limitations of using CWA AJDs to assess potential changes in jurisdiction that would result from the final rule. First, CWA JDs, whether approved or preliminary, are typically made at the request of the landowner or project proponent and do not represent a random sample. In other words, they usually represent where landowners or project proponents want to know if jurisdictional waters are located within their properties or project sites, including but not limited to purposes of conducting dredged or fill activities. Thus, some aquatic resource types may be over or under represented in the population of CWA AJDs. Second, there may be selection bias in terms of where the Corps has available information on AJDs. A landowner or applicant can decide whether they would like an AJD—meaning the Corps makes an official determination of whether an aquatic resource is jurisdictional—or whether they would prefer to voluntarily waive or set aside questions regarding jurisdiction with the use of a PJD and thus move forward assuming all waters will be treated as jurisdictional without making a formal determination. In addition, Corps Districts across the country vary in the numbers of AJDs and PJDs they issue based on local requests. However, PJDs cannot determine that something is not a "water of the United States" and/or whether there are no "waters of the United States" on the site.[54] Thus, the agencies have determined that only AJDs were appropriate to use in the analysis described above, while recognizing that these records may not be uniformly distributed across the country.

Finally, on a national level, ORM2 data are analyzed for reasonableness; when correction is warranted, it is accomplished by Corps field project managers. Not all individual records, however, are verified and data entry errors may exist. In addition, the states of New Jersey and Michigan have assumed administration of the CWA section 404 permit program for certain waters within their states. The Corps retains administration of the section 404 permitting program for specific waters within New Jersey and Michigan. Thus, the Corps conducts AJDs for only a subset of waters within New Jersey and Michigan, which have been included in the

[53] A copy of the Corps' Approved Jurisdictional Determination Form used under the 2019 Rule/*Rapanos* Guidance implementation is available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2314.

[54] When the Corps provides a PJD, or authorizes an activity through a general or individual permit relying on a PJD, the Corps is not making a legally binding determination of any type regarding whether jurisdiction exists over the particular aquatic resource in question even though the applicant or project proponent proceeds as though the resource were jurisdictional. A PJD is "preliminary" in the sense that a recipient of a PJD can later request and obtain an AJD if that becomes necessary or appropriate during the permit process or during the administrative appeal process. *See* 33 CFR 331.2.

analysis of ORM2 data where available. The agencies did not supplement the ORM2 data with information from the state programs.[55]

Attempted Analyses

Although the agencies conducted a series of exploratory analyses for the proposed rule using the NHD at high resolution and the NWI that attempted to evaluate potential changes in the jurisdictional scope of the CWA and how such changes could affect various CWA programs,[56] the agencies ultimately concluded that the limitations of these datasets preclude their use for quantifying the extent of waters whose jurisdictional status could change under the proposed rule. For a discussion of the attempted analyses and associated data sources and methods the agencies used for the proposed rule, see Appendix A in the *Appendices to the Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States"* (Docket ID EPA-HQ-OW-2018-0149-0005). The agencies did not update these analyses for the final rule and have not relied on them for the proposed or final rule due to the data limitations discussed above and described in "Limitations of the National Hydrography Dataset at High Resolution and the National Wetlands Inventory and their use for Determining the Scope of Waters Subject to Clean Water Act Jurisdiction" available in the docket for the final rule.

[55] Dredged or fill permits issued by New Jersey and Michigan under their assumed programs are not federal section 404 permits; they are state-issued permits subject to the requirements of the CWA for "waters of the State." "Waters of the State" at a minimum encompass "waters of the United States" but may or may not be broader than "waters of the United States," as discussed further in Chapter III.

[56] In response to a Freedom of Information Act (FOIA) request to the Corps, the Corps inadvertently released an internal PowerPoint slide deck that included draft summary statistics from the agencies' exploratory analyses. The released slides included disclaimer statements regarding the deliberative nature of the document and caveats regarding limitations of the underlying NHD and NWI data. The statistics and statements in the slides do not reflect the scope of jurisdictional waters under the baseline, the proposed rule, or the final rule, nor do they accurately quantify the change in the scope of jurisdiction under the proposed or final rule relative to previous regulatory baselines. Additional information related to the attempted exploratory analyses is included in the docket for the final rule. These data were also released in response to a FOIA request.

III. THE ROLE OF STATES AND TRIBES

Introduction

The CWA provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources."[57] In addition, section 518 of the CWA authorizes the EPA to treat eligible Indian tribes with reservations in a manner similar to states (TAS) for a variety of purposes, including administering each of the principal CWA regulatory programs.[58]

States and tribes have inherent sovereign authority to establish more protective standards or limits than the federal CWA, and many, though not all, CWA programs can be authorized or assumed under state or tribal law. In addition, states and tribes may implement, establish, or modify their own programs under state or tribal law to manage and regulate "waters of the state" or "waters of the tribe" outside of CWA delegated authorities.

The final rule preserves the exclusive authority of states and tribes over more waters than under previous definitions of "waters of the United States." The following chapter describes existing state and tribal authorities and programs, recognizing that under pre-2015 Rule practice and the 2019 Rule states and tribes may already address waters potentially affected by the revised definition; may want to develop programs to cover certain waters the CWA does not regulate; and may choose to leave some waters unregulated. Further information about the CWA programs can be found in the programmatic section of this document. (The Economic Analysis separately evaluates the way in which states may respond to a change in the scope of CWA jurisdiction to assess potential costs and benefits.)

Summary of Programs in States, Territories, and the District of Columbia

Introduction

States and territories play an important role co-managing aquatic resources and implementing CWA programs. This chapter discusses existing programs and authorities that govern aquatic resources and their relationship to the definition of "waters of the United States." This chapter and Appendix A present individual overviews of current state programs, including the District of Columbia and the U.S. Territories, regarding CWA programs, definitions of state waters, the scope of state jurisdiction, and additional information on state-level regulations and/or policies that affect "waters of the state." The EPA and the U.S. Department of the Army (Army) ("the agencies") compiled this information to describe the breadth of state authorities and to provide a current picture of federal and state regulatory management of aquatic resources.

The CWA programs outlined in this chapter, including the section 303(c) water quality standards program and 303(d) impaired waters program; the section 311 oil spill and response program; the

[57] 33 U.S.C. 1251(b).
[58] *See* 33 U.S.C. 1377.

section 401 water quality certification program; the section 402 National Pollutant Discharge Elimination System (NPDES) permit program; and the section 404 permit program for the discharge of dredged or fill material rely on the definition of "navigable waters" and "waters of the United States" for program implementation. A revised definition of "waters of the United States" may have some effects on these CWA programs as implemented at the state level, as described below. However, any potential future effects will vary from state to state based on a state's independent legal authority to regulate aquatic resources beyond the scope of the CWA based on the revised definition.

Methodology

This summary draws on information from multiple sources, as well as from previous analyses undertaken by independent associations and institutions. Definitions for state and territorial waters, including wetlands, were drawn from online directories of state laws. Information on state and territorial water laws and programs was found through state and territorial agency websites, and information on the various CWA programmatic areas (sections 303, 311, 401, 402, and 404) was drawn from the CWA, applicable regulations, EPA staff and websites, various publications, and comments on the proposed rule.

Wetland-specific data on state authorities were compiled using publications from the Association of State Wetland Managers and the Environmental Law Institute.[59] These refer to state assessments of wetland programs. Information on state restrictions and legal constraints was drawn from the ELI report,[60] as well as from states themselves. Summaries of state programs provided to the agencies by the Western States Water Council and from the Association of Clean Water Administrators provided additional information on state laws and authorities, water quality-related policies, and definitions.

These summaries were shared with state and territorial agencies for corrections prior to the proposed rule.[61] A list of references cited is included in Appendix C.

The summarized information does not change or substitute for any legal requirements. While the agencies have tried to ensure the accuracy of the information in this chapter, the obligations of

[59] ASWM, Status and Trends Report on State Wetland Programs in the United States (2015), available at https://www.aswm.org/pdf_lib/state_summaries/status_and_trends_report_on_state_wetland_programs_in_the_united_states_102015.pdf.; ELI, 2013. State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal CWA, available at https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf.

[60] While the ELI report summarizes potential limitations imposed by state law that could constrain states to regulate waters in the absence of federal regulation, commenters on the then-proposed 2015 Rule have identified numerous shortcomings and inaccuracies of the ELI analysis and results that may affect the degree to which the agencies rely upon it. *See*, *e.g.*, Comments of the Waters Advocacy Coalition on the Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act EPA-HQ-OW-2011-0880 (November 13, 2014) at 7-11. Docket ID: EPA–HQ–OW–2011–0880–14568. Available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14568.

[61] Prior to publishing the proposed rule, the agencies received responses to the summaries from 24 states and two territories. Of those responses, 25 were from environment or natural resources agencies and one was from a department of public health.

the regulated community are determined by the relevant statutes, regulations, or other legally binding requirements.[62]

State Responses to Past Jurisdictional Clarifications

Throughout the history of the CWA, court decisions as well as agency interpretations have re-interpreted the scope of "waters of the United States." Some states have responded to changes in jurisdictional scope of the CWA by adjusting their state laws and regulations. Some states have adjusted their laws to be consistent with the scope of CWA jurisdiction based on requirements in their own laws that they cannot be more stringent than federal regulations. Other states have increased regulatory requirements to address aquatic resources that were no longer regulated under the CWA.

Examples of state actions in response to court decisions can be seen following the Supreme Court decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, et al.* (*SWANCC*). The Supreme Court in *SWANCC* held that CWA jurisdiction does not extend to nonnavigable, isolated, intrastate waters, which many states wished to still cover. Prior to the *SWANCC* decision, fifteen states specifically addressed isolated waters. Within the year following that decision, two states passed laws regulating isolated waters within their states. In that same year, several other states issued new regulations or reinterpreted their existing regulations to also extend coverage over isolated waters.[63] The agencies recognize that these specific actions are not indicative of how states will respond to a change in the scope of CWA jurisdiction and that the actions of states following any revision of the "waters of the United States" definition is difficult to predict. However, these past state actions, in addition to the information on how states currently manage aquatic resources, can be useful in helping the agencies understand how aquatic resources could be regulated at a state level under the revised "waters of the United States" definition. For a more detailed discussion of potential state responses, see the Chapter II.A.3 of the EA.

Waters of the State

Each state has its own definition of "waters of the state," and many states define similar areas and aquatic resources as waters of the state. A few states also reference "waters of the United States" within their definitions of "waters of the state." All state definitions are more inclusive than past and current definitions of "waters of the United States" in at least one way; for example, most states encompass some combination of groundwater and artificial waters in their definitions of "waters of the state." As described in the state snapshots in Appendix A, states typically have very broad definitions which include waters that are not "waters of the United States" under the CWA, *i.e.* groundwater.[64] Few states that use the phrase "artificial waters"

[62] In the event of a conflict between the discussion in this document and any statute or regulation, the statue or regulations would be controlling.
[63] *See* Christie, J. & Hausmann, S., Various State Reactions to the *SWANCC* Decision (2003).
[64] For example, Illinois defines their "waters of the state" as "All accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State" 415 Ill. Comp. Stat. section 5/3.550, and Nevada defines their "waters of the state" as "All waters situation wholly or partly within or bordering upon the state, including but not limited to: all streams, lakes,

define it in their definition of "waters of the state," though it may be explained further in regulation. Very few states mention flow requirements in their definitions; the ones that do define "waters of the state" as those waters which flow perennially, seasonally, and intermittently.

Some states may include exemptions in their regulations for certain types of waters of the state, for certain industries, or for certain types of permits. Approximately half or more of the states regulate at least some waters beyond the current scope of federal CWA requirements.

All states have a definition of wetlands in their state laws and regulations. While these definitions vary widely in exact language, they all either recite, reference, incorporate, or outline similar factors as the federal definition of wetlands. Some are more inclusive than the federal definition, while others incorporate the exact federal factors of a wetland. Many states have different wetland definitions for tidal, nontidal, coastal, and freshwater wetlands.

Isolated waters are rarely specified under these definitions; however, at least twenty-six states have programs to cover all or some isolated waters.[65] The agencies do not have sufficient information at this time to conclude that only those twenty-six states regulate some or all isolated waters and recognize that other states may regulate isolated waters based on state program implementation practices that the agencies were unable to identify in their analysis of state programs.[66]

Additional State Conditions and Requirements

States retain authority under the CWA to determine what kinds of aquatic resources need to be regulated under state law in order to protect the interests of the state and their citizens. State environmental agencies and some local governments may use existing state legal authorities to address certain water resources that do not meet the definition of "waters of the United States." As noted above, approximately half or more of the states regulate at least some waters beyond the scope of federal CWA requirements. There are some state laws that constrain a state's authority to regulate more broadly than the federal "floor" set by the CWA in various respects. Whether or not a state actually regulates more broadly is not necessarily controlled by the presence or absence of state determinations that federal standards are sufficient.

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ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems, and drainage systems; and all bodies or accumulations of water, surface and underground, natural or artificial" Nev. Rev. Stat. section 445A.415.

[65] This count includes the twenty-five states that regulate the discharge of dredged and fill material into isolated waters and one additional state (Hawaii) that only regulates point source discharges to isolated wetlands.

[66] State permitting authorities for isolated waters, as referred to in this Resource and Programmatic Assessment and the Economic Analysis, mean those authorities that require permits for waters that are non-jurisdictional under the Clean Water Act. The term "isolated waters" is frequently used in state statutes and regulations, as well as in research on state regulatory authority beyond the scope of the CWA, to refer to waters that are not federally jurisdictional. These numbers were compiled from research that was conducted prior to 2015 and reflect the number of states that have permitting authority for waters that are not jurisdictional under pre-2015 practice, which was reestablished by the 2019 Rule. The agencies recognize that the term "isolated waters" may have other meanings in other contexts, but use it as a term of art in its discussion of state programs based on the frequency of its use in the sources relied on for this analysis.

Thirteen states have adopted laws that require their state regulations to parallel federal CWA regulations. Some state laws limit the application of state regulations to certain industries, certain types of permits, or certain types of resources. Such requirements exist in six states. Three of these states regulate some waters that are not considered within the scope of "waters of the United States." The remaining three states do not regulate waters beyond the scope of federal regulation. Seven states have enacted requirements that no environmental state agencies can promulgate state regulations beyond what is required under federal regulations.[67] These requirements include limits on geographic jurisdiction of state regulations to match CWA jurisdiction. Notwithstanding these limitations, in practice two of the seven states still regulate waters beyond the scope of "waters of the United States," while the other five states do not.[68]

Twenty-four states have adopted laws that require extra steps or findings of benefits in order to impose state regulations beyond federal requirements. The effects of these laws vary widely, depending on their exact requirements and how they are implemented in a given state. Some of these regulations effectively restrict state authority to regulate waters more stringently than federal CWA requirements; other "extra step" laws appear to have no noticeable restriction on state regulations that are broader in scope than federal CWA requirements. Eight of these 24 states are also included in the 13 states above that have determined that federal standards are sufficient. Of the 16 states that only have the "extra step" requirements, ten regulate some waters that are not covered by the federal CWA. The other six states with these requirements have not established regulations for waters outside the scope of the CWA.

The remaining 21 states and the District of Columbia do not appear to have any laws that address state regulations outside the scope of CWA jurisdiction. Ten of these states regulate waters beyond the scope of the CWA, while the other eleven states and the District of Columbia do not.

Some states may adjust their current practices in light of the revised definition of "waters of the United States." The EA provides an assessment of potential state responses, but the agencies are not able to predict with any precision what changes might result in state law as a result of the final rule. Additionally, the agencies are aware that there are currently, and have been in the past, bills before state legislatures to either add or repeal laws that address the scope of state regulation compared to federal requirements. While this could have an effect on the regulation of waters that are not "waters of the United States" in the future, the agencies will not speculate on the outcomes of these efforts and instead are focused in this chapter on the information that is available to the agencies at this time.

[67] The analysis of possible state responses to a revised definition of "waters of the United States" in the Potential State and Tribal Regulator Response section of the Economic Analysis focuses on these broader requirements that are likely to make it more difficult for states with such requirements to readjust their regulation of state waters in response to the final rule.

[68] It is beyond the scope of this Resource and Programmatic Assessment to analyze how states with legal limitations (*e.g.,* North Carolina and Wisconsin) may, in fact, regulate beyond the scope of CWA jurisdiction.

State Authorized Programs

The following summaries of CWA programs describe the status of state authorized programs and note where independent state programs are known. Additional information on these CWA programs is described in the respective program sections.

CWA Section 303(c) Water Quality Standards and 303(d) Impaired Waters Listing and Total Maximum Daily Load Program

All states have federal water quality standards under CWA section 303(c). Under CWA section 303(d) and the EPA's implementing regulations, states are required to assemble and evaluate all existing and readily available water quality-related data and information and to submit to the EPA every two years a list of impaired waters that require pollutant limits known as total maximum daily loads (TMDLs). For waters identified on a 303(d) list, states must establish TMDLs for all pollutants preventing or expected to prevent attainment of water quality standards.

State Oil Spill Response Programs

Many states have a program that covers at least some of the areas included in the CWA section 311 program. These programs vary from state to state in their requirements, coverage, and process. Many states have some mechanism to allow for reimbursement for oil spill cleanup from responsible parties, while most states have mechanisms for clean-up cost recovery, civil penalties, and/or trust funds to aid in cleanup.

CWA Section 401 Water Quality Certification Programs

All 50 states, the District of Columbia, and the U.S. Territories have adopted section 401 programs which provide the authority to approve, disapprove, or conditionally approve federal permits and licenses issued within their state.

State Pollutant Discharge Permitting Programs

Forty-seven states and the U.S. Virgin Islands have authority to administer all or portions of the CWA section 402 NPDES program and permits issued for "waters of the United States." States may be approved for all or some of the major components of the NPDES program: basic municipal and industrial, pretreatment, federal facilities, general permits, and sewage sludge (biosolids).

Many states issue their own discharge permits under state law that are separate from the NPDES program permits issued in their state. These state programs may regulate state waters that are not also "waters of the United States." Should federal CWA jurisdiction change, a state may continue to regulate, under state law, waters that are no longer jurisdictional as "waters of the United States." Alternatively, if the discharge is no longer into a "water of the United States," some states might terminate the permit, or modify the permit to recognize that the discharge requiring an NPDES permit is farther from a "water of the United States" that would set the

applicable water quality standards with which the permit limits would have to comply, subject to applicable anti-backsliding permit requirements.

