

# Tulane Institute on Water Resources Law & Policy

## WATERS OF THE UNITED STATES

Comments to the 2019 Clean Water Rule Proposal

A Paper of the Tulane Institute on Water Resources Law & Policy<sup>1</sup>

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### I. BACKGROUND

The Clean Water Act (CWA)<sup>2</sup> is one of the cornerstones of the nation’s environmental protection system. The CWA was passed in 1972 as an amendment to the Water Pollution Control Act of 1948 and was itself substantially amended in 1977 and 1987. The CWA is complementary to the Rivers and Harbors Act of 1899 (RHA) that regulates and protects various aspects of navigable waters, albeit from a more navigation-oriented point of view. Due to the importance of restoring health to the nation’s waters, the CWA employed a broad and systemic approach to improving and maintaining water quality.<sup>3</sup> In keeping with that, Congress chose to broadly define the waters covered by the CWA.<sup>4</sup> Because the CWA was passed under the authority of the Commerce Clause of the Constitution, which has an extremely broad reach and couches its own application in the conflated terms “navigable waters” and “waters of the United States (WOTUS),” there has long been confusion over the actual reach of the CWA. The proposal from President Trump’s Administration (hereinafter referred to as “the 2019 Proposal”) is but the latest chapter in that story. The presently standing rule was promulgated by President Obama’s Administration in 2015 (hereinafter referred to as “the 2015 Rule”).<sup>5</sup>

As a starting point, it is important to point out that the proposed rule does not purport to “make law.” No rule created under the CWA can go beyond what the CWA itself allows. As is the case with many laws, Congress gave the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) a mission to accomplish and a fair amount of discretion in how to do it. The entire WOTUS debate is centered on ascertaining what the underlying law actually says and how much discretion agencies have to interpret it. This is an unusual situation, however, since the 2019 Proposal is based on the proposition that the CWA is actually narrower in scope

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<sup>1</sup> Principal authors: Mark Davis, Director, and Kristen Hilferty, Senior Research Fellow, Tulane Institute on Water Resources Law and Policy.

<sup>2</sup> Federal Water Pollution Control Act, 33 U.S.C. 1251 *et. seq.*

<sup>3</sup> See *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

<sup>4</sup> *Id.*

<sup>5</sup> The 2015 Rule is in effect in 22 states, the District of Columbia, and the U.S. territories. It has been enjoined in 28 states as being improperly issued. See *Waters of the United States (WOTUS) Rulemaking, About Waters of the United States*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/wotus-rule/about-waters-united-states> (last visited April 11, 2019).

than the 2015 Rule presumed and also narrower than the regulatory and administrative regimes that existed before the 2015 Rule. That is an untested and controversial view of the state of the law that is hard to reconcile with the Trump Administration’s own reliance on the pre 2015 Rule framework as the default. This will be discussed more fully below.

This proposal also must be seen in the context of a particularly tortured procedural history. President Trump’s Administration’s plan was to first repeal the 2015 Rule and then, second, to replace it. The first step would leave the extant jurisprudence (primarily set out vaguely in *Rapanos v. United States*, 547 U.S. 715 (2006)) and ad hoc agency interpretations as the guides. The effort to repeal the 2015 Rule ultimately took the circuitous path of not actually rescinding the rule but instead trying to change its effective date to February 6, 2020, thereby nullifying its current applicability without actually repealing it. After losing several successful challenges, the Administration announced that it would abandon efforts to defend that “Applicability Date Rule” and concentrate on step two, a replacement rule. The 2019 Proposal is that replacement rule. In short, at this point, the 2015 Rule has not been repealed, though it is only in effect in 22 states,<sup>6</sup> the District of Columbia, and the U.S. territories, due to court ordered injunctions; the pre-2015 Rule regime of jurisprudence and ad-hoc decision-making is in place in 28 states;<sup>7</sup> and the 2019 Proposal is not apparently reconcilable with either the 2015 Rule or the pre-2015 Rule regime. For an effort couched in terms of protecting navigable waters from pollution, minimizing regulatory uncertainty, and showing due regard for the respective roles of Congress and the states,<sup>8</sup> this is a remarkably confusing and uncertain place to be.

At the root of much of the confusion and controversy over the CWA’s reach is the problem of determining just what Congress intended the Act to mean. This is mirrored by the problem of sorting out just what court opinions mean, particularly when they speak with more than one voice

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<sup>6</sup> In addition to the District of Columbia and the U.S. territories, the 22 states following the 2015 Rule are Washington, Oregon, California, Minnesota, Oklahoma, Illinois, Michigan, Tennessee, Ohio, Maine, New Hampshire, Vermont, New York, Massachusetts, Rhode Island, Connecticut, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, and Hawaii. *Waters of the United States (WOTUS) Rulemaking, Definition of “Waters of the United States”*: *Rule Status and Litigation Update*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update> (last visited April 11, 2019).