State Dredged and Fill Permit Programs

To date only two states, New Jersey and Michigan, have assumed the CWA section 404 program, meaning that EPA has approved their administration of a state dredged and fill program in lieu of the federal section 404 program administered by the Corps and EPA for certain "waters of the United States." In addition to the section 404 program, 38 states, American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands have some form of dredged and fill permitting programs, or similar regulatory mechanisms, for state waters. These programs vary in scope and some may address waters subject to section 404 permitting while others may not. Thirty-three of those states have authority to regulate dredged and fill discharges for at least some inland waters,[69] while the other five states and the territories only have authority to issue state permits in coastal or tidal waters.[70] Of those states with permitting authority in inland waters, 25 have permitting authority for isolated waters.[71] The balance of states rely exclusively on the CWA section 401 certification program to address water quality concerns related to dredged and fill activities permitted by the Corps in both inland and coastal waters. In addition to coastal and inland authorities, the agencies recognize that all states have the authority to regulate submerged lands in their state. While some states have used these authorities in part to develop regulatory programs that address a wide scope of dredged and fill activities, others have not, or have focused those programs on areas where federal jurisdiction is unlikely to change following the final rule.[72]

States and territories that do not have state dredged and fill programs at all rely on CWA section 401 certification programs to address water quality concerns related to dredged and fill activities

[69] While some of these state dredged and fill programs cover all types of inland waters of the state, including wetlands, some are limited to certain waters, such as streams, lakes, and waters of the state which may not be jurisdictional under the CWA. Additionally, some of these state programs may solely regulate waters that will remain federal jurisdiction under the final rule. The 33 states that have explicit authority to issue permits for dredged and fill activities in inland waters—whether through a state program or through state assumption of the 404 permitting program—are California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. These are the state programs which are relied upon for the purposes of the agencies' analysis of state responses in the *Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States."*

[70] The five states with coastal or tidal programs, but no inland programs, are Alabama, Georgia, Louisiana, Mississippi, and South Carolina.

[71] This number is referring to the states that regulate the discharge of dredged and fill material in isolated waters, while the count above of twenty-six states that regulate some or all isolated wetlands includes one state that only regulates point source discharges to isolated wetlands.

[72] The agencies have included these submerged lands programs in the State Snapshots in Appendix A of this document. The agencies treated the presence of submerged lands regulatory authority similarly to coastal wetlands permitting programs for the purposes of the agencies' analysis of state responses in the *Economic Analysis for the Navigable Waters Protection Rule: Definition of 'Waters of the United States*." The presence of such authority indicates some capacity of the state to permit dredged and fill activities but is not conclusive evidence of a state's capacity to address waters that may no longer be federally jurisdictional under the final rule.

permitted by the Corps in both inland and coastal waters. Those states with state permit programs will still often rely on 401 certification programs for dredged and fill activities permitted by the Corps in those waters not covered by the state permitting program.[73] Potential effects of the final rule on 401 certifications are discussed in a later section.

About one-third of states have expressed some level of interest regarding assumption of the federal section 404 dredged and fill permit program. Some of those states have contacted the EPA and begun action at the state level to initiate the assumption process. The EPA is aware that more states may be interested in assuming the section 404 program and will work with any state that wishes to begin the process to do so.

No-Net-Loss Goals for Wetlands

Thirty-seven states have goals to protect and preserve wetlands.[74] Twenty-three states have a formal no-net-loss goal in regulation, and nine states have an informal no-net-loss goal in policy. Five states have a formal net gain/net increase goal, meaning that their wetland policies go beyond a no-net-loss goal and seeks to increase wetlands within their states. The remaining thirteen states have no such goals in place.

Conservation and Restoration Programs

Some states rely on conservation and restoration programs in lieu of or to complement CWA programs for water resource protection and management, choosing which tools to use to address different resources in different ways. Many states have noted the effectiveness of such programs at protecting aquatic resources in their state. In the comments and federalism letters that the agencies received, multiple states mentioned that programs such as best management practices, conservation plans, and cost share programs for industries such as agriculture and forestry are effective and efficient ways to ensure aquatic resources are protected without the necessity for intensive permit programs. The agencies actively work with the USDA, for example, on several legislative programs aimed at restoring wetlands and other water features. Many of these programs apply to waters beyond the scope of CWA jurisdiction.

State Comments

Several states provided pre-proposal recommendations to the agencies' public recommendations docket (Docket ID: EPA-HQ-OW-2017-0480) that opened August 28, 2017, and closed November 28, 2017.[75] Comment letters from states that were sent to the agencies as part of the federalism consultation and a summary of the agencies' March 2018 workshop with state co-

[73] Some states submitted comments on the proposed rule stating that even those states with robust permitting programs may rely on section 401 certifications due to timing, staffing, and cost considerations.
[74] President George H.W. Bush established a national goal of no net loss of wetlands in 1989. The Corps and EPA help implement that goal within the CWA section 404 program by ensuring that appropriate and practicable steps are taken to avoid, minimize, and compensate for authorized impacts to wetlands.
[75] These recommendations are available on Regulations.gov at https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0480.

regulators are available in the docket for the final rule (Docket ID: EPA-HQ-OW-2018-0149).[76] The agencies received numerous comments from states during the public comment period for the proposed rule (which was posted on the EPA's website on December 11, 2018) that opened on February 14, 2019, and closed on April 15, 2019, which are also available in the docket for the final rule (Docket ID: EPA-HQ-OW-2018-0149).[77] The agencies reviewed and used these comments to verify, supplement, and/or correct the agencies' analyses of the state programs. For a more detailed account of state comments, refer to the agencies' "Summary Report on Consultation with State, Local, and County Governments: Revised Definition of 'Waters of the United States' Final Rule" and response to comments for the final rule.

Summary of Programs on Indian Reservations

Introduction

There are 574 federally recognized Indian tribes within the United States, including 229 native tribes within the state of Alaska.[78] Over 300 of these tribes have reservation lands. Many tribes have lands that the United States holds in trust for the tribes, known as trust lands. Under the EPA's longstanding approach, and consistent with relevant judicial precedent, trust lands validly set aside for Indian tribes are considered informal reservations and have the same status as formal reservations for purposes of the agency's programs.[79] In the aggregate, the land and waters of Indian reservations comprise over 70 million acres, or 3.7 percent of the area of the contiguous 48 states (about the size of Arizona). The largest 25 tribes account for over 80 percent of the 70 million acres.[80]

This chapter discusses existing federal CWA programs and authorities, as well as tribal inherent regulatory authority, that together govern a federally recognized tribe's aquatic resources and their relationship to the definition of "waters of the United States."[81] This summary, as well as

[76] The federalism letters are available on Regulations.gov at https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0088.
[77] These comments are available on Regulations.gov at https://www.regulations.gov/docket?D=EPA-HQ-OW-2018-0149.
[78] *See* "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," February 1, 2019, 84 FR 1200; and Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Pub. L. No. 115-121, 132 Stat. 40 (2018) (To extend federal recognition to the Chickahominy Indian Tribe, the Chickahominy Indian Tribe-Eastern Division, the Upper Mattaponi Tribe, the Rappahannock Tribe, Inc., the Monacan Indian Nation, and the Nansemond Indian Tribe; and Section 2870 of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019) (To extend federal recognition to the Little Shell Tribe of Chippewa Indians of Montana).
[79] *See, e.g.*, 81 FR 30183, 30192 (May 16, 2016); 56 Fed. Reg. 64876, 64881 (December 12, 1991); 63 FR 7254, 7257-58 (February 12, 1998); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991).
[80] Source: EPA analysis of 2010 Census information at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_GCTPH1.US03&prodType=table.
[81] This summary focuses on Indian reservation lands as defined at 18 U.S.C. 1151(a), which are a subset of the broader geographic area that comprises Indian country as a whole. *See* 18 U.S.C. 1151 (a)-(c). As reflected in the summary, eligible tribes may administer CWA regulatory programs on reservation lands. Section 518 of the CWA authorizes the EPA to treat eligible Indian tribes with reservations in a manner similar to states for a variety of

Appendix B, provides a snapshot of the current status of tribes authorized to administer CWA programs, and definitions of tribal waters, as well as additional information on tribal regulations and/or policies that affect "waters of the tribe."

The agencies compiled this information to provide a current picture of federal and tribal regulatory management of aquatic resources and to understand the potential effects of a change in scope of "waters of the United States." The EPA and the Corps directly implement most of the programs under the CWA in the vast majority of Indian country. Some tribes implement CWA programs and some tribes operate aquatic resource programs under tribal law. The agencies acknowledge that because they generally implement CWA programs on tribal lands, a reduced scope of CWA jurisdiction may affect tribes differently than it may affect states. Currently, of the tribes that are eligible, most have not received treatment in a manner similar to a state status to administer CWA programs. Based on comments received during tribal consultation and engagement, many tribes may lack the capacity to administer a tribal water program under tribal law, to create a program, or to expand programs that currently exist. Other tribes may rely on the federal government for enforcement of water quality violations. Nonetheless, the final rule preserves tribal authority to choose whether or not to regulate waters that are not covered under the CWA. Any decision by the tribes to regulate waters beyond the jurisdiction of the CWA is not compelled by the statute. While the agencies cannot predict precisely how individual tribes may be affected by the revised definition of "waters of the United States," several individual tribes submitted examples and cited to the use of federal regulations and oversight to protect reservation waters, including ephemeral streams which are non-jurisdictional under the final rule.

Methodology

Information on tribal programs for this assessment was drawn from multiple sources including federal and tribal sources. In addition, the agencies added information submitted by the tribes during the public comment period and during pre-proposal tribal engagement. Information on the various CWA programmatic areas (sections 303, 311, 401, 402, and 404) was drawn from the CWA, applicable regulations, EPA staff, websites, and various publications. A list of references cited is included in Appendix C. Additional information on tribal authorities is included in Appendix B.

The summary in this section was compiled from publicly available information sources and has not been independently verified by the agencies. The summarized information does not change or substitute for any legal requirements. While the agencies have tried to ensure the accuracy of the discussion in this document, the obligations of the regulated community are determined by the relevant statutes, regulations, or other legally binding requirements.[82]

purposes, including administering each of the principal CWA regulatory programs. Therefore, tribes cannot obtain TAS under the CWA pertaining to any non-reservation Indian country or any other type of non-reservation land. Civil regulatory jurisdiction in Indian country generally lies with the federal government and tribes, not with the state.

[82] In the event of a conflict between the discussion in this document and any statute or regulation, the statute or regulation would be controlling.

"Waters of the Tribe" or "Reservation Waters"

Under well-established principles of federal Indian law, a tribe retains attributes of sovereignty over both its lands and its members.[83] Further, tribes retain the "inherent power necessary to tribal self-government and territorial management," and there is a significant territorial component to tribal power.[84] Thus, tribes may choose to establish or define "reservation waters" under tribal law. Based on publicly available information, the agencies have attempted to compile a list of tribes that have established tribal law or regulations defining "reservation waters" or "waters of the tribe" in Appendix B. The agencies recognize that Appendix B is not a complete list of tribes that have such definitions or regulations. The agencies recognize that tribes that have defined "reservation waters" may not have tribal codes in place that allow them to regulate "reservation waters" under tribal law, and even those tribes that do have such tribal laws in place may not have the capacity or resources to enforce such tribal codes. However, the agencies have undertaken this assessment to better understand how tribes currently are regulating "reservation waters" outside of the CWA.

The following examples refer to a subset of tribes that have formally defined tribal or reservations waters. Some of these tribes include "waters of the United States" in their definition of "reservation waters," and therefore implementation of the tribes' definition of "reservation waters" could change with this final rule revising the definition of "waters of the United States."

- The Blackfeet Nation has defined "reservation waters" in their Aquatic Lands Protection Ordinance as: "(1) All naturally occurring bodies of water within the exterior boundaries of the Reservation regardless of alteration by man, including but not limited to lakes, rivers, streams (including intermittent streams), mudflats, wetlands, springs, sloughs, potholes and ponds, and any bodies of water classifiable as 'waters of the United States' under federal law; (2) Tributaries of waters identified in subpart (1) above; and (3) Wetlands."[85]

- The Confederated Salish and Kootenai Tribes of the Flathead Reservation have defined "reservation waters" in their Aquatic Lands Conservation Ordinance as: "(1) All naturally occurring bodies of water with the exterior boundaries of the Reservation regardless of alteration by man, including but not limited to lakes, rivers, streams (including intermittent streams) mudflats, wetlands, sloughs, potholes and ponds from which fish and wildlife are or could be taken, but does not include wholly manmade water bodies; (2) Tributaries of waters identified in subpart (1) above; (3) Wetlands adjacent to Reservation waters."[86] The tribe's definitions of "adjacent" and "wetlands" mirror the EPA and Corps' 1980s and 2019 regulations defining "waters of the United States."

[83] *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987*); U.S. v. Mazurie*, 419 U.S. 544, 557 (1975).
[84] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-142 (1982). *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (significant geographic component to tribal sovereignty).
[85] Blackfeet Aquatic Lands Protection Ordinance (Ordinance 90-A-amended). 2012. Available at http://www.blackfeetenvironmental.com/ordinance90/blackfeet_aquatic_lands_protection_ordinance90a.pdf.
[86] The Confederated Salish and Kootenai Tribes Aquatic Lands Conservation Ordinance, Ordinance No. 87-A (December 5, 1986). Available at http://nrd.csktribes.org/component/rsfiles/download?path=EP%252F87areg.pdf.

- The Yurok Tribe of the Yurok Reservation have defined "waters of the Reservation" or "[Yukon Indian Reservation (YIR)] waters" in their Water Pollution Control Ordinance as: any water, surface or underground, contained within, flowing through or bordering upon the Yurok Indian Reservation or any portion thereof."[87]

When examining tribal governments and programs, it becomes evident that the content and scope of tribal laws vary widely, as do the tribes' capacity to develop, implement, and enforce those laws. Only a few tribes have well-established tribal water programs.

Federal Trust Responsibility and Tribal Treaty Rights

The relationship between the federal government and federally recognized tribal governments is a "government-to-government" relationship. Federal departments and agencies recognize the federal government's trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law. The agencies are committed to maintaining their long-standing work with federally recognized Indian tribes on a government-to-government basis. One of the key principles of the *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (1984) is that, "The Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever its actions and/or decisions may affect reservation environments."[88] The Corps' Tribal Consultation Policy states that, "the trust responsibility will be honored and fulfilled," and the Corps "will ensure that it addresses tribal concerns regarding protected tribal resources, tribal rights (including treaty right) and Indian lands."[89]

During tribal consultation and engagement, many tribes provided feedback that a revised definition of "waters of the United States" could affect tribal interests and that the federal government has a trust responsibility to tribes to consider those effects.

Many tribes also expressed concern about off-reservation areas where some tribes have natural resource related-treaty rights (such as fishing, hunting, or gathering rights). Tribal input noted that the condition of waters in such areas affects off-reservation natural resources that many tribes depend upon for cultural lifeways and in which they have subsistence rights. The agencies recognize that treaty rights constitute federal law, but treaty rights do not expand the scope of authority granted to the agencies by Congress. The agencies recognize their trust responsibilities and will continue to honor these responsibilities within the scope of their authority under the CWA.

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[87] Yurok Tribe Water Pollution Control Ordinance. Available at http://www.yuroktribe.org/government/councilsupport/documents/FinalYurokWaterPollutionControlOrdinance120705.pdf.

[88] *See* "EPA Policy for the Administration of Environmental Programs on Indian Reservations" (1984 Indian Policy), November 8, 1984. Available at https://www.epa.gov/tribal/epa-policy-administration-environmental-programs-indian-reservations-1984-indian-policy.

[89] *See* "U.S. Army Corps of Engineers Tribal Consultation Policy," October 4, 2012. Available at https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf.

Treatment in a Similar Manner as a State

Section 518(e) of the CWA authorizes the EPA to grant eligible Indian tribes treatment in a similar manner as a state for a variety of purposes, including receiving certain categorical grants under several CWA funding authorities, and administering each of the principal CWA regulatory programs.[90] CWA section 518(e) is commonly known as the "treatment in a manner similar as a State" or TAS provision.

CWA section 518(e) establishes eligibility criteria for TAS, including requirements that an Indian tribe have a governing body carrying out substantial governmental duties and powers; that the functions to be exercised by the tribe pertain to the management and protection of water resources within the borders of an Indian reservation; and that the tribe can be reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Act and applicable regulations. CWA section 518(h) defines "Indian tribe" to mean any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation. It also defines "federal Indian reservation" to mean all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. Because not all tribes are federally recognized or have a federal Indian reservation, not all tribes are eligible to receive TAS to administer CWA programs. For example, most tribes in Alaska do not have a reservation and are not eligible to obtain TAS.

The EPA has established application processes for six CWA regulatory programs: section 303(c) water quality standards; section 303(d) impaired water listing and TMDL programs; section 401 water quality certification programs; section 402 NPDES permitting and other provisions; section 405 sewage sludge management programs; and section 404 dredged or fill permitting.[91] Tribes that have EPA-approved water quality standards are generally also approved to administer 401 certifications. To date, 62 tribes have TAS approvals for the development of water quality standards, and 61 tribes have approvals for water quality certification. No tribes have TAS for any CWA permitting programs (*e.g.*, sections 402 and 404) or section 303(d) impaired water listing and TMDL programs. Of the CWA programs, the section 106 and section 319 grant programs have the most tribes with TAS approvals, with 278 and 203 tribes,[92] respectively. The final rule will not affect tribes' eligibility for TAS under any of these programs as long as they meet the section 518(e) criteria.

[90] Section 518(e) specifically identifies these programs as those specified in sections 104, 106, 303, 305, 308, 309, 314, 319, 401, 402, 404, and 406 of the CWA.
[91] The application processes for these six programs are specified in 40 CFR 131.8, 40 CFR 130.16, 40 CFR 131.4(c), 40 CFR 123.31-123.34, 40 CFR 233.60-233.62, and 40 CFR 233.60-233.62 respectively.
[92] "Tribes Approved for Treatment as a State (TAS)." Available at: https://www.epa.gov/tribal/tribes-approved-treatment-state-tas.

Tribal Programs and Participation in Authorized Clean Water Act Programs

The following summaries of CWA programs capture the status of tribal authorized programs and note where independent non-CWA programs, including programs under tribal law, are known. Because of their reliance on federal programs, the potential effects of the final rule on tribes will vary depending on changes to federal programs resulting from a change in the definition of "waters of the United States." Additional information on the CWA programs and potential effects of changes in jurisdiction on implementation of these programs are described in Chapter IV.

Water Quality Standards Program

Currently, 62 tribes have obtained TAS authority to adopt water quality standards under CWA section 303(c) (*see* Appendix B). The EPA has approved water quality standards adopted by 45 of these tribes. In addition, the EPA promulgated federal water quality standards for one tribe that recently received TAS for section 303(c). The EPA is currently reviewing applications from an additional ten tribes who have applied to administer a water quality standards program. The agencies know of approximately 75 to 80 tribes that have the capability to develop and administer water quality standards under tribal law for non-jurisdictional waters: the 62 tribes that have TAS for water quality standards and up to two dozen tribes without TAS[93] that have independently developed water quality standards for their waters under tribal law. These tribes have at least general protections for certain reservation waters—including many with specific designated uses and criteria and including ephemeral and intermittent streams—in their water quality standards, which could be implemented at their discretion. Some tribes have developed unique designated uses for water quality standards, such as cultural and traditional uses, and uses appropriate for local species.