<sup>7</sup> The 28 states following agency regulations and guidance from before the issuance of the 2015 Rule are Montana, Idaho, Nevada, Wyoming, Utah, Colorado, New Mexico, North Dakota, South Dakota, Nebraska, Kansas, Texas, Iowa, Missouri, Arkansas, Louisiana, Wisconsin, Indiana, Kentucky, West Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Alaska. *Waters of the United States (WOTUS) Rulemaking, Definition of “Waters of the United States”*: *Rule Status and Litigation Update*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update> (last visited April 11, 2019). *See also Waters of the United States (WOTUS) Rulemaking, About Waters of the United States*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/wotus-rule/about-waters-united-states> (last visited April 11, 2019).

<sup>8</sup> Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, February 28, 2017.

and when they speak more to what the law does not allow than to what it does. Both of these problems are front and center in this current WOTUS exercise.

The 2015 Rule, which was enacted by President Obama's administration, is called the Clean Water Rule and is also known as the Waters of the United States (WOTUS) rule. The 2015 Rule was the product of two Supreme Court decisions, namely *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) and *Rapanos v. United States*.<sup>9</sup> In SWANCC and *Rapanos*, the court found the coverage of the CWA and WOTUS to be narrower than had been previously thought by many courts and by its administering agencies, the EPA and the Corps.

Prior to SWANCC and *Rapanos*, it was the prevailing policy of the EPA, the Corps, and the courts to read the CWA expansively, which brought important but remote water bodies, such as prairie potholes and isolated wetlands, within the interpretation of WOTUS. The rationale was that those waters and wetlands were important to interstate commerce for various reasons, such as supporting migratory birds and waterfowl. For example, duck hunting and bird watching both attract many participants who spend money and travel to engage in their passion. Unquestionably, those actions have some bearing on interstate commerce. For many years, and through both Democratic and Republican administrations, the connection between interstate commerce, migratory birds, and the wetlands they rely upon was thought to be independently sufficient for CWA and WOTUS jurisdiction. However, according to the Supreme Court in SWANCC and *Rapanos*, this connection was not sufficient to confer jurisdiction.

Since much of the 2015 Rule and the 2019 Proposal stems from the Supreme Court's analysis in *Rapanos*, it is important to understand that case. The most important thing to understand about *Rapanos* is that it did not settle the law. To be sure, a majority of the Court (five of the nine Justices) agreed on the winner, but there was no majority view on the question of why the plaintiffs prevailed. All of the Justices agreed that the term WOTUS covers more than waters that are navigable in the traditional sense. Four of the Justices, led by Justice Scalia, argued for a narrow definition of WOTUS, one that covered "relatively permanent standing or continuously flowing bodies of water,"<sup>10</sup> while not necessarily excluding streams, rivers, and lakes that might be dry "seasonally" or during extraordinary circumstances, such as droughts.<sup>11</sup> Justice Scalia's opinion also stated that the WOTUS label applies to wetlands with a continuous surface connection to relatively permanent surface waters.<sup>12</sup>

Four of the other Justices (all of whom dissented against the conclusion that the plaintiffs won the case) were content with the agency interpretations of WOTUS.

Finally, Justice Kennedy agreed that the agencies had gone too far with their interpretation, but he disagreed with Justice Scalia (and the three Justices who joined him) about why. Justice

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<sup>9</sup> See *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC) and *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>10</sup> *Rapanos*, 547 U.S. at 739.

<sup>11</sup> *Id.* At 732.

<sup>12</sup> *Id.* At 742.

Kennedy took a middle ground approach that rejected the “relatively permanent surface water” approach in Justice Scalia’s opinion in favor of including wetlands and remote waters if there existed a “significant nexus” to waters that were considered navigable in the traditional legal sense.<sup>13</sup> Since the four dissenters certainly would have included in WOTUS the waters and wetlands that Justice Kennedy was willing to include, there was a rather messy plurality in favor of the significant nexus approach. The 2015 Rule largely tracks Justice Kennedy’s pivot point opinion in *Rapanos*. The 2015 Rule was less expansive in terms of what it included in WOTUS than was the previous EPA and Corps interpretation (and which would have been allowed by the four dissenters in *Rapanos*), but more expansive than Justice Scalia’s *Rapanos* opinion.

By contrast, the 2019 Proposal largely seems to follow Justice Scalia’s opinion from *Rapanos*. The 2019 Proposal does not detail why the EPA and the Corps are changing course from the 2015 Rule and the “significant nexus” test for each type of wetland and stream they are excluding from federal jurisdiction. President Trump’s Administration does cite Justice Kennedy’s *Rapanos* opinion in the preamble to the 2019 Proposal, but those citations do not include any mention of his “significant nexus” test nor the Administration’s reason for rejecting it. While discussing the Administrative Procedure Act (APA) in *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), the Supreme Court explained:

Revocation constitutes a reversal of the agency’s former views as to the proper course. A “settled course of behavior embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.” *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–808, 93 S.Ct. 2367, 2374–2375, 37 L.Ed.2d 350 (1973). Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

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Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245–246, 9 L.Ed.2d 207 (1962).