Impaired Water Listing and Total Maximum Daily Load Program

While several tribes have expressed interest in obtaining CWA section 303(d) TAS authority,[94] none have submitted applications for CWA section 303(d) TAS to date.[95] Under CWA section 303(d) and EPA's implementing regulations, an authorized tribe would be required to assemble and evaluate all existing and readily available water quality-related data and information and to submit to the EPA every two years a list of impaired waters that require TMDLs. For waters identified on a CWA section 303(d) list, an authorized tribe would then be required to establish TMDLs for all pollutants preventing or expected to prevent attainment of the applicable water quality standard. As far as the agencies are aware, no tribes have similar programs authorized under tribal law.

[93] Information about tribes with TAS and EPA-approved water quality standards came from https://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards-and-contacts/. Information about tribes that have adopted water quality standards only under tribal law was provided by EPA regional office staff familiar with tribal water quality standards activities.

[94] For more information on TAS status, see the "Tribal Participation in Clean Water Act Programs" section of this chapter and https://www.epa.gov/tmdl/final-rule-treatment-indian-tribes-similar-manner-states-purposes-section-303d-clean-water-act.

[95] The process for attaining TAS for 303(d) was finalized in September 2016.

Tribal Oil Spill Prevention, Planning and Response Program

Implementation of the CWA section 311 regulatory programs cannot be delegated to the states or tribes. The EPA coordinates with states and tribes and implements the program from EPA headquarters and Regional offices. Only a few tribes, such as the Navajo Nation, have an oil spill prevention program similar to the EPA's spill prevention, control, and countermeasure program. Most tribes do not currently have the resources to create an aboveground storage tank program and typically rely on the EPA to inspect aboveground storage tanks at facilities subject to the program, particularly oil exploration and production facilities located on remote reservation lands. The agencies did not have sufficient information to determine if tribes have cost recovery, civil penalty, and trust fund access similar to the OPA authorities discussed in Chapter IV, but generally do not view tribal authority to be as developed as state law in this context.

The EPA has authority to respond to and conduct enforcement of oil spills into and on "waters of the United States" on reservation lands. If there is an oil spill into or on non-jurisdictional waters on reservation lands, the response would be determined by the tribal government.

Section 401 Water Quality Certification Program

CWA section 401 certification provides authorized tribes with a tool to review federally issued permits and licenses and ensure they comply with federally approved water quality standards on reservations and other appropriate requirements of state or tribal law. Authorized tribes can request CWA section 401 certification authority and at present 61 tribes have TAS to administer a 401certification program. For those lands and waters where the tribe has not received CWA section 401 certification authority, the EPA Regional offices have the authority to administer the CWA section 401 program.

Tribal Pollutant Discharge Elimination System Programs

At this time, no tribe has requested and obtained authorization to administer the CWA section 402 NPDES program. As a result, in almost all cases, the EPA issues CWA section 402 permits for dischargers on reservation lands.[96] The agencies are aware of several tribes with authority to regulate discharges similar to a section 402 program under tribal law but are not currently aware of any tribes that administer such non-CWA tribal pollutant discharge regulatory programs. Appendix B provides a snapshot of the agencies' current understanding of tribes that are authorized to administer a pollutant discharge program under tribal law.

Tribal Dredged and Fill Material Permit Programs

Currently, no tribe has TAS authority to assume administration of the CWA section 404 program, and similar to the NPDES program, the federal government (*i.e.*, the Corps) administers the program on tribal lands. However, the agencies are aware of several tribes that have independent authority to administer their own dredged or fill permitting program under

[96] There are a few exceptions, *e.g.*, due to specific federal and state statutory provisions in the Maine Settlement Act, the state of Maine issues NPDES permits in parts of Indian country.

tribal law (*i.e.*, a non-assumed program), though are not aware of how many of these tribes implement such programs.[97] Appendix B provides a snapshot of the agencies' current understanding of tribes that are authorized to administer a dredged or fill program under tribal law.

CWA Tribal Financial Assistance Programs

Funding is available to tribes with TAS eligibility under several CWA funding authorities, including sections 106 and 319. Currently, 278 tribes have TAS authority for the section 106 water pollution control grant program. In addition, 203 tribes have TAS authority for the section 319 nonpoint source pollution grant program.

Funding is also available for tribes under CWA section 104. The EPA's Wetland Program Development Grants, which are issued under CWA section 104, are assistance agreements available to federally-recognized tribes and intertribal entities to develop or refine comprehensive tribal programs to protect, manage, and restore wetlands, including the development of a regulatory program.[98] Wetland Program Development Grants, for example, can be used to help tribes develop a dredged or fill program under tribal law, but cannot be used for program implementation.

The agencies have determined that there will not be effects on CWA financial assistance programs due to a change in the definition of "waters of the United States," as further discussed in the "CWA Financial Assistance Programs" section of Chapter IV.

Tribal Comments

Several tribes provided pre-proposal recommendations to the agencies' public recommendations docket (Docket ID: EPA-HQ-OW-2017-0480) that opened August 28, 2017, and closed November 28, 2017. Comment letters from tribes that were sent to the agencies as part of the tribal consultation and engagement and a summary of the agencies' March 2018 workshop with tribal co-regulators are available in the docket for the final rule (Docket ID: EPA-HQ-OW-2018-0149). The agencies received numerous comments from tribes during the public comment period

[97] *See, e.g.*, Bad River Reservation Wetland and Watercourse Protection Ordinance (Resolution No. 12-16-09.138). 2009; Blackfeet Aquatic Lands Protection Ordinance (Ordinance 90-A-amended). 2012. Blackfeet Aquatic Lands Protection Ordinance (Ordinance 90-A-amended). 2012. Available at http://www.blackfeetenvironmental.com/ordinance90/blackfeet_aquatic_lands_protection_ordinance90a.pdf (in addition, the tribe has a wetlands program that performs homesite lease reviews for tribal members to identify potential impacts to wetlands and floodplains, and preconstruction site reviews for any projects that may affect wetlands); The Confederated Salish and Kootenai Tribes Shoreline Protection Ordinance, Tribal 64(A); and The Confederated Salish and Kootenai Tribes Aquatic Lands Conservation Ordinance, Ordinance No. 87-A (December 5, 1986). Available at http://nrd.csktribes.org/component/rsfiles/download?path=EP%252F87areg.pdf. *See also* "Fiscal Year 2016-2020 Confederated Salish and Kootenai Tribes Wetland Program Plan (WPP)" (February 9, 2016). Available at https://www.epa.gov/sites/production/files/2016-03/documents/final_cskt_wetland_program_plan_2016-2020_feb_9_submit_feb_10_2016_-1.pdf.

[98] "Wetland Program Development Grants and EPA Wetlands Grant Coordinators." Available at: https://www.epa.gov/wetlands/wetland-program-development-grants-and-epa-wetlands-grant-coordinators.

for the proposed rule and in tribal consultation and engagement meetings with the agencies which are also available in the docket for the final rule (Docket ID: EPA-HQ-OW-2018-0149).

IV. CWA Programmatic Analyses

Introduction

The CWA prohibits the discharge of pollutants to "navigable waters," defined as "waters of the United States," except in compliance with specific sections of the Act. Thus, many CWA programs—including water quality standards, state and tribal 401 certification programs, discharge permits, and oil spill prevention and planning programs—apply only to waters subject to CWA jurisdiction. In this chapter, the agencies indicate where revisions to the definition of "waters of the United States" might affect CWA programs and programs authorized under other statutes. These changes are typically discussed qualitatively, both because of limitations in data availability and quality, and due to uncertainties in the way in which states or tribes might respond based on the final rule. These limitations are discussed in Chapter II.

Section 303(c) Water Quality Standards

Introduction

Water quality standards are provisions of state, territorial, authorized tribal, or federal law approved by the EPA that describe the desired condition of a waterbody or the level of protection or mandate for the way a desired condition will be expressed or established for such waters in the future. The core components of water quality standards are designated uses, water quality criteria that support the uses, and antidegradation requirements. Designated uses establish the environmental objectives for a waterbody, and water quality criteria define the minimum conditions necessary to achieve those environmental objectives. The antidegradation requirements provide a framework for maintaining and protecting water quality that has already been achieved.

Water quality standards are the foundation for a wide range of programs under the CWA. They serve multiple purposes including establishing the water quality goals for a specific waterbody, or portion thereof, and providing the regulatory basis for establishing water quality-based effluent limits beyond the technology-based levels of treatment required by CWA sections 301(b) and 306. Water quality standards also serve as a basis for water quality assessment and a target for CWA restoration activities such as total maximum daily loads (TMDLs).

The CWA requires states and authorized tribes to establish water quality standards for navigable waters (*i.e.*, "waters of the United States"). The EPA has not defined "waters of the United States" separately for water quality standards but, instead, relies on the established definitions, interpretations, and decisions in administering the water quality standards program. States and tribes may choose to expand their coverage of water quality standards beyond "waters of the United States" to include other waters as "waters of the state" or "waters of the tribe." For example, a state or tribe may specifically designate ephemeral streams (even those that do not meet the definition of "waters of the United States" under 2019 Rule) as waters to which state or tribal water quality standards apply.

Section 303(c) of the Act requires that states and authorized tribes hold a public hearing to review their standards at least once every three years (*i.e.*, triennial review), and that the EPA review and approve or disapprove any new or revised state and authorized tribal standards for "waters of the United States." State and tribal water quality standards go into effect for CWA purposes upon EPA approval. If the EPA disapproves a state's or authorized tribe's water quality standards, or if the Administrator determines that a new or revised water quality standard is necessary to meet the requirements of the CWA, the EPA must propose and promulgate federal standards for a state or authorized tribe, unless the state or authorized tribe develops its own and the EPA approves.

Potential Effects

States and authorized tribes usually develop water quality standards for broad categories of designated uses or broad classifications of waters. States and authorized tribes also have developed broad statements of general protection in narrative form that apply to all their jurisdictional waters. In some cases, states and authorized tribes develop waterbody-specific water quality standards. Waterbody-specific water quality standards have been developed for larger, complex systems that are unique, such as the Chesapeake Bay and the Everglades, and for some individual lakes with respect to nutrients. For wetlands, states and authorized tribes generally rely on a broad set of narrative water quality standards, although a few states and authorized tribes have developed more robust quantitative water quality standards for wetland categories.

While states and tribes have the option of adopting site-specific criteria, water quality standards are typically written broadly to apply to types of waters. The agencies anticipate that water quality standards are comprehensive and flexible enough to cover a broad or narrow interpretation of the definition of "waters of the United States," and no further investment or disinvestment of water quality standards development and adoption will be necessary with changes in interpretation. Regardless of the extent of jurisdiction of the CWA, state and tribal water quality standards can provide coverage for all types of waters. Therefore, the agencies do not anticipate the revised "waters of the United States" definition to significantly change the development and adoption of state and tribal water quality standards under state or tribal law.

Should they choose, states and tribes may apply standards under state or tribal law for waters that are not "waters of the United States," but they would not be in effect for CWA purposes. In such federally non-jurisdictional waters, states could apply their water quality standards as a matter of state law, and authorized tribes could apply their water quality standards to the extent their authority under tribal law would allow. The question that arises in assessing potential effects is whether states and tribes will continue to apply and enforce water quality standards that are no longer federally enforceable for waters that are newly excluded from CWA jurisdiction. In the EA, the agencies attempt to predict state responses to the revised definition of "waters of the United States," and anticipate the application of water quality standards will follow the overall predicted general framework described in that document.

CWA Section 303(d) Listing and TMDL Programs

Introduction

CWA section 303(d) requires that states identify waters within their boundaries for which applicable water quality standards are not being achieved through existing controls and permitting requirements (referred to as the 303(d) list or the list of impaired waters). Each state is required to assemble and evaluate all existing and readily available water quality-related data and information in order to submit a list of impaired and threatened waters to the EPA by April 1st of even-numbered years. The EPA is required to approve or disapprove the state's 303(d) list within 30 days of submission. If the EPA disapproves a state's list, the EPA is required to identify for inclusion any additional impaired waters. In September 2016, the EPA published a rule to establish regulatory procedures for eligible tribes to obtain treatment in a similar manner as states (TAS) for the section 303(d) program, including issuing lists of impaired waters and developing TMDLs, as states routinely do.[99] To date, no tribes have obtained TAS authority to administer the section 303(d) listing and TMDL program.

For waters identified on a 303(d) list, states must establish TMDLs for all pollutants preventing or expected to prevent attainment of water quality standards. TMDLs must be set at levels necessary to attain and maintain the applicable water quality standards, including a margin of safety and consideration of seasonal variation. The TMDL allocates pollutant loads to both point and nonpoint sources. States use these allocations to set permit limits for point sources and develop restoration strategies for nonpoint sources. States submit their TMDLs to the EPA for review, and the EPA must either approve or disapprove the TMDL within 30 days of receipt; if the EPA disapproves a state TMDL, the EPA must establish a TMDL for that waterbody within 30 days.

Analysis of Potentially Affected Waters

The EPA receives most of its information on impaired waters from ongoing monitoring and assessment programs conducted by the states. States categorize waters based on type, such as lakes, streams, or wetlands,[100] but do not always explicitly differentiate between stream types (*e.g.*, perennial, intermittent, ephemeral) in their CWA reports to the EPA. Quantitatively estimating the potential effects of any jurisdictional change on the CWA 303(d) program using existing datasets is not possible because the states do not provide a sufficient level of detail regarding water body type in their section 305(b) reports to the EPA regarding "the water quality of all navigable waters" in the states. For flowing waters, the agencies anticipate that many waters are either intermittent or ephemeral, particularly in the arid West. Yet the NHD at high resolution does not accurately and separately identify intermittent and ephemeral streams in most

[99] Final Rule: Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act. 81 FR 65901 (September 26, 2016). Available at https://www.gpo.gov/fdsys/pkg/FR-2016-09-26/pdf/2016-22882.pdf. See also: https://www.epa.gov/tmdl/final-rule-treatment-indian-tribes-similar-manner-states-purposes-section-303d-clean-water-act.

[100] States typically focus their monitoring efforts on rivers, streams, lakes, and ponds. Wetlands, shorelines, and coastal waters only comprise approximately 2 percent of 303(d) listed waters.

of the country,[101] whereas such features are treated differently in the final rule. In addition, intermittent and ephemeral streams are not *per se* jurisdictional under the 2019 Rule. For the proposed rule, the agencies attempted to analyze the potential effects by comparing the locations of streams currently listed as impaired as well as the locations of established TMDLs to categories of streams mapped in the NHD at high resolution. However, due to data limitations of the NHD, the agencies concluded that such an analysis did not appropriately or accurately assess the potential effects of the proposed rule on the 303(d) and TMDL programs. The attempted analysis and its limitations are described in greater detail in Appendix A to the Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States." The agencies did not receive any quantitative data from comments on the proposed rule that would change this analysis.

Potential Effects

As discussed below, changes in CWA jurisdiction could potentially affect state and federal 303(d) programs in several ways, including by changing the total number, stream miles, or acres of waters covered under the scope of CWA 303(d) and the number of TMDL restoration plans developed under the CWA.

For future 303(d) actions, a change in the scope of CWA jurisdiction could affect existing and future state or tribal CWA section 303(d) lists and TMDL restoration plans under section 303(d). For example, some states or tribes may not assess non-jurisdictional waters and may identify fewer waters as impaired and therefore develop fewer TMDLs. This could result in reduced protection for aquatic ecosystems if other mechanisms for restoration are not available or utilized (*e.g.*, CWA section 319 program watershed plans). However, some states may now be able to focus limited resources on assessing and developing TMDLs for more priority waters that otherwise might be delayed due to the need to assess all federal waters within state borders. The result may be greater ecological restoration of high priority resources earlier compared to the 2019 Rule baseline. The agencies lack the data to quantitatively assess potential state responses and the potential overall effect on aquatic resources.

States may continue to apply their own state law-based programs to identify and restore impaired waters, although this activity would not be required under the CWA for waters that are not jurisdictional under the final rule. All states have water quality standards in some form or another, as well as monitoring and assessment programs. They also have existing laws and programs that they may choose to utilize to address water quality challenges. If states do not require public notice and participation components in state regulations and policies for "waters of the state," and impaired waters were not identified via the current CWA 303(d) public notice requirements, the public may be less likely to be aware of impairments for waters that do not fall

[101] Outside of the arid West and the limited areas where state and Federal data stewards have specifically mapped ephemeral streams, ephemeral streams are often mapped in the intermittent category. In addition, many ephemeral streams are not mapped in the dataset. The NHD datasets are regularly updated and maintained through stewardship partnerships with states and other collaborative bodies, such as Federal agencies. An agency in each state manages the maintenance activities within the state, and updates are made available in the national dataset. For example, the U.S. Forest Service and the Bureau of Land Management were some of the first data stewards to add ephemeral streams within certain federal lands to the NHD.

within the definition of "waters of the United States." States will continue to have access to section 319 funds (appropriations permitting) for nonpoint source watershed restoration, which would be expected to continue independent of a water's jurisdictional status.

TMDLs for impaired waters consist of waste load allocations for point sources, load allocations for nonpoint sources, and a margin of safety. Changes in jurisdiction may prompt questions regarding the status of waste load allocations and load allocations in existing TMDLs, as well as water quality-based effluent limits in existing NPDES permits that are based on a current TMDL waste load allocation. This has the potential to prompt requests for TMDL revisions that may shift additional pollutant reduction responsibility to those sources discharging to jurisdictional waters. As noted elsewhere, however, existing dischargers may still require NPDES permits if pollutants are conveyed downstream to jurisdictional waters even if the intervening water or feature is not jurisdictional. Some states and NPDES permittees may request review and revision of existing permits and TMDLs to account for potential jurisdictional changes. As there are currently more than 73,000 completed TMDLs nationwide, revisions to a portion of those could require additional state and federal resources to address. The agencies lack the data to assess this potential outcome.

CWA Section 311 Oil Spill Prevention, Preparedness and Response Programs

Introduction

Section 311 of the CWA prohibits discharges or substantial threats of discharges of oil or hazardous substances in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines.[102] It also requires immediately reporting spills of harmful quantities to the federal government and gives authority to the federal government to respond to and enforce penalties for discharges into waters subject to CWA jurisdiction. In 1990, Congress enacted the Oil Pollution Act (OPA)[103] to help prevent major oil spills and ensure efficient, effective responses to spills when they occur. The jurisdictional scope of the OPA is the same as the CWA.[104] OPA amended CWA section 311 to set up a system of contingency planning under the

[102] 33 U.S.C. 1321(b)(3) prohibits discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C. § 1331 *et seq*.] or the Deepwater Port Act of 1974 [33 U.S.C. § 1501 *et seq*.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. § 1801 *et seq*.].

[103] OPA 90, Public Law 101-380

[104] 33 U.S.C. 2701(21). While CWA section 311(b) uses the phrase "navigable waters of the United States," which traditionally means waters subject to jurisdiction under the Rivers and Harbors Act, EPA and the courts have historically 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). EPA also has historically interpreted "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) (defining "navigable waters" as "waters of the United States"). In 2002, EPA revised its regulatory definition of "navigable waters" in 40 CFR 112 to ensure that the language of the rule was consistent with the regulatory language of other CWA programs. Oil Pollution Prevention & Response; Non-Transportation-Related Onshore & Offshore Facilities, 67 FR 47042, July

National Oil and Hazardous Substances Pollution Contingency Plan. Oil spill response plans must be adequate to remove a worst-case discharge, not just a likely discharge. OPA also authorizes the national spill response system and a program to fund oil response expenses, claims, and damage assessment, as well as seek reimbursement from the party or parties responsible for the spill.

Spill prevention and preparedness under CWA section 311 and OPA

The regulation of discharges of oil and hazardous substances under CWA section 311 and OPA is complex, involving multiple potential dischargers and multiple federal agencies. Implementation of CWA section 311 programs cannot be assumed by states or tribes. The EPA coordinates with states and tribes and implements the program from EPA headquarters and regional offices. Under delegated authority, the EPA regulates non-transportation-related onshore facilities; the Department of Transportation (DOT) regulates transportation-related onshore facilities; the U.S. Coast Guard (USCG) regulates marine-transportation-related facilities and vessels; and the U.S. Department of the Interior regulates other offshore facilities, including associated pipelines.[105] Note that responsibility for non-transportation-related offshore facilities that are landward of the coastline (*e.g.*, oil production facilities located in the Louisiana bayous) has been delegated to the EPA, and the EPA shares regulatory jurisdiction with the DOT at certain pipeline breakout facilities.[106,107] A 1994 Memorandum of Understanding details the regulatory jurisdiction among these three agencies.[108]

Under CWA section 311 and OPA, the USCG established requirements to prevent and contain discharges of oil from vessels[109] and marine-transportation-related[110] facilities. The DOT Office of Pipeline Safety, which is part of the Pipeline and Hazardous Materials Safety Administration, established requirements for many onshore pipelines and breakout facilities,[111] as well as for railroads or "rolling stock." Some facilities include a combination of transportation-related and non-transportation-related components subject to the jurisdiction of more than one federal agency under CWA section 311(j); these facilities are called "complex" facilities. The EPA, DOT, and USCG spill preparedness and prevention programs are described in more detail below.

17, 2002; *see also* 56 FR 54612, October 22, 1991. 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. D.C. 2008).

[105] *See* Executive Order 12777, Implementation of Section 311 of the Federal Water Pollution Control Act of October 18, 1972, as Amended, and the OPA of 1990 (October 18, 1991), at section 2(b)(1).

[106] An earlier Memorandum of Understanding between the Secretary of Transportation and the EPA Administrator, dated November 24, 1971 (36 FR 24080), provided the agreed upon definitions of non-transportation-related facilities and transportation-related facilities.

[107] This is described in more detail in the joint memorandum "Jurisdiction over Breakout Tanks/Bulk Storage Tanks (Containers) at Transportation-Related and Non-Transportation-Related Facilities" (February 4, 2000).

[108] Memorandum of Understanding dated February 3, 1994 (59 FR 34102, July 1, 1994).

[109] *See* 33 CFR 155.

[110] *See* 33 CFR 154.

[111] *See* 49 CFR 194.

EPA CWA 311 Programs and OPA

The EPA's Spill Prevention, Control, and Countermeasure Rule[112] establishes spill prevention procedures, methods, and equipment requirements for non-transportation-related onshore and offshore facilities with aboveground oil storage capacity or completely buried underground oil storage capacity that meet certain threshold criteria.[113] Facilities with oil storage capacity greater than 1,320 gallons (except farms[114]) that have a reasonable expectation of an oil discharge to navigable waters of the United States or adjoining shorelines are required to prepare and implement Spill Prevention, Control and Countermeasure Plans.[115]

Spill Prevention, Control and Countermeasure Plans are designed to prevent discharges from reaching navigable waters or adjoining shorelines and require measures to contain, clean up, and mitigate the effects of discharged oil. In addition, some Spill Prevention, Control and Countermeasure facilities are also required to submit Facility Response Plans if they meet certain criteria; these plans address worst case discharges that may present substantial harm as a result of a discharge of oil or threat of such a discharge.

The EPA estimates that there are approximately 541,000 facilities subject to Spill Prevention, Control and Countermeasure requirements in the U.S.[116] Facilities subject to Spill Prevention, Control and Countermeasure requirements do not have to notify or register with the EPA, nor are they required to submit Spill Prevention, Control and Countermeasure plans to the EPA. Facilities subject to facility response planning are required to submit plans to the EPA. EPA reviews submitted plans to ensure consistency with the regulatory requirements. The EPA estimates that there are approximately 3,830 facilities with Facility Response Plans in the U.S.

DOT CWA 311 Programs

At DOT, the Pipeline and Hazardous Materials Safety Administration develops and enforces regulations for the nation's 2.6-million-mile pipeline transportation system and the nearly one million daily shipments of hazardous materials by land, sea, and air. The Pipeline and Hazardous Materials Safety Administration's requirements for oil spill response plans to reduce the environmental impact of oil discharged from onshore oil pipelines are codified at 49 CFR 194. This part applies to an operator of an onshore oil pipeline that, because of its location, could reasonably be expected to cause substantial harm, or significant and substantial harm to the environment by discharging oil into or on any navigable waters of the United States or adjoining shorelines.[117] The regulation requires operators to submit a response plan to the Pipeline and Hazardous Materials Safety Administration before oil can be transported. If the Pipeline and Hazardous Materials Safety Administration has not approved an onshore oil pipeline response

[112] The Spill Prevention, Control and Countermeasure rule was originally promulgated on December 11, 1973, at 38 FR 34164 (40 CFR 112.1 through section 112.12), under the authority of section 311(j)(1)(C) of the CWA.
[113] *See* 40 CFR 112.1.
[114] Farms are exempt under two circumstances: (1) if the farm has less than 6,000 gallons of aboveground storage and no reportable oil discharge history; or (2) has 2,500 gallons or less of aboveground storage, regardless of reportable oil discharge history.
[115] Spill Prevention, Control and Countermeasure requirements are codified in 40 CFR part 112, Subparts A through C.
[116] *See* EPA Information Collection Request (ICR) No. 0328.15, OMB No. 2050-0021.
[117] *See* CWA 311(b)(1) for full jurisdictional scope.

plan, an operator may submit a certification that it has obtained sufficient response resources to respond to a worst-case discharge and may operate up to two years without approval. The Pipeline and Hazardous Materials Safety Administration has approximately 560 facility response plans from pipeline operators.

The Pipeline and Hazardous Materials Safety Administration's oil spill planning requirements for rolling stock and motor vehicles are found in the Hazardous Materials Regulations at 49 CFR 130. The regulation on response plans at 49 CFR 130.100 requires railroads to have current, written comprehensive oil spill response plans meeting the requirements of this subpart for any route or route segments used to transport either of the following: any liquid petroleum oil or other non-petroleum oil subject to this part in a quantity greater than 42,000 gallons (1,000 barrels) per packaging; or a single train carrying 20 or more loaded tank cars of liquid petroleum oil in a continuous block or a single train carrying 35 or more loaded tank cars of liquid petroleum oil throughout the train consist, since a spill while in transit might potentially affect a water subject to CWA jurisdiction. The Pipeline and Hazardous Materials Safety Administration has approximately 20 comprehensive oil spill response plans from railroads.

USCG CWA 311 Programs

The USCG Office of Marine Environmental Response Policy serves as program manager for planning and preparedness for oil spills and hazardous substance pollution incidents and other threats to public safety, the marine environment, or marine transportation and commerce. Marine Environmental Response implements the facility response planning requirements for marine-transportation-related facilities at 33 CFR 154. Marine-transportation-related facilities are typically located on the territorial seas or traditional navigable waters (TNWs) where oil is transferred to and from vessels.

Spill Notification and Response

Oil spills can occur in a wide variety of places and from a wide variety of sources, and dozens of federal, state, tribal, and local agencies may play roles in spill notifications and responses. The National Oil and Hazardous Substances Pollution Contingency Plan is a federal regulation that identifies and implements the key federal response authorities for oil/chemical incidents under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[118] and CWA section 311 as amended by the OPA.[119] The National Oil and Hazardous Substances Pollution Contingency Plan established a National Response System, comprised of organizations that routinely and effectively prepare for and respond to a wide range

[118] CERCLA authorizes response to releases or substantial threats of releases to the environment of (1) hazardous substances and (2) pollutants or contaminants which may present an imminent and substantial danger to the public health or welfare. EPA promulgates and maintains a list of hazardous substances. Pollutants or contaminants include substances that upon exposure will or may reasonably be anticipated to cause certain specified harmful health effects. Definitions of hazardous substance and pollutant or contaminant exclude petroleum. While the National Oil and Hazardous Substances Pollution Contingency Plan addresses spills regulated by the CWA/OPA and CERCLA, the application of the definition of "waters of the United States" does not apply to CERCLA so the discussion of CERCLA issues are described at a high level in the rest of this document.

[119] 40 CFR 300. The National Oil and Hazardous Substances Pollution Contingency Plan serves as an operational supplement to the National Response Framework.

of oil and hazardous substance releases. The National Response System is a multi-layered system of individuals and teams from state, local, tribes, and territories and federal agencies, industry, and other organizations that share expertise and resources to ensure that oil spill and chemical release response activities are timely and efficient and that they minimize threats to human health and the environment.

Section 311 of the CWA authorizes response to discharges or threatened discharges of oil and CWA hazardous substances. Section 311 of the CWA further states that the response authority is for a discharge or substantial threat of discharge (1) into or on navigable waters of the United States, (2) on the adjoining shorelines to the navigable waters, (3) into or on the waters of the exclusive economic zone, or (4) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States. Federal On-Scene Coordinators have the authority to conduct, direct, and coordinate response efforts at the incident scene to protect the environment, public health, as well as worker safety and health. They are also responsible for determining whether there is a need for federal involvement.

Funding emergency responses is important because actions must often be taken before clear liability or actors are identified.[120] The Oil Spill Liability Trust Fund (see details below) administered by the National Pollution Funds Center, operated by the USCG, is used to fund the response to oil discharges and substantial threats of discharges per CWA 311(c) and/or CWA 311(e). In general, responsibility for payment lies with the responsible party, when the responsible party can be identified and is financially viable.

USCG's Oil Spill Liability Trust Fund

The Oil Spill Liability Trust Fund was established as a funding source to pay removal costs and damages resulting from oil discharges or substantial threats of oil discharges to navigable waters of the United States, adjoining shorelines, or the exclusive economic zone. The Oil Spill Liability Trust Fund is used for costs not directly paid by the responsible party. The fund is also used to pay costs to respond to "mystery spills," for which the source has not been identified.

In order to access the Oil Spill Liability Trust Fund, the Federal On-Scene Coordinator must show the discharge (or substantial threat of discharge) is into or on the navigable waters of the United States or adjoining shorelines. The Fund cannot be utilized for spills that do not reach or have the threat of reaching waters subject to CWA jurisdiction. The discharge (or substantial threat of discharge) must be of an oil, which can include petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil; however, the Fund cannot be used for discharge of any substance which is specifically listed or designated as a hazardous substance under CERCLA.

[120] The Superfund Trust Fund is used to fund responses to releases and threats of releases of CERCLA hazardous substances, not including oil as provided by the petroleum exclusion found at 42 U.S.C. 9601(14) and (33). The EPA administers the Superfund Trust Fund. Superfund removal actions are capped at $2 million/12 months unless certain findings described in the law are made to allow expenditures greater than $2 million or a time frame of longer than 12 months.

Natural Resources Damage Assessment Under the OPA and the Oil Spill Liability Trust Fund

The Superfund (CERCLA), CWA 311and OPA Programs provide for cleanup of contaminants that are released or threatened to be released and pose a threat to human health and the environment. In addition, they generally provide that natural resources be restored to the condition that they were in before injury from environmental contaminants. The costs of restoration of natural resources and compensation for injury pending restoration is typically sought from the party or parties responsible for the release of the contaminants. Under CERCLA, CWA 311, and OPA, responsibility for protection of natural resources lies with federal, state, and tribal Trustees, and foreign Trustees as applicable. This is because no one individual "owns" a natural resource; rather, they are held in trust for the public.

One of the primary responsibilities of Trustees under CERCLA, CWA 311, and OPA is to assess the extent of injury to a natural resource and determine appropriate ways of restoring and compensating for that injury. A Natural Resource Damage Assessment is the process of collecting, compiling, and analyzing information to make these determinations.[121] Trustees have the option of using the methodologies prescribed by the Department of the Interior (DOI), 43 CFR 11, or the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), 15 CFR 990. The DOI regulations are applicable to Natural Resource Damage Assessments under CERCLA, while the NOAA methodologies are applicable for Natural Resource Damage Assessments under OPA.

The Oil Spill Liability Trust Fund may be used for limited purposes in the natural resource damages context. These include, but are not limited to, the payment of costs incurred by Trustees in carrying out their functions under OPA Section 1006 for conducting Natural Resource Damage Assessments and for developing and implementing plans for the restoration, rehabilitation, replacement or acquisition of the equivalent of injured resources, as well as the payment of removal costs, including the costs of monitoring removal actions.[122]

Because the agencies have historically interpreted the use of the term "navigable waters of the United States" under the OPA to be the same as "navigable waters" under the CWA, changes to the waters subject to CWA regulatory jurisdiction could potentially modify where Natural Resource Damage Assessments could be conducted under the OPA, as well as the abilities of Trustees to use the Oil Spill Liability Trust Fund to fund restoration work in some circumstances.

Methodology

In an exploratory effort to estimate potential effects of the proposed rule on EPA-regulated facilities under CWA section 311, the agencies first estimated the potentially affected universe of regulated facilities. The agencies estimate that approximately 541,000 facilities may be regulated

[121] A Natural Resource Damage Assessment determines the extent of injuries to natural resources from hazardous substance releases or oil discharges and determines appropriate ways of restoring and compensating for those injuries. 43 CFR 11; 15 CFR 990. The measure of damages under CERCLA and OPA is the cost of restoring injured natural resources to their baseline condition, compensation for the interim loss of injured resources pending recovery, and the reasonable costs of a damage assessment. CERCLA Sections 107(a)(4)(C) and 107(f)(1); OPA Sections 1001(5) and 1002(b)(2); 43 CFR 11.15; 15 CFR 990.62.

[122] 26 U.S.C. 9509(c)(1)(A).

by the Spill Prevention, Control and Countermeasure rule. Oil production facilities (43 percent), electric utilities (12 percent), real estate rental and leasing (6 percent), and farms (4 percent), account for the majority of facilities subject to Spill Prevention, Control and Countermeasure requirements.[123] The inventory of facilities subject to facility response planning that have submitted and are maintaining a facility response plan as of January 2018 is approximately 3,830 facilities nationally, inclusive of governmental facilities.

The agencies used the EPA's facility response planning universe in an attempt to estimate the number of facilities potentially affected by the proposed change in jurisdictional waters. The agencies anticipate that a facility subject to facility response planning could initially file a reconsideration request per 40 CFR 112.20(i) that the potentially affected waterbody is no longer jurisdictional under the CWA. In an attempt to assess the magnitude of the potential change, the agencies overlaid the location of facilities with facility response plans, based on geographical coordinates from EPA's Oil Program Database,[124] with stream features mapped in the high resolution NHD. Before finalizing the results of this exploratory analysis, however, the agencies determined that this estimate cannot be used to extrapolate the number of facilities subject to Spill Prevention, Control and Countermeasure requirements nationally that could have potentially been affected by the proposed change in the definition of "waters of the United States." Even at high resolution, the NHD does not sufficiently map ephemeral streams nationwide so as to accurately distinguish them from intermittent tributaries and thus support an estimate of potential jurisdictional change. Furthermore, ephemeral streams are not categorically jurisdictional under the 2019 Rule baseline; rather, ephemeral streams must be analyzed on a case-by-case basis according to the significant nexus test of the *Rapanos* Guidance.

Given these and other data limitations, the agencies also conducted three case studies for illustrative purposes to assess the potential impacts of changes in CWA jurisdiction on the Facility Response Planning program by analyzing the proximity of facilities subject to facility response planning to NWI water resources identified as ephemeral, and where available, to NHD high resolution waters identified as ephemeral.[125] The Economic Analysis for the final rule provides a more in-depth discussion of these case studies, including an assessment of the potential effects of the rule.

The agencies do not have sufficient information at this time to evaluate the potential impacts of the final rule to DOT- Pipeline and Hazardous Materials Safety Administration regulated facilities or the potential effects on emergency response in the inland zone.

[123] *See* the latest Spill Prevention, Control and Countermeasure Information Collection Request (ICR) renewal (EPA ICR No. 0328.17, OMB No. 2050-0021).
[124] The Oil Program Database is an internal EPA database that expands on the information available through EPA's Facility Registry Service and other publicly available data systems.
[125] See Table III-9 in the Economic Analysis for the final rule for details on how ephemeral waters were identified.

Potential Effects

Potential Implications on Oil Spill Prevention and Preparedness (EPA-regulated facilities)

Whether or not there is a reasonable expectation of an oil discharge reaching waters subject to CWA jurisdiction is an important factor in determining applicability of the CWA for oil storage facilities that may be required to prepare and implement Spill Prevention, Control and Countermeasure plans. This determination must be based solely upon consideration of the geographical and locational aspects of the facility, such as proximity to navigable waters or adjoining shorelines; topography; or drainage. An owner or operator may not consider constructed features, such as containment dikes, equipment, or other manmade structures that prevent, contain, hinder, or restrain a discharge when making this determination, as described in 40 CFR 112.1(b).

Factors to be considered by the facility owner/operator for this evaluation are described in Section 2.6 of EPA's Spill Prevention, Control and Countermeasure guidance document.[126] For example, the guidance states, "An owner or operator should consider the location of the facility in relation to a stream, ditch, gully, or storm sewer; the volume of material likely to be spilled; drainage patterns; and soil conditions."[127] If waters that could be affected by an oil spill from the facility would no longer be jurisdictional under the final rule, federal spill prevention and preparedness plans may no longer be required. The same may also be true of the facility response planning requirements. Planholders with waters or features that may not be jurisdictional under the final rule could potentially reconsider the applicability of the facility response planning (and perhaps the Spill Prevention, Control and Countermeasure) requirements to their facilities. Facility owners or operators would still need to evaluate whether there is a reasonable expectation of an oil discharge as defined in 40 CFR 112.1(b) reaching waters subject to CWA jurisdiction in the immediate proximity to the facility, after accounting for potential conveyance of spilled oil via non-jurisdictional waters, such as non-jurisdictional ditches or certain stormwater conveyance systems. In this case, a facility may still be subject to Spill Prevention, Control and Countermeasure and facility response planning requirements.

Potential Effects on Other Programs

Spill preparedness requirements also exist for transportation-related facilities such as pipelines and railcars. These programs derive their authority from CWA section 311 as amended by the OPA of 1990 and therefore may be similarly affected by the change in the scope of jurisdictional waters.

[126] *See* Spill Prevention, Control and Countermeasure Guidance for Regional Inspectors, December 16, 2013. Available at https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/spcc-guidance-regional-inspectors.
[127] *Id.* at 2-34.

Potential Implications for Emergency Response

As discussed above, the Oil Spill Liability Trust Fund is available to reimburse costs of assessing and responding to oil spills in waters subject to CWA jurisdiction. Availability of the Oil Spill Liability Trust Fund allows an immediate response to a spill, including containment, countermeasures, cleanup, and disposal activities. If a water is not jurisdictional, costs incurred by states or tribes to clean up the spill and costs related to business impacts associated with spills into that water might not be reimbursed by the Oil Spill Liability Trust Fund.