In the 2019 Proposal, the EPA and the Corps have failed to offer such a reasoned analysis. For example, President Obama’s Administration assembled a “connectivity report,” which was a 300 plus page document detailing how to apply Justice Kennedy’s “significant nexus” test.<sup>14</sup> That report was peer-reviewed and was also reviewed by the EPA’s Science Advisory Board.<sup>15</sup> The report was cited in the 2015 Rule to justify regulating wetlands that might not seem geographically

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<sup>13</sup> *Id.* At 759.

<sup>14</sup> Wittenberg, Ariel, *Clean Water Act, Experts predict legal trouble for Scalia-inspired rule*, E&E NEWS, (Dec. 14, 2018), <https://www.eenews.net/stories/1060109731>.

<sup>15</sup> *Id.*

close to larger waterways, but that significantly contributed to downstream water quality.<sup>16</sup> President Trump’s Administration has not thrown out that report, and the Administration uses it to justify regulating only wetlands and streams that have surface water connections to larger waterways.<sup>17</sup> However, the EPA and the Corps fail to explain why they have not included the more distant wetlands and waterways to which the report found important connections.<sup>18</sup> Rather, the agencies say it is a legal question.<sup>19</sup> Because the 2019 Proposal does not provide a reasoned analysis for the change, it appears to violate the APA and *State Farm*.

## II. OBSERVATIONS

Our reading of the 2019 Proposal leads us to the following observations and concerns:

1. The 2019 Proposal is intended to clarify the definition of “waters of the United States.” However, the 2019 Proposal implicates issues of clarity and may require case-by-case analyses. For example, the proposed rule does not adequately define certain phrases, such as “perennial,” “intermittent,” and “direct hydrologic surface connection.” The proposed rule also does not explain what happens in certain situations. For example, there might not be a direct hydrologic surface connection between a wetland and a water of the United States presently, but such a connection may come into existence in the future.
2. The 2019 Proposal does not detail who will regulate discharges if a waterbody is no longer covered by the new WOTUS definition. If regulation falls to the states, this is problematic because some states might not have the capacity, resources, or desire to regulate.
3. The EPA and the Corps estimate that at least 18 percent of streams and 51 percent of wetlands nationwide would not be protected under the 2019 Proposal,<sup>20</sup> but the agencies have not specified which water bodies will lose protection. It is unclear if there will be an effort to categorize waterbodies as jurisdictional or not.
4. The preamble to the 2019 Proposal states that “the agencies would remove interstate waters and interstate wetlands as a separate category of ‘waters of the United States’ to more closely align the definition to the constitutional and statutory authorities reflected in the CWA and judicial interpretations of the term ‘navigable waters,’ while balancing the statute’s policy directives to preserve and protect the rights and responsibilities of the States.” The 2019 Proposal does not provide a substantive reason for removing interstate waters from the reach of the CWA. Moreover, interstate waters have been jurisdictional since the 1948 passage of the Federal Water Pollution Control Act.<sup>21</sup> Thus, the 2019

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Bogardus, Kevin and Ariel Wittenberg, *Clean Water Act, EPA falsely claims ‘no data’ on waters in WOTUS rule*, E&E NEWS, (Dec. 11, 2018), <https://www.eenews.net/stories/1060109323>.

<sup>21</sup> Federal Water Pollution Control Act, 33 U.S.C. 1251 *et.seq.* See also *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, Federal Water Pollution Control*

Proposal does not merely revoke the 2015 Rule, but also changes the 1972 CWA (and earlier versions of the law) to reflect the Administration's narrative of Federalism.

5. Additionally, the Mississippi River is a prime example of the need for federal jurisdiction over waters of which no one state has authority, though the waters may flow through/past the states and even form their borders. A key case study for this is the Gulf Hypoxia Task Force, which involves multiple states and sub-basins. With the 2019 Proposal dropping interstate waters and wetlands from CWA jurisdiction, there may be implications for that effort. The 2019 Proposal fails to explain whether these ramifications have been considered.
6. Under the Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA), Louisiana's cost share for construction of coastal wetlands restoration projects has varied, but there is a provision stating that if the State achieves no net loss regarding the current development of wetlands, then the cost share might further change. The 2019 Proposal might affect Louisiana's compliance with this provision depending on whether certain wetlands are considered jurisdictional.
7. The 2019 Proposal does not explain whether and what effect it will have on mitigation requirements that are conditions of existing permits. For example, a current permit might require a 3:1 mitigation concerning jurisdictional wetlands, but those wetlands might no longer be jurisdictional under the proposed rule. Further, this could have contractual implications if the permittee has already hired a company to perform mitigation work or if the permittee has already sought credits from a mitigation bank.
8. The 2019 Proposal might not pass muster if it were challenged under the Administrative Procedure Act. That is, the 2019 Proposal is based on the analysis in Justice Scalia's four judge plurality opinion from *Rapanos*, and rejects the majority analysis from that case, i.e., Justice Kennedy's significant nexus test. Instead, it might have been more proper from a legal standpoint for President Trump's Administration to fit its proposed rule under Justice Kennedy's significant nexus test since it appears to be the controlling law. The administration also fails to explain why the significant nexus test is being rejected.
9. With President Trump's Administration having retreated from the Applicability Date Rule (as discussed above), the 2015 Rule is in effect in 22 states and enjoined in the remaining states, which are following the 1986/1988 regulatory definition of waters of the United States and associated jurisprudence. The Trump administration is in the potential position of defending the 2015 Rule and the prior regulatory definitions as the rule of law while simultaneously rejecting these analyses in the proposed rule. *See, e.g., Sackett v. United States Environmental Protection Agency*, 566 U.S. 120 (2012).

10. The 2019 Proposal does not explain how to analyze waterbodies that fall under two categories. For example, the proposed rule discusses impoundments and wetlands, but the proposed rule does not explain how to classify an impounded wetland.
11. Groundwater itself is excluded from the 2019 Proposal's definition of waters of the United States. However, groundwater should be a jurisdictional consideration because contamination of a jurisdictional water can occur in instances where groundwater serves as a conduit between jurisdictional waters. Justice Kennedy's "significant nexus" test seems to leave room for a groundwater connection, but the proposed rule does not. Rather, it looks solely at surface connections.
12. The 2015 Rule provided sufficient guidance generally and advised how agencies should proceed if there was any confusion. The proposed rule lacks any such guidance.
13. With the interpretation of the significant nexus test in the 2015 Rule, the only discharge regulated under the CWA is into the first water of the United States even if that waterbody is connected to another water of the United States. This, at least, offers the possibility of protecting both waterbodies by regulating the discharge into the first waterbody. However, this protection might disappear under the 2019 Proposal: that is, if a discharge is into a waterbody that is not a water of the United States, then contaminants may travel into the second waterbody, which is a jurisdictional water.
14. The 2019 Proposal does not discuss whether and to what extent it impacts the jurisdictional definitions in the Rivers and Harbors Act of 1899 (RHA). The proposed rule also does not address potential conflicts, i.e. instances that might no longer require a CWA permit but still require a RHA permit.
15. The 2019 Proposal does not clearly indicate whether a pump or canal is a sufficient "direct hydrologic surface connection." For example, the Bayou Sauvage National Wildlife Refuge in New Orleans is connected to a jurisdictional water by a pump. Moreover, if a canal is sufficient, the proposed rule does not indicate whether it matters if the canal is public or private.
16. Considering the above confusion and the fact that agriculture is largely exempt from the CWA already, the 2019 Proposal does not clearly help anyone. In sum, there is more confusion and less protection.
17. Though it is unclear which waters and wetlands will remain under federal protection, it is clear that the 2019 Rule is intended to shift the responsibility for protecting many of those waters to the states. That shift and its impacts on the states and the public have not been discussed or analyzed in any meaningful way.

### III. CONCLUSIONS

For nearly 45 years, the Clean Water Act has been a pillar of American environmental law and of a federalism-based approach to stewardship of the nation's water resources. Many of the improvements to the quality and safety of our water resources can be tied directly to the Act.

Despite that importance, it is also undeniable that there is a persistent uncertainty about the reach of the CWA, uncertainty that manifests itself in the administrative, legal, and political spheres. The 2019 Proposal is a case in point. It is vague and open-ended in nature. It will not produce greater certainty or predictability, nor will it eliminate the need for case-by-case jurisdictional determinations. Rather, the 2019 Proposal will spur further debate and litigation, and it will result in a system that shifts the costs and responsibility of protecting the nation's waters from the federal government to the states. Thus, the 2019 Proposal creates more confusion and less protection for the nation's waters. Simply put, the 2019 Proposal is at odds with its stated purposes since it:

1. Cannot resolve uncertainty about the waters to which the CWA applies; only Congress can ultimately do that. Indeed, by not being clear what waters the 2019 Proposal will cover, it will likely spawn even more confusion, uncertainty, and conflict than the regimes it seeks to replace.
2. Will almost certainly fail to clarify the appropriate lines between the federal and state spheres of operation. Inherent in the 2019 Proposal is the assumption that waters that fall outside of the CWA's jurisdiction will be either be picked up by the states or somehow not need governmental protection. Neither assumption is supported by history or current reality. To expect states and private persons with water rights to pick up the supervision, management, and enforcement of a water program is to expect the financially and politically impossible, at least without a far more robust discussion about the aims and impacts of the 2019 Proposal.