The agencies conducted research to identify states with statutory authority similar to CWA section 311 and Title 1 of the OPA that would provide for cost recovery, civil penalties, and trust funds, which may allow them to alleviate potential financial burden from state cleanup of oil spills to non-jurisdictional waters. This research found that all states have some form of mechanism for oil spill cleanup reimbursement from responsible parties, with 46 states providing for clean-up cost recovery, 45 states allowing for some form of civil penalties, and 34 providing funds to aid in cleanup.[128] The statutes allowing for these measures vary greatly. For example, most coastal states have statutes specifically focused on oil spills in state waters. However, for many interior states, reimbursement comes from statutes prohibiting discharge of pollutants into state waters generally, rather than from a specific oil spill cost recovery law.[129]

The types of damages that states are allowed to seek cost recovery for varies as well. In general, the OPA creates liability for more activities than most state statutes. Damages provided for in the OPA, but usually not included in state statutes, include loss of subsistence use, loss of revenue profits and earning capacity, and loss of public services.[130] Only California goes beyond the OPA standard.[131] Every other state lacks recovery for at least one form of damage allowed under the OPA. State statutes commonly contain language that allows for recovery of "reasonable expenses" from the state cleanup, such as Conn. Gen. Stat. section 22a-452 (explaining Connecticut's cost recovery), or "costs of cleanup work," Kansas Statutes Annotated section 65-171v (explaining Kansas's cost recovery). How these general statutes are interpreted by courts in each state likely varies. Nevertheless, their sole use may result in recovery of fewer categories of damages than provided for by the OPA.

Most states allow for unlimited cost recovery. Only five states have caps on the amount the state may be reimbursed through cost recovery.[132] At least seven states have strict liability[133] for cost recovery,[134] whereas the majority of states do not include a standard of liability.[135] Every state allows for either cost recovery of cleanup expenses, civil penalties for oil spills, or both. As with

[128] *See* State Statutes Attachment.
[129] *Id*.
[130] *Id*.
[131] *See* Cal Gov Code section 8670.56.5.
[132] Florida, Louisiana, New Jersey, New York, and Texas. *See* State Statutes Attachment.
[133] Strict liability means intent and/or negligence is not a factor in determining liability. If the action occurred, then the party is liable regardless of intent and/or negligence.
[134] Arizona, Hawaii, Missouri, New Jersey, North Carolina, Oregon, and South Dakota. *See* State Statute Attachment.
[135] Absent a defined standard of liability, it is up to the courts to decide whether liability is strict, or whether liability is based on intent and/or negligence.

most activities regulated by state law, there is a great degree of variability among the different states.

States that do allow for cost recovery could potentially still have increased costs if they are not able to utilize the Oil Spill Liability Trust Fund because the damages recoverable under state statutes may not be as extensive as under the OPA. In addition, nearly a third of states lack a trust fund in the absence of the Oil Spill Liability Trust Fund. *See* Appendix A. States with statutes generally prohibiting discharges of pollutants into state waters, as opposed to those with specific oil spill cost recovery laws and regulations, may face the most uncertainty over the exact damages able to be recovered.

CWA Section 401 State/Tribal Water Quality Certification Programs

Introduction

Under Section 401 of the CWA, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a state or authorized tribe where the discharge would originate issues a Section 401 water quality certification verifying compliance with existing water quality requirements or waives the certification requirement. Congress enacted Section 401 of the CWA to give states and tribes a direct role in federal permitting and licensing processes to ensure that activities subject to federal permitting comply with established water quality requirements.

Permits, Licenses, and Activities Subject to CWA Section 401

To be subject to CWA section 401 certification, the permit or license must be issued by a federal agency. If the permit is issued by a state or tribe through an authorized CWA program, it is not considered "federal" for purposes of section 401. Some of the most common federal licenses and permits subject to section 401 certification include:

- CWA section 402 NPDES permits issued by the EPA in states that do not administer a state permit program in lieu of the federal program (currently, New Hampshire, Massachusetts, and New Mexico), and NPDES permits issued by EPA on tribal lands.

- CWA section 404 permits for discharges of dredged or fill material issued by the Corps. At present, the Corps issues all section 404 permits in 48 states, and section 404 permits for discharges into non-assumed waters in Michigan and New Jersey.

- Federal Power Act licenses for non-federal hydroelectric dams and natural gas pipelines issued by the Federal Energy Regulatory Commission.

- Rivers and Harbors Act sections 9 and 10 permits issued by the Corps for activities that have a potential to discharge in "navigable waters of the United States" subject to that statute (which are different from but typically included in the meaning of "waters of the United States" under the CWA).

This list is not exhaustive, but rather provides examples of federal permits that are commonly subject to CWA section 401.

Extent of State and Tribal Involvement

Congress enacted section 401 of the CWA to provide states and authorized tribes with an important tool to help protect water quality of federally regulated waters within their borders in collaboration with federal agencies. Under section 401, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States[136], unless the state or authorized tribe where the discharge would originate either issues a section 401 water quality certification finding compliance with existing water quality requirements or waives the certification requirement. Section 401 envisions a robust state and tribal role in the federal licensing or permitting process where local authority may otherwise be preempted by federal law, but places limitations on how that role may be implemented to maintain an efficient process, consistent with the overall cooperative federalism construct established by the CWA.[137]

Under section 401, a certifying authority may grant, grant with conditions, deny, or waive certification in response to a request from a project proponent. The certifying authority determines whether the proposed activity will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirement of state law. *Id.* Certifying authorities may also add to a certification "any effluent limitations and other limitations, and monitoring requirements" necessary to assure compliance. *Id* at 1341(d). These additional provisions must become "a condition" of the federal license or permit should it be issued. *Id.* A certifying authority may deny certification if it is unable to determine that the discharge from the proposed activity will comply with the applicable sections of the CWA and appropriate requirements of state law. If a certifying authority denies certification, the federal license or permit may not issue. *Id*. at 1341(a)(1). A certifying authority may waive certification by "fail[ing] or refus[ing] to act on a request for certification, within a reasonable period of time . . . after receipt of such request." *Id.*

The EPA, as the federal agency charged with administering the CWA, is responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including section 401.[138] In addition to administering the statute and promulgating implementing regulations, the EPA has several other roles under section 401.

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[136] The CWA, including section 401, uses "navigable waters", defined as "waters of the United States, including territorial seas." 33 U.S.C. 1362(7).

[137] EPA recently published a proposed rule updating and modernizing its regulations on water quality certifications which were last modified before enactment of the 1972 CWA amendments. 84 FR 44080 (Aug. 22, 2019).

[138] *See* 33 U.S.C. 1251(d), 1361(a); *Mayo Found. for Medical Educ. and Res. v. United States*, 562 U.S. 44, 45 (2011); *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003); *California Trout v.*

The EPA acts as the section 401 certification authority under two circumstances. First, the EPA will certify on behalf of a state or tribe where the jurisdiction in which the discharge will originate does not itself have certification authority. 33 U.S.C. 1341(a)(1). In practice, this results in the EPA certifying on behalf of the many tribes that do not have TAS authority for section 401. Second, the EPA will act as the certifying authority where the discharge would originate on lands of exclusive federal jurisdiction.[139]

The EPA also coordinates the opportunity for neighboring jurisdictions to raise concerns and recommendations where their water quality may be affected by a discharge subject to section 401 certification. *Id*. at 1341(a)(2). Although section 401 certification authority lies with the jurisdiction where the discharge originates, a neighboring jurisdiction whose water quality is potentially affected by the discharge may have an opportunity to raise concerns. Where the EPA Administrator determines that a discharge subject to section 401 "may affect" the water quality of a neighboring jurisdiction, the EPA is required to notify that other jurisdiction. *Id*. If the neighboring jurisdiction determines that the discharge "will affect" the quality of its waters in violation of any water quality requirement of that jurisdiction, it may notify the EPA and the federal licensing or permitting agency of its objection to the license or permit. *Id.* It may also request a hearing on its objection with the federal licensing or permitting agency. At the hearing, the EPA will submit its evaluation and recommendations. The federal agency will consider the jurisdiction's and the EPA's recommendations, and any additional evidence presented at the hearing. The federal agency "shall condition such license or permit in such manner as may be necessary to insure compliance with the applicable water quality requirements" of the neighboring jurisdiction. *Id.* If the conditions cannot ensure compliance, the federal agency may not issue the license or permit.

Finally, the EPA also must provide technical assistance for section 401 certifications upon the request of any federal or state agency, or project proponent. *Id*. at 1341(b). Technical assistance might include provision of any relevant information on applicable effluent limitations, standards, regulations, requirements, or water quality criteria.

FERC, 313 F.3d 1131, 1133 (9th Cir. 2002); *American Rivers, Inc. v. FERC*, 129 F. 3d 99, 107 (2d. Cir. 1997).

[139] The federal government may obtain exclusive federal jurisdiction over lands in multiple ways, including where the federal government purchases lands with state consent consistent with article 1, section 8, clause 17 of the U.S. Constitution, where a state chooses to cede jurisdiction to the federal government, and where the federal government reserved jurisdiction upon granting statehood. *See Collins v. Yosemite Park Co.*, 304 U.S. 518, 529-30 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-42 (1937); *Surplus Trading Company v. Cook*, 281 U.S. 647, 650-52 (1930); *Fort Leavenworth Railroad Company v. Lowe*, 114 U.S. 525, 527 (1895). Examples of lands of exclusive federal jurisdiction include Denali National Park.

Potential Effects

Section 401 certification is limited to situations involving a federal permit or license that may result in a discharge to "waters of the United States." As a result, the revised definition of "waters of the United States" will affect where federal permits are required and where section 401 certification applies. In instances of reduced CWA coverage, such as the final rule's exclusion of ephemeral streams, the applicability of section 401 will likewise be reduced. States and tribes may continue to apply state and tribal law and water quality standards to such waters, as authorized and applicable.

CWA Section 402 NPDES Programs

Introduction

Section 402 of the CWA provides that a NPDES permit is required for the discharge of pollutants from any point source to a "water of the United States." EPA estimates that the NPDES program requires permit coverage for discharges from approximately 655,200 facilities or activities.[140] The NPDES program addresses a wide range of discharges, including discharges from: publicly owned treatment works, combined sewer systems, sanitary sewer systems, stormwater activities (municipal separate storm sewer systems (MS4s), industrial, and construction), industrial facilities, commercial facilities, cooling water intake structures, concentrated animal feeding operations, and concentrated aquatic animal production facilities.

Types of NPDES Permits (General and Individual Permits)

The two basic types of NPDES permits are individual and general permits. These permit types share many of the same components but are used under different circumstances and involve different permit issuance processes. An individual permit is a permit specifically tailored to an individual facility. General permits are issued to a category or class of facilities or activities,[141] and are used to cover the vast majority (608,500 or 93 percent) of discharges requiring NPDES permits. Individual permits typically incorporate more site-specific limits and conditions and are issued to a relatively small percentage (46,700 or 7 percent) of the more complex facilities or activities regulated by the NPDES program. The universe of individual permits comprises approximately 14,200 Publicly-owned Treatment Works, 855 large and medium (*i.e.*,

[140] In December 2018, the President signed into law the Vessel Incidental Discharge Act (VIDA) (Title IX of the Frank LoBiondo Coast Guard Authorization Act of 2018), which requires EPA to develop new national standards of performance for commercial vessel incidental discharges and the USCG to develop corresponding implementing regulations. Prior to VIDA, EPA regulated incidental discharges from commercial vessels under the NPDES permitting program and these discharges were authorized by the Vessel General Permit (VGP). Permitted facilities covered under the VGP permit are now regulated under Section 312 of the Clean Water Act. The version of the RPA that accompanied the proposed rule included vessels in the universe of NPDES permitted discharges; in light of the above change, the discharges covered by the VGP have been removed.

[141] *See* 40 CFR 122.28.

populations > 100,000) MS4s, and 31,500 non- publicly-owned treatment works (*i.e.*, industrial, commercial) facilities or activities.[142]

The EPA classifies some NPDES permittees as "major facilities." Major facilities include publicly-owned treatment works with design flows of greater than one million gallons per day and facilities with pretreatment programs approved by the EPA or an authorized state. Major industrial facilities are identified based on ratings developed by EPA or an authorized state.[143] Facilities that are not classified as major facilities are "minor facilities." There are approximately 6,600 major facilities, comprising 4,300 publicly-owned treatment works and 2,300 non-publicly-owned treatment works. Nearly all of these facilities are covered by individual NPDES permits. There are an additional 42,000 minor facilities, made up of approximately 10,000 publicly-owned treatment works and 32,000 non- publicly-owned treatment works, covered by individual NPDES permits. In addition, there are approximately 365,000 pesticide applications and 93,000 other non-stormwater minor facilities covered by general NPDES permits. Approximately 181,200 stormwater facilities are covered by general permits. This estimate includes stormwater discharges from Phase II MS4s,[144] construction activities, and industrial activities.

Who Issues an NPDES Permit?

Dischargers obtain an NPDES permit from either the EPA or a state or tribe authorized to administer its own NPDES program. If the EPA approves a state or tribal program, the state or tribe assumes permitting authority responsibilities in lieu of the EPA. Most states are authorized to implement some or all of the NPDES program through a process defined by CWA section 402(b) and NPDES regulations in 40 CFR 123. Forty-seven states and the U.S. Virgin Islands are currently authorized to administer all or portions of the NPDES program under state authorities for some or all of five categories (basic municipal and industrial, pretreatment, federal facilities, general permits, and sewage sludge (biosolids)). State permitting authorities issue approximately 90 percent of the NPDES permits and EPA issues approximately 10 percent. The EPA is currently the permitting authority for some components of the Idaho NPDES program. The state was recently authorized to administer the NPDES program, effective July 1, 2018; however, Idaho's administration of each of the program components will be phased in over a four-year period. The EPA is the permitting authority for Massachusetts, New Hampshire, New Mexico; Indian country; federal facilities (*e.g.*, military bases, national parks, federal lands); and U.S. Territories (including Washington, D.C.), except the U.S. Virgin Islands. The EPA cannot issue

[142] All of the estimates in this section are based on data from the Integrated Compliance Information System (ICIS-NPDES) in December 2017.
[143] *See* 40 CFR 122.2
[144] Phase II MS4s are those "small MS4s" (*i.e.*, MS4s not already covered by a Phase I MS4 program, located within the urbanized area boundary as determined by the latest U.S. Decennial Census, or designated by the permitting authority) that were designated under the "Phase II" stormwater rule as requiring NPDES permit coverage. *See* 64 FR 68722, December 8, 1999. Most Phase II MS4s are covered by state or EPA-issued general permits. By contrast, Phase I MS4s include "medium" (serving populations of 100,000 to 250,000) and "large" (serving populations of 250,000 or more) sized MS4s that were designated as requiring NPDES permit coverage under the "Phase I" stormwater rule. *See* 55 FR 47990, November 16, 1990.

NPDES permits for discharges from point sources that do not convey pollutants to "waters of the United States."

Waters of the State

State NPDES programs can be broader in scope or more stringent than the federal program.[145] However, where state programs have a broader scope than what is required for the federal program, the additional coverage is not considered part of the federally-approved program.[146]

Many states issue their own discharge permits under state law that are not managed as part of an authorized NPDES program.

Tribal Permits

Under the CWA, tribes can be authorized to administer the NPDES program.[147] Thus far, no tribes have requested and obtained authorization. As a result, the EPA issues permits for discharges in Indian country.

There are approximately 255[148] individual NPDES permits in Indian country,[149] including 15 majors, in six EPA Regions, as shown below in Figure 1.[150] The permits include tribal-owned publicly-owned treatment works, other tribal industrial and commercial facilities, state and federal facilities, as well as non-tribal facilities in Indian country.

[145] *See* 40 CFR 123.1(i)(1).
[146] *See* 40 CFR 123.1(i)(2).
[147] *See* CWA sections 402(b), 518(e); 40 CFR 123(d)(2).
[148] The number of individual permits in Indian country was derived from data in EPA Office of Water's Permit Management Oversight System database, which reported a total of 266 such facilities. When reviewing the permitting data on those 266 facilities in EPA's ECHO system, 11 of the facilities identified had insufficient data to allow an analysis of these systems and were removed.
[149] "NPDES permits in Indian country" refer to facilities with NPDES permits that discharge to tribal waters.
[150] Data derived from the Office of Water's Permit Management Oversight System database in May 2017.

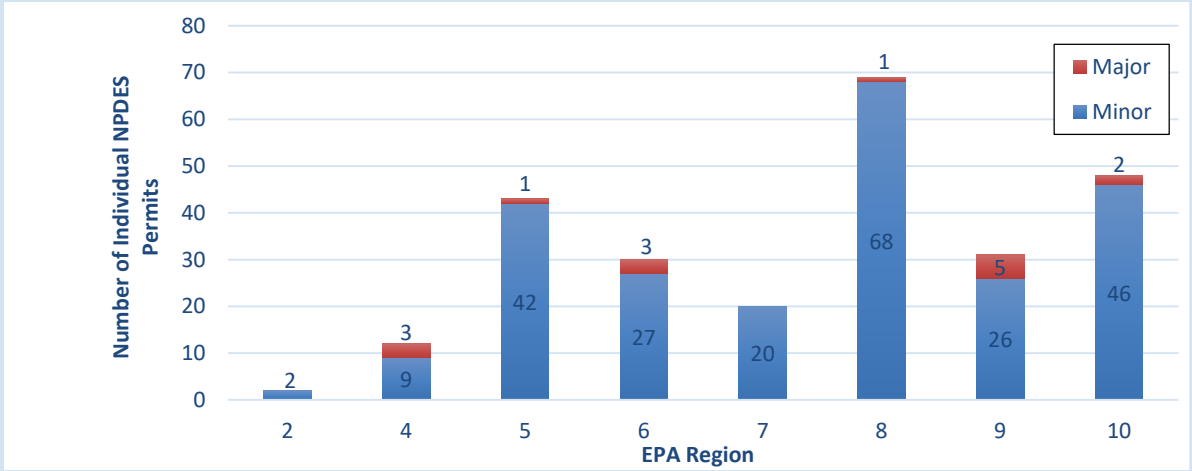

Figure 1: Number of Individual NPDES Permits for Major and Minor Facilities in Indian Country, by Region.

There are facilities in Indian country that are covered by general permits. For the permits issued by the EPA, the EPA has gathered the following data:

- **Pesticide General Permit:** Data from the most recently issued 2016 Pesticide General Permit indicate that a total of 25 operators discharge in Indian country. However, because most Pesticide General Permit permittees are not required to file a Notice of Intent, or NOI, and are automatically covered under the Pesticide General Permit, the Agency does not have complete data on the universe of permittees covered under the Pesticide General Permit.
- **Construction General Permit for stormwater discharges from certain construction activities:** Based on historical data from 2012 to 2016, approximately 425 facilities/sites on tribal land are covered by the EPA's construction general permit at any given time.
- **Multi-Sector General Permit for stormwater discharges from certain industrial activities:** Data from the current Multi-Sector General Permit, issued in 2015, indicate that there are 43 facilities on tribal land covered by the EPA's Multi-Sector General Permit.