#### **IV. APPENDIX A. CURRENT DEFINITIONS—“Waters of the United States” Under the Clean Water Act—40 CFR 230.3, 33 CFR 328.3 and 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, Part 300 App. E, 302.3 and 401.11.**

##### **40 CFR 230.3 (Effective until August 27, 2015) (currently in effect in 28 states)**

(s) The term waters of the United States means:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(t) The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

**40 CFR 230.3 (Effective August 28, 2015 to February 5, 2018) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

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

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (o)(3)(iii) of this section, of waters identified in paragraphs (o)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (o)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (o)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (o)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(viii) All waters located within the 100–year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100–year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (o)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (o), the following definitions apply:

(i) Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (o)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (o)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (o)(1)(i) through (v) or are located at the head of a water identified in paragraphs (o)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) Neighboring. The term neighboring means:

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

(B) All waters located within the 100–year floodplain of a water identified in paragraphs (o)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100–year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (o)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (o)(1)(iv) of this section), to a water identified in paragraphs (o)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (o)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (o)(1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (o)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (o)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (o)(1) through (3) of this section.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

**40 CFR 230.3 (Effective February 6, 2018)**

The current version of 40 CFR 230.3 reads the same as the version in effect from August 28, 2015 to February 5, 2018 (see above) with the exception that it adds the aforementioned Applicability Date Rule to the end of section (o): “(4) Applicability date. This paragraph (o) is applicable beginning on February 6, 2020.”

**33 CFR 328.3 (Effective until August 27, 2015) (currently in effect in 28 states)**

For the purpose of this regulation these terms are defined as follows:

(a) The term waters of the United States means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(d) The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term tidal waters means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

**33 CFR 328.3 (Effective from August 28, 2015 to February 5, 2018) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

For the purpose of this regulation these terms are defined as follows:

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

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

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

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

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

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(iv) Small ornamental waters created in dry land;

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

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

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(c) Definitions. In this section, the following definitions apply:

(1) Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) Neighboring. The term neighboring means:

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

(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

- (i) Sediment trapping,
- (ii) Nutrient recycling,
- (iii) Pollutant trapping, transformation, filtering, and transport,
- (iv) Retention and attenuation of flood waters,
- (v) Runoff storage,

(vi) Contribution of flow,

(vii) Export of organic matter,

(viii) Export of food resources, and

(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(d) The term tidal waters means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

### **33 CFR 328.3 (Effective February 6, 2018)**

The current version of 33 CFR 328.3 reads the same as the version in effect from August 28, 2015 to February 5, 2018 (see above) with the exception that it adds the aforementioned Applicability Date Rule, which states: “(e) Applicability date. Paragraphs (a) through (c) of this section are applicable beginning on February 6, 2020.”

### **40 CFR 110.1 (effective until August 27, 2015) (currently in effect in 28 states)**

Navigable waters means the waters of the United States, including the territorial seas. The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

- (1) That are or could be used by interstate or foreign travelers for recreational or other purposes;
  - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
  - (3) That are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as navigable waters under this section;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and
- (f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section: Provided, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States;

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**40 CFR 110.1 (Effective from August 28, 2015 to February 5, 2018) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

Navigable waters means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

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

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

(B) All waters located within the 100–year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100–year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) **Tributary and tributaries.** The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

NPDES means National Pollutant Discharge Elimination System;

Sheen means an iridescent appearance on the surface of water;

Sludge means an aggregate of oil or oil and other matter of any kind in any form other than dredged spoil having a combined specific gravity equivalent to or greater than water;

United States means the States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

**40 CFR 110.1 (Effective February 6, 2018)**

The current version of 40 CFR 110.1 reads the same as the version in effect from August 28, 2015 to February 5, 2018 (see above) with the exception that it adds the aforementioned Applicability Date Rule, which states: “(4) Applicability date. This definition is applicable beginning on February 6, 2020.”

**40 CFR 112.2 (Effective January 14, 2010 to August 27, 2015) (currently in effect in 28 states)**

Navigable waters of the United States means “navigable waters” as defined in section 502(7) of the FWPCA, and includes:

(1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub.L. 92–500), and tributaries of such waters;

(2) Interstate waters;

(3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

**40 CFR 112.2 (Effective August 28, 2015 to February 5, 2018) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

Navigable waters means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(ii) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

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

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

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) **Tributary and tributaries.** The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition

that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Non-petroleum oil means oil of any kind that is not petroleum-based, including but not limited to: Fats, oils, and greases of animal, fish, or marine mammal origin; and vegetable oils, including oils from seeds, nuts, fruits, and kernels.

Offshore facility means any facility of any kind (other than a vessel or public vessel) located in, on, or under any of the navigable waters of the United States, and any facility of any kind that is subject to the jurisdiction of the United States and is located in, on, or under any other waters.

Oil means oil of any kind or in any form, including, but not limited to: fats, oils, or greases of animal, fish, or marine mammal origin; vegetable oils, including oils from seeds, nuts, fruits, or kernels; and, other oils and greases, including petroleum, fuel oil, sludge, synthetic oils, mineral oils, oil refuse, or oil mixed with wastes other than dredged spoil.