Certain EPA Regions also issue general permits that cover facilities in Indian country. Estimates from April 2018 indicate that approximately 158 facilities are covered by these permits. The vast majority are covered by permits issued by the EPA's Region 8 for lagoon systems. Region 10 issues a general permit for tribal net pen enhancement facilities (finfish rearing operations located in marine waters) in Washington that covers three facilities, and a general permit for seafood processing facilities, which includes one tribal facility.

Permit Conditions

NPDES permits typically include effluent limitations that restrict the type and amount of specific pollutants that can be discharged to waters of the United States, as well as requirements for monitoring and reporting. In addition, all NPDES permits are required to include standard

conditions which delineate the legal, administrative, and procedural requirements of the permit.[151] There are two general categories of effluent limitations that are included in permits: technology-based effluent limits and water quality-based effluent limitations. Technology-based effluent limits require a minimum level of effluent quality that is attainable using demonstrated technologies for reducing discharges of pollutants into waters of the United States. Technology-based effluent limits are developed independently of the potential effect of a discharge on the receiving water.

Water quality-based effluent limitations are developed to protect water quality by ensuring that water quality standards are met in the receiving water. The NPDES regulations provide that a water quality-based effluent limitation should be included in a permit for any pollutant in a discharge that "causes, has the reasonable potential to cause, or contribute" to an excursion above a state water quality standards.[152] Many state water quality standards have general provisions allowing some consideration of mixing of effluent and receiving water when determining the need for and calculating water quality-based effluent limitations. Depending on the state's water quality standards and implementation policy, such considerations could be expressed in the form of a dilution allowance or regulatory mixing zone. Water quality-based effluent limitations may be based on the criteria in the applicable water quality standards, and consideration of effluent and receiving water critical conditions, including any dilution allowances or mixing zones that are allowed by the water quality standards.[153]

Water quality-based effluent limitations may be based on an applicable waste load allocation of a TMDL. A TMDL is a calculation of the maximum amount of a single pollutant that a waterbody can receive and still meet water quality standards and an allocation of that amount to the sources of the pollutant. The portions of the TMDL assigned to point sources are waste load allocations. Permitting authorities must ensure water quality-based effluent limitations are consistent with the assumptions and requirements of any waste load allocation that has been assigned to the discharge as part of a TMDL.[154]

Potential Effects

One potential effect of the final rule that may be misunderstood by the public and the regulated community is that existing NPDES permits may still be needed even if an existing jurisdictional water, such as an ephemeral stream that was found to have a significant nexus to a TNW under the 2019 Rule/*Rapanos* Guidance practice, may no longer be jurisdictional under the final rule. That is because the test for NPDES permit coverage is whether a release of a pollutant from a point source travels to a water of the United States. If a pollutant is conveyed through an ephemeral stream to a jurisdictional water, an NPDES permit may likely still be required. Some existing permits may be modified depending on applicable standards and subject to anti-backsliding permit requirements.

[151] *See* 40 CFR 122.41.
[152] *See* 40 CFR 122.44(d)(1).
[153] *See* CWA 301(b)(1)(C); 40 CFR 122.44(d)
[154] *See* 40 CFR 122.44(d)(1)(vii)(B).

The EPA's Integrated Compliance Information System (ICIS)-NPDES database[155] includes 250,040 unique permit numbers, including individual and general permits.[156] In an exploratory effort before proposing the revised definition, the agencies conducted a geospatial analysis of outfall coordinates from the ICIS-NPDES database and high resolution NHD water feature location in an attempt to estimate the potential effects of a change in the definition of "waters of the United States" on the section 402 program. Intermittent streams that meet the definition of "tributary" in the rule would remain "waters of the United States." However, discharges to ephemeral features would be potentially affected (mainly because of the change in applicable water quality standards) by changes to the definition of "waters of the United States." Because the NHD does not distinguish intermittent from ephemeral streams at a national level and because ephemeral streams are not *per se* jurisdictional under the *Rapanos* Guidance practice or the 2019 Rule, however, the agencies determined that such an analysis was not appropriate for estimating the potential effects of the proposed rule on the section 402 program at a national level.

Given these and other data limitations, the agencies conducted three case studies as illustrative examples to assess the potential impacts of changes in CWA jurisdiction on the NPDES program by analyzing the location of the permitted facility, or where available, the NPDES permitted outfalls to NHD high resolution waters in three selected regions. The Economic Analysis for the final rule provides a more in-depth discussion of these case studies, including an assessment of the potential effects of the rule. Below, the agencies address a few of the point source categories that raised frequent questions or concerns during the public engagement process for this rulemaking.

Stormwater

Over the years, some municipalities and some other public entities that operate MS4s and stormwater management programs expressed concern that various stormwater control measures—such as some stormwater treatment systems, and some flood control systems—could be considered "waters of the United States" because of their proximity and potential connection to surface waters. These concerns emphasized that any definitional change to what is a "water of the United States" for these control features should acknowledge the appropriate jurisdictional status relating to these systems.

The revised definition of "waters of the United States" excludes stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater runoff. The agencies' longstanding practice is to view stormwater control measures that are not built in a

[155] ICIS-NPDES is an information management system maintained by the EPA's Office of Compliance to track permit compliance and enforcement status of facilities regulated by the NPDES program under the CWA. ICIS-NPDES data are available for download from EPA's Enforcement and Compliance History Online website at https://echo.epa.gov/tools/data-downloads.

[156] This estimate includes both active and expired permits in ICIS-NPDES since facilities with expired permits can still operate with administratively continued permits. It excludes "terminated" permits that are no longer binding. It also excludes permits that did not have valid latitude/longitude coordinates or that were not truly NPDES permits (*see* Appendix A to the Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States").

"water of the United States" as non-jurisdictional. Conversely, the agencies have viewed some waters, such as certain channelized streams, as jurisdictional even where used as part of a stormwater management system. For example, portions of the Los Angeles River in Los Angeles County, California, and the Rio Grande in the City of Albuquerque, New Mexico, are considered part of the MS4. Nothing in the final rule is intended to change that practice.

Pesticide General Permit

An NPDES permit is required for point source discharges of biological pesticides, and chemical pesticides that leave a residue, to a "water of the United States." The EPA issues an NPDES Pesticide General Permit that is available in areas where the EPA is the NPDES permitting authority and covers these types of discharges. Forty-six[157] states and the U.S. Virgin Islands have NPDES permitting authority and have developed their own Pesticide General Permits. NPDES permits are not required for non-point source discharges or for discharges to non-jurisdictional waters, and the CWA exempts discharges of agricultural stormwater or irrigation return flow from needing NPDES permits.[158] The final rule does not itself establish any new requirements regarding the use of pesticides. As a result, the final rule does not change NPDES requirements regarding application of pesticides to waterbodies.

Water Transfers Rule

The NPDES regulations exempt water transfers from the requirement to obtain an NPDES permit and define a water transfer as an activity that conveys or connects two "waters of the United States" without subjecting the transferred water to an intervening industrial, commercial or municipal use. In order to constitute a "water transfer" under the regulation, "the water being conveyed must be a water of the United States prior to being discharged to the receiving waterbody. If the water that is being conveyed is not a water of the United States prior to being discharged to the receiving body, then that activity does not constitute a water transfer."[159] Therefore, to the extent the jurisdictional status of a water being conveyed as part of a water transfer is affected by a revision to the definition of "waters of the United States," the change could affect the status of such activities. The agencies have addressed, however, many of the instances where water transfers may occur and have retained jurisdiction over waters that may have otherwise been disconnected from downstream jurisdictional waters through active surface water management. The preamble to the final rule in Section III.A.3 addresses these issues at length.

[157] Idaho is an approved program but will not be administering the general permits program until 2020; until that time, Region 10 will be responsible for the Pesticide General Permit.
[158] 33 U.S.C. 1342(l).
[159] *See* 73 FR 33697, 33699 (June 13, 2008).

CWA Section 404 Permit Programs and other Dredged and Fill Programs

Introduction

Section 404 of the CWA requires a permit for discharges of dredged and/or fill material from a point source into "waters of the United States" unless the discharge is associated with an activity exempt from 404 permitting requirements under CWA section 404(f). Regulated discharges include the redeposit other than incidental fallback of dredged material into "waters of the United States" and generally any fill material (*e.g.*, rock, sand, dirt) placed in "waters of the United States" which has the effect of replacing any portion of "waters of the United States" with dry land or changing the bottom elevation of any portion of "waters of the United States." Such discharges may be associated with activities such as site development, roadway construction, erosion protection, linear projects (such as utility crossings), shoreline stabilization, and restoration projects.

The Corps manages the day-to-day administration of the CWA section 404 permitting program in 48 states and all tribal lands and U.S. Territories. Two states, New Jersey and Michigan, have assumed the section 404 program, pursuant to section 404(g), meaning that they have been approved by the EPA to administer a state dredged and/or fill program consistent with the CWA but in lieu of the federal section 404 program administered by the Corps and EPA (with the exception of waters over which the Corps must retain jurisdiction as specified in the CWA).

Federal Section 404 Program

Proposed activities are regulated through a permit review process. An individual permit is required for potentially significant impacts. Individual permits are reviewed by the permitting agency (Corps or approved state or tribe), which evaluates applications under a public interest review, as well as the environmental criteria set forth in the CWA section 404(b)(1) Guidelines, regulations that are established by the EPA.[160]

For most discharges that will have only minimal adverse effects to the aquatic environment, a general permit may be suitable. General permits are issued on a nationwide, regional, or programmatic basis for particular categories of activities. The general permit process allows certain activities to proceed with little or no delay, provided that the general or special conditions for the general permit are met. For example, a general permit can authorize minor road activities and utility line backfill. The Corps develops, issues, and reissues nationwide permits every five years, with the most recent issued in 2017.[161]

Assumed CWA Section 404 programs

By assuming administration of the CWA section 404 regulatory program under section 404(g), a state or eligible tribe takes on the primary responsibility of permitting discharges of dredged and/or fill material into certain "waters of the United States" within its borders. Prior to assuming

[160] 40 CFR 230.
[161] 82 FR 1860 (January 6, 2017).

the CWA section 404 permitting program, a state or tribal program must be approved by the EPA to be consistent with and at least as stringent as the requirements of the CWA and its implementing regulations. For section 404 permitting purposes, the approved state or tribal program must exercise jurisdiction over all waters subject to the CWA program except those waters retained by the Corps. [162] States or tribes with assumed programs can also regulate waters that are not "waters of the United States" or waters that are retained by the Corps under state or tribal law.

Assumed state or tribal dredged or fill permit programs can be broader in scope or more stringent than the federal program, or both. Where state programs have a broader scope of program coverage than what is required by the CWA section 404 program, the additional coverage is not considered part of the EPA-approved program.[163] States and tribes may authorize discharges of dredged or fill material issuing individual permits or general permits, both of which are subject to a five-year authorization duration.

Michigan was approved to administer the CWA section 404 program in 1984, and New Jersey was approved in 1994. No tribes have yet assumed the section 404 program. About one-third of states have expressed some level of interest to the EPA regarding assumption of the federal section 404 dredged and fill permit program.

State and tribal independent dredged and fill permitting programs

Even without an assumed program, any state or tribe may use state or tribal authorities to regulate discharges of dredged or fill materials into any waters of their state or reservation waters. Where such waters are considered "waters of the United States" the Corps would also implement the section 404 program unless it was assumed by the state or tribe.

As discussed above, 38 states, American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands have some form of dredged and fill permitting programs, or similar regulatory mechanisms, for state waters. Thirty-three of those states have authority to regulate dredged and fill discharges for at least some inland waters,[164] while the other five states and the territories only have authority to issue state permits in coastal or tidal waters.[165] Of those states with permitting authority in inland waters, 25 have permitting authority for isolated waters. Some of these state programs overlap with the Corps' dredged and fill permitting requirements

[162] Retained waters are discussed further in a July 30, 2018 Memorandum for Commanding General, U.S. Army Corps of Engineers Subject: Clean Water Act Section 404(g) - Non-Assumable Waters. *See* https://www.army.mil/e2/c/downloads/525981.pdf.
[163] *See* 40 CFR 233.1(c) and 40 CFR 233.1(d).
[164] While some of these 33 state dredged and fill programs cover all types of inland "waters of the state," including wetlands, some are limited to certain waters, such as streams, lakes, and "waters of the state" which may not be jurisdictional under the CWA. Additionally, some of these state programs may solely regulate waters that will remain jurisdictional under the final rule. For the purpose of the Economic Analysis' section on Potential State and Tribal Response, the agencies have concluded that inland programs are more indicative of a state's capacity to address waters that may no longer be federally jurisdictional under the final rule. Therefore, the Economic Analysis only counts the 33 inland state dredged and fill programs in its analysis
[165] The five states with coastal or tidal programs, but no inland programs, are Alabama, Georgia, Louisiana, Mississippi, and South Carolina.

under the CWA, and some address waters or activities that the Corps does not regulate. Following the change in the jurisdictional scope of the CWA, states with permitting authority may already regulate discharges of dredged and fill material into newly non-jurisdictional waters or may choose to expand their programs to address them.

The agencies are aware of several tribes that have the authority to independently administer their own dredged or fill permitting program under tribal law (*i.e.*, a non-assumed program), though are not aware of how many of these tribes implement such an independent dredged or fill permitting program.[166] Appendix B provides a snapshot of the agencies' current understanding of tribes that are authorized to administer a dredged or fill program under tribal law. These tribes may already address features that are non-jurisdictional under the final rule or may choose to expand their programs in order to address them. Other tribes may choose to develop tribal codes, ordinances, or programs to address waters that are non-jurisdictional under the final rule.

Although discussed more thoroughly in Chapter III and in the section on CWA section 401 certification, many states, territories, and tribes rely on the CWA section 401 certification program for ensuring water quality standards are met when the Corps issues dredged and fill permits under the CWA on state, territorial, or reservation lands. Tribes in particular often draw on the support of EPA regional offices for completing the 401certification process under the CWA when the Corps issues such federal permits.

Potential Effects

Federal programs

Changes in the definition of "waters of the United States" under the CWA will affect some federal permitting operations. The agencies expect that fewer[167] CWA section 404 permits will be issued by the Corps because certain waters will no longer be jurisdictional. For example, ephemeral streams are potentially subject to CWA jurisdiction under the 2019 Rule but are excluded under the final rule. The agencies have estimated national avoided costs and forgone benefits for the section 404 program associated with the final rule in the Economic Analysis, yet acknowledge that this analysis required a significant number of assumptions. Therefore, the agencies are uncertain of the actual number of permits that will no longer be required following a

[166] *See, e.g.*, Bad River Reservation Wetland and Watercourse Protection Ordinance (Resolution No. 12-16-09.138). 2009; Blackfeet Aquatic Lands Protection Ordinance (Ordinance 90-A-amended). 2012. Blackfeet Aquatic Lands Protection Ordinance (Ordinance 90-A-amended). 2012. Available at http://www.blackfeetenvironmental.com/ordinance90/blackfeet_aquatic_lands_protection_ordinance90a.pdf (in addition, the tribe has a wetlands program that performs homesite lease reviews for tribal members to identify potential impacts to wetlands and floodplains, and preconstruction site reviews for any projects that may affect wetlands); The Confederated Salish and Kootenai Tribes Shoreline Protection Ordinance, Tribal 64(A); and The Confederated Salish and Kootenai Tribes Aquatic Lands Conservation Ordinance, Ordinance No. 87-A (December 5, 1986). Available at http://nrd.csktribes.org/component/rsfiles/download?path=EP%252F87areg.pdf. *See also* "Fiscal Year 2016-2020 Confederated Salish and Kootenai Tribes Wetland Program Plan (WPP)" (February 9, 2016). Available at https://www.epa.gov/sites/production/files/2016-03/documents/final_cskt_wetland_program_plan_2016-2020_feb_9_submit_feb_10_2016_-1.pdf.

[167] Fewer relative to historic practice, but the agencies cannot predict future restoration or development interests in an improved economy that may increase permitting interest.

change in the definition of "waters of the United States." The agencies note that the jurisdictional status of many individual waters will remain unaffected by the final rule.

As discussed further in the Economic Analysis, the agencies examined permitting data (for both individual and general permits) and the extent of mitigated impacts to anticipate how the final rule could affect future section 404 permit actions. During fiscal years (FY) 2011 to 2015,[168] 248,688 permits were issued under the federal CWA section 404 program. Based on the authorized impact areas of section 404 permits issued over this time period, Florida, Louisiana, Alaska, and Texas had the largest areas of authorized permanent impacts for permitted activities on non-ocean and non-tidal water resources. States with large mitigation requirements, whether in terms of acres, linear feet, or credits—including Florida, Louisiana, South Carolina, Indiana, and Texas—may experience some potential impacts from the revised definition of "waters of the United States" in the event that the states do not require similar mitigation following the change. The EA also contains three case studies and a national assessment to illustrate some of the potential effects of the final rule with respect to CWA section 404.

An approved jurisdictional determination, or AJD, is a determination of whether or not a resource is considered a "water of the United States;" a preliminary jurisdictional determination, or PJD, treats all aquatic resources that would be affected in any way by the permitted activity on the parcel as jurisdictional so that a permit applicant can move ahead expeditiously to obtain a permit decision even as the Corps makes no legally binding determination regarding whether jurisdiction exists over a particular aquatic resource. AJDs made in the context of the CWA section 404 dredged and fill permitting program can help inform an understanding of the potential effects following a revised definition of "waters of the United States." It is important to note that in the context of the federal 404 dredged and fill permitting program, jurisdictional determinations (JDs) are typically made at the request of the landowner or project proponent. Because of this, there may be selection bias in terms of where the Corps has available information. In addition, because a number of factors influence where and when applicants request JDs, looking solely at program data does not allow overall analysis about the scope of where permits are and are not needed. (Note that a single permit application may involve many waters and/or JDs, and that a JD is not required for all permit actions.) Many applicants request JDs as an initial step in a request for a permit. Alternatively, some applicants may request an approved JD to obtain confirmation as to the jurisdictional status of aquatic resources to identify those waters which are not jurisdictional as a means to potentially reduce mitigation requirements and associated costs rather than assuming they are jurisdictional as done under a PJD.

The change in the scope of waters the agencies consider jurisdictional under the final definition of "waters of the United States" could result in either an increase or decrease in requests for AJDs compared to the 2019 Rule as implemented where PJDs are often favored. Over the long-term, the agencies anticipate that the additional clarity in the final rule as to which waters are

[168] Calendar year 2015 was the most recent complete year available at the time the agencies accessed data for use in this analysis. Note that the dates of the Corps' section 404 permit data from Operation and Maintenance Business Information Link, Regulatory Mode (ORM2) examined for the Economic Analysis are different from the dates of the Corps' approved jurisdictional determination data from ORM2 examined for the aquatic resource assessment discussed in this document.

categorically jurisdictional should reduce the administrative burden of establishing jurisdiction. Initially, this may lead to more AJDs to confirm jurisdiction where it otherwise might not have been clear under the significant nexus standard. Alternatively, applicants may continue requesting more PJDs than AJDs. In FY2015, 65 percent of all JDs were preliminary JDs (35 percent were approved JDs); in FY2016, 80 percent of all JDs were preliminary JDs (20 percent were approved JDs); in FY2017, 75 percent of all JDs were preliminary JDs (25 percent were approved JDs); and in FY2018, 69 percent of all JDs were preliminary JDs (31 percent were approved JDs).