Oil-filled operational equipment means equipment that includes an oil storage container (or multiple containers) in which the oil is present solely to support the function of the apparatus or the device. Oil-filled operational equipment is not considered a bulk storage container, and does not include oil-filled manufacturing equipment (flow-through process). Examples of oil-filled operational equipment include, but are not limited to, hydraulic systems, lubricating systems (e.g., those for pumps, compressors and other rotating equipment, including pumpjack lubrication systems), gear boxes, machining coolant systems, heat transfer systems, transformers, circuit breakers, electrical switches, and other systems containing oil solely to enable the operation of the device.

Oil Spill Removal Organization means an entity that provides oil spill response resources, and includes any for-profit or not-for-profit contractor, cooperative, or in-house response resources that have been established in a geographic area to provide required response resources.

Onshore facility means any facility of any kind located in, on, or under any land within the United States, other than submerged lands.

Owner or operator means any person owning or operating an onshore facility or an offshore facility, and in the case of any abandoned offshore facility, the person who owned or operated or maintained the facility immediately prior to such abandonment.

Partially buried tank means a storage container that is partially inserted or constructed in the ground, but not entirely below grade, and not completely covered with earth, sand, gravel, asphalt, or other material. A partially buried tank is considered an aboveground storage container for purposes of this part.

Permanently closed means any container or facility for which:

- (1) All liquid and sludge has been removed from each container and connecting line; and
- (2) All connecting lines and piping have been disconnected from the container and blanked off, all valves (except for ventilation valves) have been closed and locked, and conspicuous signs have been posted on each container stating that it is a permanently closed container and noting the date of closure.

Person includes an individual, firm, corporation, association, or partnership.

Petroleum oil means petroleum in any form, including but not limited to crude oil, fuel oil, mineral oil, sludge, oil refuse, and refined products.

Produced water container means a storage container at an oil production facility used to store the produced water after initial oil/water separation, and prior to reinjection, beneficial reuse, discharge, or transfer for disposal.

Production facility means all structures (including but not limited to wells, platforms, or storage facilities), piping (including but not limited to flowlines or intra-facility gathering lines), or equipment (including but not limited to workover equipment, separation equipment, or auxiliary non-transportation-related equipment) used in the production, extraction, recovery, lifting, stabilization, separation or treating of oil (including condensate), or associated storage or measurement, and is located in an oil or gas field, at a facility. This definition governs whether such structures, piping, or equipment are subject to a specific section of this part.

Regional Administrator means the Regional Administrator of the Environmental Protection Agency, in and for the Region in which the facility is located.

Repair means any work necessary to maintain or restore a container to a condition suitable for safe operation, other than that necessary for ordinary, day-to-day maintenance to maintain the functional integrity of the container and that does not weaken the container.

Spill Prevention, Control, and Countermeasure Plan; SPCC Plan, or Plan means the document required by § 112.3 that details the equipment, workforce, procedures, and steps to prevent, control, and provide adequate countermeasures to a discharge.

Storage capacity of a container means the shell capacity of the container.

Transportation-related and non-transportation-related, as applied to an onshore or offshore facility, are defined in the Memorandum of Understanding between the Secretary of Transportation and the Administrator of the Environmental Protection Agency, dated November 24, 1971, (appendix A of this part).

United States means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, and the Pacific Island Governments.

Vegetable oil means a non-petroleum oil or fat of vegetable origin, including but not limited to oils and fats derived from plant seeds, nuts, fruits, and kernels.

Vessel means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel.

Worst case discharge for an onshore non-transportation-related facility means the largest foreseeable discharge in adverse weather conditions as determined using the worksheets in appendix D to this part.

#### **40 CFR 112.2 (Effective February 6, 2018)**

The current version of 40 CFR 112.2 reads the same as the version in effect from August 28, 2015 to February 5, 2018 (see above) with the exception that it adds the aforementioned Applicability Date Rule, which states: “(4) Applicability date. This definition is applicable beginning on February 6, 2020.”

#### **40 CFR 116.3 (Effective until August 27, 2015) (currently in effect in 28 states)**

Navigable waters is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas,” and includes, but is not limited to:

(1) All waters which are presently used, or were used in the past, or may be susceptible to use as a means to transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, and including adjacent wetlands; the term wetlands as used in this regulation shall include those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally

include swamps, marshes, bogs and similar areas; the term adjacent means bordering, contiguous or neighboring;

(2) Tributaries of navigable waters of the United States, including adjacent wetlands;

(3) Interstate waters, including wetlands; and

(4) All other waters of the United States such as intrastate lakes, rivers, streams, mudflats, sandflats and wetlands, the use, degradation or destruction of which affect interstate commerce including, but not limited to:

(i) Intrastate lakes, rivers, streams, and wetlands which are utilized by interstate travelers for recreational or other purposes; and

(ii) Intrastate lakes, rivers, streams, and wetlands from which fish or shellfish are or could be taken and sold in interstate commerce; and

(iii) Intrastate lakes, rivers, streams, and wetlands which are utilized for industrial purposes by industries in interstate commerce.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**40 CFR 116.3 (Effective August 28, 2015 to February 5, 2018) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

Navigable waters is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(ii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iii) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

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

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

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) **Tributary and tributaries.** The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Offshore facility means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

Onshore facility means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

Otherwise subject to the jurisdiction of the United States means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided for by international agreement to which the United States is a party.