The agencies analyzed data for AJDs from FY2013-2018 made under *Rapanos* Guidance practice. During that time period, the Corps conducted AJDs under the CWA for 97,060 aquatic resources. Of these AJDs, 66,053 aquatic resources were determined to be jurisdictional. The Corps conducted 18,068 upland determinations in that same period.

Chapter II discusses the potential aquatic resource implications identified by analyzing Corps data on AJDs. In short, many waters determined to be jurisdictional from FY13-FY18 data were within categories of waters that are likely to be jurisdictional under both the 2019 Rule as implemented and the revised definition of "waters of the United States." There are, however, some waters found jurisdictional during this time period that maybe considered outside the scope of the revised definition of "waters of the United States" under the final rule.

CWA Section 404 permits will not be required for dredged or fill activities in waters that are no longer subject to CWA jurisdiction. Where no federal permit is required, compensatory mitigation under federal regulation will not be required for unavoidable impacts to non-jurisdictional waters. Regulation of newly non-jurisdictional waters following the change in the definition of "waters of the United States" depends on state or tribal regulations that extend beyond the CWA, where such regulations exist. See the Economic Analysis for more information regarding potential state responses to a change in the definition of "waters of the United States."

Assumed CWA section 404 programs

New Jersey covers all waters of the state under their state-authorized dredged or fill program except in the Pinelands of New Jersey, where permitting of these discharges is limited to the waters within the jurisdictional scope of the CWA. Thus, the state would have to decide whether or not to change their statutes and permitting requirements within this coastal region following a change in the definition of "waters of the United States." Michigan, in 2013, revised its statutory language to limit its authorized permit program to the geographic scope of the CWA unless the Michigan legislature determines additional regulation is necessary.[169] In this case, the state

[169] Passed in 2013, PA 98 states: "Sec. 30101a. For the purposes of this part, the powers, duties, functions, and responsibilities exercised by the department because of federal approval of Michigan's permit program under section 404(g) and (h) of the federal water pollution control act, 33 USC 1344, apply only to 'navigable waters' and 'waters of the United States' as defined under section 502(7) of the federal water pollution control act, 33 USC 1362, and further refined by federally promulgated rules and court decisions that have the full effect and force of federal law. Determining whether additional regulation is necessary to protect Michigan waters beyond the scope of

would have to consider whether it would be necessary to change its statute and permitting requirements in response to a change in the definition of "waters of the United States." If either New Jersey or Michigan's programs change as a result of resulting from this regulation, this will require EPA review and approval.[170]

The agencies are aware of the view that some states would only seek to assume section 404 permitting authority if their state had sufficient "waters of the United States" to warrant the assumption effort. Other states have indicated that a change in CWA jurisdiction may be an incentive to develop their own state dredged and fill permitting program and may increase interest in 404 assumption. A change in scope of CWA jurisdiction, therefore, might alter (both positively and negatively) state (and potentially tribal) interests in assuming the CWA section 404 program depending on the nature of their aquatic resources and other state interests.

State and tribal programs

Because 38 states[171] and at least three tribes administer a state or tribally authorized dredged or fill program, the change in the definition of "waters of the United States" may affect such programs insofar as these states or tribes would need to determine whether the scope of their program would or should change as a result of the change in federal CWA jurisdiction. Further discussion can be found in Chapter III: State and Tribal Roles and Analysis.

CWA Financial Assistance Programs

Introduction

The CWA authorizes a variety of financial assistance programs, which are related directly or indirectly to "waters of the United States." The change in the definition of the "waters of the United States" could potentially affect some of these programs. For purposes of this discussion, the following CWA financial assistance programs are the primary and most relevant programs administered by the EPA: Section 106 Grant Program; section 319 Nonpoint Source Management Program; section 320 National Estuary Program; and various grant programs authorized under CWA section 104(b)(3), including Wetland Program Development Grants and the Healthy Watersheds Consortium Grant Program.

federal law is the responsibility of the Michigan legislature based on its determination of what is in the best interest of the citizens of this state."

[170] *See* 40 CFR 233.15.

[171] This includes states with inland dredged and fill programs, as well as those with permit programs for coastal or tidal waters. Both Michigan and New Jersey have state dredged and fill programs outside of their assumed programs.

Description and Potential Effects

CWA Section 106 Grant Program

Section 106 of the CWA authorizes the EPA to provide financial assistance to states (including the U.S. Territories and the District of Columbia), eligible interstate agencies, and eligible tribes to assist them in administering programs for the prevention, reduction, and elimination of pollution. The EPA provides this financial assistance in the form of section 106 water pollution control (section 106) grants, which provide funding to build and sustain effective water quality programs to help meet the objective of the CWA.

Section 106 grants support a wide variety of water pollution prevention and control programs and activities, including monitoring and assessing water quality; developing water quality standards; identifying impaired waters and establishing TMDLs; managing NPDES programs; ensuring compliance; implementing enforcement actions; protecting source water; and managing outreach and education programs.

Section 106 grants are allocated annually by the EPA directly to states and interstate agencies. A portion of section 106 funds is set aside and allocated to EPA regional offices to make allotments to eligible tribes. The EPA calculates section 106 allotment funds to states, territories, and interstate agencies (not including Monitoring Initiative funds) using an allocation formula that funds "on the basis of the extent of the pollution problem in the state" (CWA section 106(b)). Since 2006, the EPA has provided additional Monitoring Initiative funding to states, interstate agencies, and tribes to enhance water quality monitoring programs and conduct surveys of the nation's waters. The state Monitoring Initiative funds are allocated separately.

The programmatic scope of the CWA section 106 water pollution program grants is sufficiently broad and cross-cutting to minimize the effects of any change in jurisdiction from a grant-allocation perspective. These funds already support programs of the state or tribe regardless of whether the programs address waters that are jurisdictional. For example, groundwater has never been jurisdictional under the Act. Thus, the state and tribal program funding through section 106 grants would be unaffected by the change in the definition of "waters of the United States."

CWA Section 319 Nonpoint Source Management Program

The Section 319 Nonpoint Source Management Program directs the EPA to help focus state and local nonpoint source efforts. Under the section 319 program, states, territories and tribes receive grants to support a wide variety of activities including technical assistance, financial assistance, education, training, technology transfer, demonstration projects and monitoring to assess the success of specific nonpoint source implementation projects.

CWA section 319(h) funds are provided to designated state and tribal agencies to implement their approved nonpoint source management programs. State and tribal nonpoint source programs include a variety of components, including technical assistance, financial assistance, education, training, technology transfer, demonstration projects, and regulatory programs. Each year, the EPA awards about five percent of section 319(h) funds to tribes and awards the balance of the funds to states and territories in accordance with a longstanding allocation formula.

States and tribes submit annual section 319(h) funding plans to the EPA consistent with funding priorities they have established. If the funding plan is consistent with grant eligibility requirements and procedures, the EPA then awards the funds.

Section 319 grants are authorized for purposes of assisting the state or tribe in implementing nonpoint source control and management programs, as described in the CWA and as prioritized by the state or tribe. These programs encompass large watersheds and complex geographies and are largely shaped by the priorities of the state or tribe. Section 319 grant funding has historically applied to all types of surface water and groundwater, without considering the water's jurisdictional status. Furthermore, like the language of section 106, section 319(i) authorizes EPA to make grants for protecting groundwater quality, which further indicates that the scope of the grant program is not linked to CWA jurisdiction.[172]

CWA Section 320 National Estuary Program

The National Estuary Program is a place-based program to protect and restore the water quality and ecological integrity of estuaries of national significance. Currently, 28 estuaries located along the Atlantic, Gulf, and Pacific coasts and in Puerto Rico are designated as estuaries of national significance. Under the National Estuary Program, the EPA awards assistance agreements to the 28 designated estuaries whose activities are necessary for the development and implementation of a comprehensive conservation and management plan.

Section 320 funds are used to protect and restore the water quality and ecological integrity of estuaries of national significance. This is accomplished through the development and implementation of Comprehensive Conservation and Management Plans by National Estuary Programs. The authorizing language does not refer to "waters of the United States," or "navigable waters," so they are not affected by the change in CWA jurisdiction.

CWA Section 104(b)(3) Authorized Grant Programs

Grants awarded under CWA section 104(b)(3) cover a range of EPA programs and are limited to projects for coordination and acceleration of research, investigations, experiments, training, demonstrations, surveys and studies relating to the causes, effects, extent, prevention, reduction and elimination of water pollution.

Wetland Program Development Grants. The Wetland Program Development Grants fund projects that support the development and growth of state, tribal, or local wetlands protection, restoration, or management programs. Wetland Program Development Grants assist state, tribal, local government agencies and interstate/intertribal entities in building programs to protect, manage and restore wetlands and other aquatic resources. Under the program, the EPA administers a set of four competitive grants: national Wetland Program Development Grants, regional Wetland Program Development Grants, tribal Wetland Program Development Grants, and the Five Star and Urban Waters Restoration program. Funds cannot be used for

[172] 33 USC 1329(i).

implementation projects, such as individual mitigation projects, mitigation banks, or in-lieu-fee mitigation programs.

Healthy Watersheds Consortium Grant Program. The Healthy Watersheds Consortium Grant Program seeks to accelerate strategic protection of healthy, freshwater ecosystems and their watersheds across the country. The primary focus is on the protection and stewardship of land in the watershed, rather than restoration of degraded habitats or projects with a strictly water quality improvement outcome. The Healthy Watershed Consortium Grant Program funds one cooperative agreement to an organization to manage the Healthy Watershed Consortium Grant subaward process that awards subgrants to support the strategic protection of freshwater ecosystems and their watersheds across the country. Non-profit, non-governmental organizations, interstate agencies, and intertribal consortia which are capable of undertaking activities that advance watershed protection programs are eligible to compete in this program. These funds are used for healthy watershed capacity development and for local demonstration and/or training subaward projects. Under the CWA 104(b)(3) authority, projects funded under the subgrant process must be limited to activities that conduct or promote the coordination and acceleration of research, investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of water pollution.

The above CWA grant programs administered under section 104(b)(3) do not rely on a connection with the jurisdictional scope of the CWA. These programs, like the section 106 and 319 grant programs, are intended to address programmatic improvements regarding the ability and capacity of states, tribes and local communities to manage and protect surface water resources regardless of their jurisdictional status.

Clean Water Act Enforcement Program

Introduction

CWA section 301 prohibits the unauthorized discharge of a pollutant by a person from a point source to "waters of the United States." Noncompliance with CWA sections 301 or 311, or noncompliance with a requirement of a permit issued under sections 402 or 404, constitutes a violation of the CWA. The goals of the enforcement program under the CWA are to assure compliance, to protect human health and the environment, to send a clear message of deterrence to the regulated community, and to create a level regulatory playing field for all citizens and businesses. The CWA provides the implementing agencies with a range of enforcement tools to bring a party into compliance.

Overview of Administrative, Civil Judicial, and Criminal Enforcement Authorities

The EPA has both administrative and judicial tools to enforce compliance with the CWA. It may issue compliance orders under CWA section 309(a) or administrative penalty orders under CWA section 309(g). For discharges of oil or hazardous substances, the EPA may pursue

administrative enforcement under CWA section 311(b).[173] These authorities allow the EPA to require compliance with the CWA through orders that seek restoration and impose monetary penalties that recapture the economic benefit of noncompliance and deter future violations. In addition, CWA sections 309(b) and 311(b) authorize the EPA to commence a civil judicial action in United States District Courts to enforce compliance with the CWA. Civil judicial actions are used to compel a party to cease its violations and/or provide injunctive relief, including restoration of waters subject to CWA jurisdiction. Under appropriate circumstances, the EPA may invoke its enforcement authority under section 311(e) to abate imminent and substantial threats to public health or the environment related to the discharge of oil or hazardous substances. Additionally, the EPA may invoke its emergency authority under section 504 to address imminent and substantial endangerments to the health or welfare of persons related to the discharge of pollutants.

CWA section 309(c) authorizes the EPA to take criminal enforcement action for violations of the Act. Typically, CWA criminal enforcement efforts are reserved for the most egregious violations involving culpable conduct related to unpermitted discharges to "waters of the United States," discharges in violation of permits, and/or dishonest or false conduct that undermines the CWA's statutory scheme. Criminal enforcement may also be pursued when there have been significant repetitive violations notwithstanding prior administrative or civil enforcement efforts to obtain compliance. While less commonly pursued than administrative and civil enforcement actions, criminal enforcement is an important element of the overall enforcement effort. Criminal enforcement may also secure restitution for victims and can recover assets that represent the proceeds of criminal wrongdoing. In addition to fines, criminal conviction can result in the imposition of prison sentences that serve as a vital deterrent to future wrongdoing and expresses society's disapproval of the conduct and the seriousness of the crime. EPA's Office of Criminal Enforcement, Forensics and Training also partners with state and local authorities to assist them in investigating and prosecuting egregious violations of the CWA's authorized programs.

Authority to Enforce CWA Section 402

Discharges from "point sources" to "waters of the United States" may be authorized through the CWA section 402 NPDES permit program. The EPA and states with authorized programs administer the permitting program. Unpermitted discharges or violations of NPDES permit requirements may be the subject of an enforcement action. The CWA authorizes the EPA enforcement action in both authorized states as well as in those states where the EPA is the NPDES permitting authority.

[173] The EPA shares responsibility for CWA section 311 enforcement with the U.S. Coast Guard (USCG). The details of the shared responsibility are found in a Memorandum of Understanding between the EPA and the USCG. 58 FR 19420 (April 14, 1993). Any facility or vessel that discharges into navigable waters of the United States or adjoining shorelines is required to report the discharge to the National Response Center, which is operated by the USCG.

Authority to Enforce CWA Section 404

Section 404 of the CWA regulates the discharge of dredged or fill material into "waters of the United States" through the permitting program administered by the Corps. Discharges that are not permitted or exempted can be the subject of an enforcement action.

The EPA shares responsibility for CWA section 404 enforcement with the Corps except in states and tribes which have assumed the program. CWA section 309 and CWA section 404 authorize the EPA, the Corps, and authorized states and tribes to enforce against unpermitted discharges and violations of permits. For Corps issued permits, the details of the shared enforcement responsibility are found in the 1989 Memorandum of Agreement between the agencies.[174] Under the Memorandum of Agreement, the EPA is the lead enforcement agency for flagrant violations, repeat violators, and other cases where the Corps recommends that the EPA take an action. The state, tribal and EPA responsibilities are identified in CWA section 404(h) and the regulations at 40 CFR 233.40.

Potential Effects

The revised definition of "waters of the United States" will decrease the scope of the CWA geographic jurisdiction compared to the 2019 Rule as implemented. For example, ephemeral features are categorically excluded from CWA jurisdiction under the final rule and may have been jurisdictional in some circumstances if they satisfied the significant nexus test articulated in the *Rapanos* Guidance. Isolated wetlands and other water features that do not contribute surface water flow to traditional navigable waters in a typical year or are not inundated by flooding from a jurisdictional water in a typical year are also not jurisdictional under the final rule. Waters outside the scope of the agencies' authority under the CWA likewise fall beyond the agencies' enforcement authority under the Act. However, nothing in the revised definition of "waters of the United States" affects the ability of states and tribes to apply and enforce independent authorities over aquatic resources under state or tribal law.

[174] Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (January 19, 1989). Available at http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Compliance/1989_Enforcement_MOA.pdf.

V. Other Potential Program Impacts

Safe Drinking Water Act Programs, Including Source Water Protection

Introduction

The Safe Drinking Water Act (SDWA) was established in 1974 to protect the quality of drinking water in the United States. This law focuses on waters actually or potentially designated for drinking use, whether from aboveground or underground sources. The SDWA authorizes the EPA to establish minimum standards to protect drinking water and requires all owners or operators of public water systems to comply with these health-related standards.

The primary components of the SDWA public water systems regulatory program focus on treatment and prevention as the means of providing safe drinking water. There are no SDWA requirements on the quality of water entering a drinking water treatment plant; rather, the drinking water utility must treat contaminants and ensure safe public drinking water for their consumers by meeting the regulatory standards for potable use. If contaminants entering drinking water facilities increase or decrease, the treatment facility must adjust processes accordingly to ensure delivery of water that meets applicable standards.

Amendments to the SDWA in 1996 enhanced the existing law by recognizing source water protection, requiring operator certification, establishing a funding mechanism for water system improvements, and ensuring public access to community water system information. This approach was intended to improve drinking water quality through a multi-barrier approach by addressing it from source to tap.[175]

The 1996 amendments required states and water suppliers to conduct one-time assessments of water sources to see where they may be vulnerable to contamination. These source water assessments included three steps: delineation of the source water protection area; inventory of the potential sources of contamination; and determination of the susceptibility (vulnerability) of the water supply to contamination. While these assessments serve as an important source of information and can be used to develop protection plans, the SDWA does not confer any authority to protect surface water, implement a source water protection plan, or update the initial source water assessment.

[175] The 1996 Safe Drinking Water Act Amendments created a coordinated set of programs and requirements to help water systems make sure they have a safe supply of drinking water. These programs and requirements form a multiple barrier approach that focus on contamination at the source, treatment, and tap to help provide a safe supply of drinking water for consumers. The barriers are:

- Risk Prevention: Selecting and protecting the best source of water where possible or protecting a current source of water.
- Risk Management: Using effective treatment technologies, properly designed and constructed facilities, and employing trained and certified operators to properly run system components.
- Monitoring and Compliance: Detecting and fixing problems in the source and distribution system.
- Individual Action: Providing customers with information on water quality and health effects so they are better informed about their water system.

(EPA Office of Water, EPA 816-K-06-005, September 2006)

The CWA and other state, tribal, and local regulations help to ensure high quality source waters are available for drinking water use. Water quality in rivers, streams, and lakes that serve as drinking water sources depends on pollutant loadings from a variety of sources, including point sources, nonpoint source runoff, groundwater quality, air deposition, and the quality of upstream surface waters. Key CWA programs supporting source water protection include water quality standards, section 311 oil spill prevention and response, section 402 NPDES permits, section 404 permits, TMDL development and implementation, and nonpoint source management. Funds from the section 106 program can be used to monitor water quality in source water areas, and the section 319 nonpoint source program grants can be used for projects to improve water quality of impaired waterbodies. Additionally, voluntary actions of federal, state, or local source water protection programs and collaborations may be focused on protecting and improving sources of drinking water. For example, the U.S. Department of Agriculture implements multiple programs that benefit source water quality and protection. *See, e.g.*, https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/.

Groundwater

While public water systems that rely on surface water serve more than twice as many people as those that rely primarily on groundwater, there are far more groundwater systems than surface water systems in the United States.[176] Groundwater is connected to surface water through infiltration from wetlands, rivers, streams, lakes, and reservoirs. This infiltration provides storage and maintains water levels in aquifers which, in turn, may supply base flow for surface waters which is especially important during dry periods.

State and Tribal Programs

In general, most states with SDWA authority maintain source water protection as a non-regulatory program, although many states regulate discharges to groundwater under state permitting programs because those states treat groundwater as "waters of the states."[177] Several states require periodic updates of source water assessments; some only require updating the assessments for groundwater sources (wellhead protection plans) and a few states include source water protection in their public water supply plans or other planning processes. In these states, many of the requirements are for assessment and planning activities, rather than implementation of the plans (*e.g.*, stream restoration or development of local ordinances).

There are several notable exceptions where source water protection and watershed management are explicitly addressed at the local level. These include cities where most of the drinking water originates on federal lands that are managed for water quality (*e.g.*, San Francisco, California, which relies on the Hetch Hetchy watershed in Yosemite National Park, and Portland, Oregon,

[176] EPA data from 2019 Third Quarter Safe Drinking Water Information System/Federal Version indicate that approximately 133,500 systems serving over 105 million people utilize groundwater as a primary source of water, while approximately 14,900 systems serving over 224 million people utilize surface water as a primary source of water.

[177] Association of Clean Water Administrators, Comment on the EPA Proposed Rule: Clean Water Act Coverage of Discharges of Pollutants via a Direct Hydrologic Connection to Surface Water, Docket ID No. EPA-HQ-OW-2018-0063-0230. Available at https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0063-0230.

which relies on the Bull Run Watershed Management Unit, 96 percent of which is owned by the U.S. Forest Service) and in cities where state or local regulations protect their source areas and control the activities allowed in the watershed (*e.g.*, New York City, New York).

The SDWA does not require tribes to implement source water protection on tribal lands nor does it confer regulatory authority to tribes to protect surface water used as drinking water sources. Most tribes maintain source water protection as a non-regulatory program; therefore, the level of programmatic activity and investment in implementing protections varies from tribe to tribe.

Tribes are eligible to receive financial and capacity support for source water protection under the SDWA Public Water System Supervision Program and through Direct Implementation Tribal Cooperative Agreements administered by EPA regional offices (exclusive of Alaska, where the state has primary enforcement responsibility for the Alaska Native Villages, and the Navajo Nation, which also has primary enforcement responsibility), which help tribes to complete source water assessments and develop source water protection programs. However, implementation of source water protection is more often supported through the Indian Environmental General Assistance Program or as part of other environmental protection efforts such as watershed management, pesticide management, or nonpoint source reduction, and is completed through CWA programs, such as the section 106 program, section 319 nonpoint source program, or other environmental programs.

The Drinking Water and Clean Water State Revolving Funds

Under SDWA authorities, the Drinking Water State Revolving Fund (DWSRF)[178] can be used to maintain existing infrastructure or purchase improved treatment, storage, and transmission and distribution for a drinking water system. The DWSRF provides subsidy to disadvantaged communities and SDWA requires that states use at least 15% of their loan funds for systems serving 10,000 or fewer, to the extent there are sufficient applications. The DWSRF may only lend to a system out of compliance if that project is intended to return the system to compliance.

The DWSRF includes several optional set-asides that states may take for such uses as supporting source water protection programs. Eligible activities include, but are not limited to, support for state personnel who manage source water protection programs, updates to source water assessments, loans to public water systems for land acquisition and conservation easements, loans to public water systems for incentive-based source water protection measures, and expenditures for activities described in a state's Wellhead Protection Program or for the implementation of efforts to protect source waters. From 1997-2019, 27 states used at least some

[178] EPA provides grants to all 50 states plus Puerto Rico to capitalize state Drinking Water State Revolving Fund (DWSRF) loan programs. The states contribute an additional 20 percent to match the federal grants. The program also provides direct grant funding for the District of Columbia, U.S. Virgin Islands, American Samoa, Guam, and the Commonwealth of Northern Marianas. The 51 DWSRF programs function like infrastructure banks by providing low interest loans to eligible recipients for drinking water infrastructure projects. Since inception of the program, EPA has provided $21.1 billion in financing to the DWSRF, which in turn has financed $41.1 billion in infrastructure improvement.

portion of these set-asides for Source Water Protection Technical Assistance, or Source Water Protection Loans.[179]

Additionally, the Clean Water State Revolving Fund (CWSRF) can be used to support projects that protect sources of drinking water. This includes projects to maintain or improve publicly owned treatment works and combined sewer overflows, as well as nonpoint source projects. While some subsidy can be available for the CWSRF, assistance generally is in the form of loans that must be repaid.

The agencies do not expect the function or scope of funding programs to be affected as a result of any change in the definition of "waters of the United States." They are available and will continue to be available to states.

Potential Effects

Over 65 percent of Americans who are served by public water systems rely on systems which primarily draw their water from rivers, streams, lakes, and reservoirs.[180] In an exploratory effort for the proposed rule, the agencies attempted to evaluate the spatial distribution of drinking water sources in relation to streamflow classification (*e.g.*, perennial, intermittent, ephemeral) type by overlaying the source protection areas[181] for surface water intakes on the National Hydrography Dataset (NHD) at high resolution. Due to data limitations of the NHD – in particular the fact that the NHD does not identify intermittent and ephemeral streams as separate categories in many parts of the country and may misclassify flow conditions compared to actual on the ground conditions – coupled with uncertainty regarding the jurisdictional status of many intermittent streams and all ephemeral streams subject to a case-specific significant nexus analysis under the 2019 Rule/*Rapanos* Guidance practice, the agencies concluded that the exploratory analysis cannot appropriately or accurately assess the potential effects of the proposed rule. These limitations are unchanged; therefore, the agencies did not and cannot use the NHD to assess the potential impacts of the revised definition of "water of the United States" on public water systems.

In addition, the agencies note that the mere presence of ephemeral streams in a source protection area does not mean there will be water quality degradation following the revised definition of "waters of the United States," as states, tribes, and local governments may have programs and policies to protect source water, and even if those are absent, activities that might result in water quality degradation will not occur on all streams. Indeed, many ephemeral streams are not

[179] Does not include funds that went to SWP Area Delineation Assessments, since it was required for all states, or funds that went to wellhead protection or capacity development

[180] Data from EPA's Government Performance and Results Act Inventory Summary Report, FY2017 Third Quarter. Available at https://obipublic11.epa.gov/analytics/saw.dll?PortalPages&PortalPath=/shared/SFDW/_portal/Public&Page=Inventory.

[181] Each source protection area identifies those waters that will reach a drinking water intake within 24 hours but does not necessarily represent an area that receives special protection. Also, the choice of a 24-hour time of travel does not imply that activities in drainage areas above this do not have the potential to impact water quality to downstream drinking water supplies. Rather, the 24-hour transport was chosen as a consistent nationwide metric.

considered jurisdictional under the 2019 Rule. The agencies received comments requesting a more quantitative analysis of the potential impact of the rule, however, as discussed in Chapter I, the limitations of the available data do not allow for such an analysis, and the commenters did not provide additional data to facilitate such an analysis.

Public water systems are located throughout the hydrologic landscape. Actions that have the potential to change water quality have the potential to affect downstream public water system operations. The degree of this impact, if any, can vary based on the nature and magnitude of change; state, tribal, and local authorities and programs for managing water quality; and the size, complexity, and technical capacity of an individual drinking water system. Drinking water regulations under SDWA will continue to apply to water delivered by public water systems, with the goal of protecting public health. The DWSRF is available to help fund source water protection activities and finance improvements to drinking water utilities. Overall, the potential effects of the change in CWA jurisdiction on drinking water quality will depend on whether the activities affecting non-jurisdictional waters affect the quality of the water at a drinking water utility's water intake, and the capabilities of individual drinking water utilities to respond to a potential change in source water quality; whether there are state or tribal protections in place, including local source water protection activities, that will cover areas that would not be subject to CWA jurisdiction; and how well an individual drinking water utility is prepared to respond to a potential change in source water quality that may affect its operations and ability to meet SDWA requirements.

RCRA Section 1004(27) Permitting and Corrective Action Program

Introduction

Hazardous Waste Permitting

Under the Resource Conservation and Recovery Act (RCRA), a facility that stores, treats or disposes of hazardous waste (as defined under EPA's RCRA regulations) is generally required to obtain a permit. Hazardous wastes are classified as either listed wastes or wastes exhibiting a hazardous characteristic. Most states have been authorized to administer this permitting program, with the exception of Alaska and Iowa, along with some U.S. Territories. EPA regional offices administer the RCRA program for regulated activities in unauthorized states, territories, and tribal lands (except where the state is authorized to administer the program on tribal lands) within their region.

RCRA facility permits include requirements to conduct facility-wide corrective action (cleanup of contamination), including corrective action beyond the facility boundary, as necessary to protect human health and the environment. Remediation activities often involve less concentrated wastes, one-time activities, and shorter-term activities. The EPA or an authorized state oversees such remediation activities. Corrective action cleanup/remediation activities at RCRA-permitted facilities may involve discharges of treated water (*e.g.*, from pump and treat operations) to "waters of the United States," generally through the facility's wastewater treatment facility.

RCRA regulations provide certain exemptions from RCRA permits (and certain facility standards) specifically for wastewater treatment units that are part of a wastewater treatment facility subject to the CWA (whether or not they actually possess a CWA permit). Specifically, the wastewater treatment unit exemption applies to a wastewater treatment unit that meets the definition of "tank" or "tank system" (which includes associated ancillary equipment (*e.g.* piping)), manages hazardous wastewaters, and is part of a wastewater treatment facility subject to CWA section 402 or 307(b) requirements.[182] Also, publicly-owned treatment works managing hazardous wastewaters are deemed to have a RCRA permit as long as certain conditions are met, among them, having a CWA section 402 permit.[183]

A facility that is not permitted under CWA section 402 and instead is permitted under RCRA to manage a hazardous waste is subject to different requirements than a facility permitted under CWA section 402 or 307(b). The requirements for RCRA permitted (or interim status) facilities are generally specified in 40 CFR parts 264, 265, and 270. The requirements include secondary containment for hazardous waste tank systems.

Potential Effects

Potential Effect to RCRA Hazardous Waste Permitting

If a facility with a wastewater treatment unit is not subject to CWA section 402 or 307(b) requirements, then the wastewater treatment unit exemption from RCRA permitting would not apply and the facility could be subject to RCRA permitting requirements for that wastewater unit and requirements for facility-wide corrective action. Thus, the change in the scope of CWA jurisdiction has the potential to affect the regulatory status of certain facilities currently covered by the wastewater treatment unit exemption in states with authorized RCRA programs if those facilities are discharging to waters that may change jurisdictional status, such as some ephemeral streams. Such facilities could be required to obtain RCRA permits for those units or modify their existing permits to include those units. In addition, facilities could utilize off-site wastewater treatment capacity where available (*e.g.*, centralized wastewater treatment), and hazardous waste generators may perform treatment without a RCRA permit in tanks or containers consistent with the temporary accumulation provisions in 40 CFR 262[184] and as allowed under their authorized state RCRA program.

Because EPA regional offices administer the RCRA permit program in Iowa, Alaska, certain territories and on tribal lands, the final rule could affect the regulatory status of certain facilities currently covered by the wastewater treatment unit exemption or publicly-owned treatment works in those locations in the event that such facilities handle and store wastes in tanks that are listed or exhibit characteristics considered hazardous waste. The respective EPA regional offices could be required to issue additional RCRA permits in such instances. Given existing data limitations, the agencies are unable to quantify any potential change resulting from this final rule.

[182] *See* 40 CFR 264.1(g)(6), 265.1(c)(10), and 270.1(c)(2)(v). *See also* definition of wastewater treatment unit at 40 CFR 260.10.
[183] *See* permit by rule regulation at 40 CFR 270.60(c).
[184] *See* Footnote 102 in the November 28, 2016 Federal Register, 81 FR 85792.

Because data are lacking on potentially affected facilities, publicly-owned treatment works, and corrective action or remediation programs due to the change in the definition of "waters of the United States," the agencies are only able to characterize this effect as a possibility. The actual number of facilities or programs that handle qualifying wastes is uncertain and public comments did not provide additional insight. Whether state authorized NPDES programs would change their permitting approach in response to the final rule is unknown. Even if the revised definition results in changes to state programs, the agencies have concluded elsewhere in this document that it is more likely the revised definition of "waters of the United States" would change permit limits or compliance points rather than eliminate permitting altogether.

The agencies are not aware of other state, tribal, or local laws or programs that currently exist that could address the potential effects of a change in permitting responsibility from the CWA to RCRA following the revised definition of "waters of the United States."

Consideration of Other Federal Programs

Introduction

When reviewing individual requests for a federal approval or permit under the various CWA programs, the approval or permit decision by the EPA or the Corps may create a nexus to a variety of other federal laws, regulations, and policies that may need to be addressed as part of the individual request for a federal approval or permit. These federal laws, regulations, and policies include, but are not limited to, the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA).[185]

Because the Corps issues thousands of permits nationwide under the Rivers and Harbors Act and the CWA section 404 dredged and fill permitting program, the Corps has developed streamlined processes for coordinating compliance with other federal laws and regulations. However, where the revised definition of "waters of the United States" means that a section 404 permit is not required, a complex set of scenarios for addressing the nexus with other federal laws results.

For a federal project, activity, program, permit, or other applicable federal undertaking affecting features that may not be regulated under CWA programs under the revised definition of "waters of the United States," a federal agency could still be responsible for complying with any other applicable federal laws, regulations, and policies, such as the Endangered Species Act which applies regardless of impacts to waters subject to CWA jurisdiction. The two most likely scenarios for such federal agency involvement on a project are when a federal agency itself is constructing a project or when a non-federal entity (either public or private) needs a non-CWA federal permit or approval or is receiving funding for a project from a federal agency. An example of the first scenario would be where the Department of Army seeks a CWA section 404 permit from the Corps for construction of facilities that may affect "waters of the United States." In such a situation, the Department of the Army may rely on the Corps' processes for complying with other federal laws such as NEPA or the ESA. If the waters are no longer jurisdictional under the revised definition, then the Department of the Army would still be responsible for complying

[185] *See* 42 U.S.C 4321 *et seq.* (NEPA); 16 U.S.C. 1531 *et seq.* (ESA); 54 U.S.C. 300101 *et seq.* (NHPA).

with those other federal laws in connection with its own federal construction project. The exact mechanism for compliance would vary depending on the applicable federal law or policy and its requirements. An example of the second scenario would be where a community non-governmental organization is receiving a grant through the National Oceanic and Atmospheric Administration (NOAA) habitat conservation program for stream restoration activities that requires Corps approval or a permit under CWA section 404 for work in a "water of the United States." NOAA is likely to rely on the Corps' streamlined processes for complying with other federal laws for the grant program. Where waters are no longer jurisdictional under a revised definition of "waters of the United States," no CWA permit will be required, and NOAA would be responsible for ensuring that any actions funded by its grant programs would comply with other federal laws.

The situation may be different where there is no federal agency nexus. In such cases, where certain waters are no longer regulated under CWA programs for a non-federal project and no other federal nexus exists, the application of applicable federal law may shift from the federal government to a private party. For example, if the Corps no longer needs to issue a federal permit and therefore may not consult under section 7 of the ESA, section 9 of the ESA still applies and private parties are still liable for any take of listed species. In addition, multiple states and tribes have laws, regulations, or policies that address similar purposes as the federal authorities including, but not limited to, public review requirements, environmental resource considerations, historic properties preservation, and special species protections. The extent to which each state's or tribe's authorities align with federal requirements may vary among states and tribes, some providing more requirements and some providing fewer or none. Following the final rule, states or tribes without similar authorities have the discretion to determine if their laws, regulations, or policies should be adjusted.

National Environmental Policy Act

NEPA requires the federal government to consider the potential environmental effects of certain actions prior to making decisions. NEPA is a procedural statute designed to inform decision-making. Certain federal actions, like issuing CWA section 404 permits, potentially require a NEPA review. The Corps, for example, will determine whether a categorical exclusion applies to a proposed permitting activity or if it requires an Environmental Assessment or Environmental Impact Statement. If a project is no longer subject to a federal permit, a NEPA review may no longer be required. In some states, however, state equivalent environmental review processes may still be required, in addition to any local land use planning requirements.

Endangered Species Act

The ESA provides for the protection of federally listed threatened and endangered species and their designated critical habitat. This requirement applies regardless of CWA jurisdiction. When a CWA permit or approval is required, the Corps or the EPA (*i.e.*, where EPA retains authority under CWA section 402) takes appropriate action under section 7 of the ESA (including, in appropriate circumstances, conducting consultation with U.S. Fish and Wildlife Service (USFWS) and/or National Marine Fisheries Service (NMFS)). Section 7 of the ESA and its implementing regulations provide procedures and tools to streamline and expedite consultation.

Under the final rule, fewer waters will be jurisdictional than under the 2019 Rule as implemented, thereby potentially reducing instances of a federal nexus through a CWA permit or other CWA action for the ESA. Any decrease in associated ESA section 7 consultations could result in a corresponding increase in ESA section 10 permit activities for USFWS and NMFS should applicants or states decide to seek incidental take coverage under ESA section 10. Section 9 of the ESA applies regardless of the resources at issue, and the scope of CWA jurisdiction does not modify or affect that core provision of the ESA.

National Historic Preservation Act

Section 106 of the NHPA directs federal agencies to take into account the effect of their undertakings on historic properties and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. In some cases, applicants for Corps or EPA permits or approvals under the CWA are directly involved in the section 106 consultation process under the Advisory Council on Historic Preservation's implementing regulations. As in the examples above, there are three project scenarios that under the final rule may no longer be subject to CWA regulations in certain waters: (1) when another federal agency constructs the project; (2) when a non-federal entity (public or private) constructs the project and receives funding or needs approval from another federal agency; and (3) when a non-federal entity constructs a project and no other federal agency permit approval is required and no federal funding is received.

In scenarios one and two, where another federal agency may be conducting the project or where a non-federal entity may need approvals or is receiving funding from another federal agency and a CWA permit is no longer required in certain waters, that federal agency would be responsible for complying with any applicable consultation requirements under section 106 of the NHPA. If the other federal agency does not have procedures and tools in place to streamline and expedite reviews similar to those of the Corps, the consultations with the Advisory Council on Historic Preservation and Tribal and State Historic Preservation Officers may take more time and effort. Where a non-federal entity is receiving funding or approval from another federal agency, the burden of obtaining information as part of the consultation may be shifted to the non-federal entity as the applicant or grantee.

In the third scenario, where a non-federal entity would not require any other approvals from other federal agencies and is not receiving federal funds, compliance with section 106 of the NHPA may not be required for those projects if the only nexus to a federal undertaking, funding, or permit would have been through a CWA permit that is not required because a feature is not jurisdictional under the revised definition of "waters of the United States." The non-federal entity would need to comply with any other applicable federal, state, or tribal laws for historic properties which may or may not align with the NHPA in the types of historic properties protected, the consultation process, and/or the proposed activities subject to review.