A discharge in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), means: (1) A discharge into any waters beyond the contiguous zone from any vessel or onshore or offshore facility, which vessel or facility is subject to or is engaged in activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, and (2) any discharge into any waters beyond the contiguous zone which contain, cover, or support any natural resource belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).

Public vessel means a vessel owned or bareboat-chartered and operated by the United States, or a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce.

Territorial seas means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of 3 miles.

Vessel means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

**40 CFR 116.3 (Effective February 6, 2018)**

The current version of 40 CFR 116.3 reads the same as the version in effect from August 28, 2015 to February 5, 2018 (see above) with the exception that it adds the aforementioned Applicability Date Rule, which states: “(4) Applicability date. This definition is applicable beginning on February 6, 2020.”

**40 CFR 117.1 (Effective until August 27, 2015) (currently in effect in 28 states)**

(i) Navigable waters means “waters of the United States, including the territorial seas.” This term includes:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs (i)(1) through (4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (i)(1) through (5) of this section (“Wetlands” means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally included playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds): Provided, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**40 CFR 117.1 (Effective from August 28, 2015 to February 5, 2018) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

(i) Navigable waters is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (i)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (i)(3)(iii) of this section, of waters identified in paragraphs (i)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (i)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (i)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (i)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (i)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (i)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(viii) All waters located within the 100-year floodplain of a water identified in (i)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (i)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (i)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (i)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (i)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(iv) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph, the following terms apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (i)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (i)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (i)(1)(i) through (v) or are located at the head of a water identified in paragraphs (i)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

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

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

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such

water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (i)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (i)(1)(iv) of this section), to a water identified in paragraphs (i)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (i)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (i)(1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (i)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (i)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

#### **40 CFR 117.1 (Effective February 6, 2018)**

The current version of 40 CFR 117.1 reads the same as the version in effect from August 28, 2015 to February 5, 2018 (see above) with the exception that it adds the aforementioned Applicability Date Rule, which states: “(4) Applicability date. This definition is applicable beginning on February 6, 2020.”

#### **400 CFR 122.2 (Effective until August 27, 2015) (currently in effect in 28 states)**

Waters of the United States or waters of the U.S. means:

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters, including interstate “wetlands;”
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
  - (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
  - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
- (f) The territorial sea; and
- (g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

**400 CFR 122.2 (Effective from August 28, 2015 to February 5, 2018) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

Waters of the United States or waters of the U.S. means:

- (1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:
  - (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  - (ii) All interstate waters, including interstate wetlands;
  - (iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (v) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under

paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary,

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

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

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

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) **Tributary and tributaries.** The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A

water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act jurisdiction remains with EPA.

Whole effluent toxicity means the aggregate toxic effect of an effluent measured directly by a toxicity test.

#### **40 CFR 122.2 (Effective February 6-7, 2018)**

A version of 40 CFR 122.1 that was effective on February 6, 2018 added the aforementioned Applicability Date Rule, which states: “(4) Applicability date. This definition is applicable beginning on February 6, 2020.”

However, a new version of 40 CFR 122.2 became effective on February 7, 2018, and it removed the Applicability Date Rule.

#### **40 CFR 232.2 (Effective December 30, 2008 to August 27, 2015) (currently in effect in 28 states)**

Waters of the United States means:

All waters which are currently used, were used in the past, or may be susceptible to us in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

All interstate waters including interstate wetlands.

All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

Which are or could be used by interstate or foreign travelers for recreational or other purposes; or  
From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or  
Which are used or could be used for industrial purposes by industries in interstate commerce.

All impoundments of waters otherwise defined as waters of the United States under this definition;

Tributaries of waters identified in paragraphs (g)(1)–(4) of this section;

The territorial sea; and

Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)–(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**40 CFR 232.2 (Effective August 28, 2015 to June 7, 2017) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

Waters of the United States means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000

feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi) of this definition, they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

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

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

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) **Tributary and tributaries.** The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters

such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

#### **40 CFR 232.2 (Effective February 6, 2018)**

The current version of 40 CFR 232.2 reads the same as the version in effect from August 28, 2015 to June 7, 2017 (see above) with the exception that it adds the aforementioned Applicability Date Rule, which states: “(4) Applicability date. This definition is applicable beginning on February 6, 2020.”

#### **40 CFR 300.5 (Effective until August 27, 2015) (currently in effect in 28 states)**

Navigable waters as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas. The term includes:

- (1) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;
- (2) Interstate waters, including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters;
  - (i) That are or could be used by interstate or foreign travelers for recreational or other purposes;
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
  - (iii) That are used or could be used for industrial purposes by industries in interstate commerce;

- (4) All impoundments of waters otherwise defined as navigable waters under this section;
- (5) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and
- (6) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.
- (7) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**400 CFR 300.5 (Effective August 28, 2015 to February 5, 2018) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

Navigable waters means the waters of the United States, including the territorial seas.

- (1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:
  - (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  - (ii) All interstate waters, including interstate wetlands;
  - (iii) The territorial seas;
  - (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
  - (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;
  - (vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
  - (vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through

(iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i)

through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) Neighboring. The term neighboring means:

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

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the

chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from

the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

**40 CFR 300.5 (Effective February 6, 2018)**

The current version of 40 CFR 300.5 reads the same as the version in effect from August 28, 2015 to February 5, 2018 (see above) with the exception that it adds the aforementioned Applicability Date Rule, which states: “(4) Applicability date. This definition is applicable beginning on February 6, 2020.”

**40 CFR Pt. 300, App. E (Effective until August 27, 2015) (currently in effect in 28 states)**

Navigable waters as defined by 40 CFR 110.1 means the waters of the United States, including the territorial seas. The term includes:

- (a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;
- (b) Interstate waters, including interstate wetlands;
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
  - (1) That are or could be used by interstate or foreign travelers for recreational or other purposes;
  - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; and
  - (3) That are used or could be used for industrial purposes by industries in interstate commerce.
- (d) All impoundments of waters otherwise defined as navigable waters under this section;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and
- (f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.
- (g) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**40 CFR Pt. 300, App. E (Effective from August 28, 2015 to February 5, 2018) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(viii) All waters located within the 100–year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100–year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

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

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

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of

such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

#### **40 CFR Pt. 300, App. E (Effective February 6, 2018)**

The current version of 40 CFR 300, App. E reads the same as the version in effect from August 28, 2015 to February 5, 2018 (see above) with the exception that it adds the aforementioned Applicability Date Rule, which states: “(4) Applicability date. This definition is applicable beginning on February 6, 2020.”

#### **40 CFR 302.3 (Effective until August 27, 2015) (currently in effect in 28 states)**

Navigable waters or navigable waters of the United States means waters of the United States, including the territorial seas

**40 CFR 302.3 (Effective August 28, 2015 to February 5, 2018) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(viii) All waters located within the 100–year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100–year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(ii) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

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

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

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of

the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

#### **40 CFR 302.3 (Effective as of August 1, 2018)**

The current version of 40 CFR 302.3 reads the same as the version in effect from August 28, 2015 to February 5, 2018 (see above) with the exception that it adds the aforementioned Applicability Date Rule, which states: “(4) Applicability date. This definition is applicable beginning on February 6, 2020.”

#### **40 CFR 401.11 (Effective until August 27, 2015) (currently in effect in 28 states)**

(l) The term navigable waters includes: All navigable waters of the United States; tributaries of navigable waters of the United States; interstate waters; intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce. Navigable waters do not include prior converted cropland. Notwithstanding the determination of

an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

**40 CFR 401.11 (Effective from August 28, 2015 to February 5, 2018) (currently in effect in 22 states, the District of Columbia, and the U.S. territories)**

(l) The term navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (1)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (1)(3)(iii) of this section, of waters identified in paragraphs (1)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (1)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (1)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

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

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

(viii) All waters located within the 100-year floodplain of a water identified in (1)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(1)(iv) through (viii) of this section.

(i) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(ii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(1)(i) through (iii) of this section.

(iii) The following features:

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

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (1), the following terms apply:

(i) **Adjacent.** The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

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

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

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such

water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(1)(iv) of this section), to a water identified in paragraphs (1)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (1)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(1)(i) through (iii) of this section.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(1)(i) through (iii) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (1)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

**40 CFR 401.11 (Effective as of February 6, 2018)**

The current version of 40 CFR 401.11 reads the same as the version in effect from August 28, 2015 to February 5, 2018 (see above) with the exception that it adds the aforementioned Applicability Date Rule, which states: “(4) Applicability date. This definition is applicable beginning on February 6, 2020.”

**IV. APPENDIX B. PROPOSED RULE. “Revised Definition of ‘Waters of the United States’”—33 CFR 328.3; 40 CFR 110.1; 40 CFR 112.2; 40 CFR 116.3; 40 CFR 117.1; 40 CFR 122.2; 40 CFR 230.3; 40 CFR 232.2; 40 CFR 300.5; 40 C.F.R. Pt. 300, App. E; 40 CFR 302.3; and 40 CFR 401.11.**

### **Title 33—Navigation and Navigable Waters**

For the reasons set forth in the preamble, the Corps of Engineers proposes to amend 33 CFR part 328 as follows:

#### **PART 328—DEFINITION OF WATERS OF THE UNITED STATES**

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

**Authority:** 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is revised to read as follows:

##### **§ 328.3 Definitions.**

For the purpose of this regulation these terms are defined as follows:

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

(1) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(2) Tributaries of waters identified in paragraph (a)(1) of this section;

(3) Ditches that satisfy any of the conditions identified in paragraph (a)(1) of this section, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(4) Lakes and ponds that satisfy any of the conditions identified in paragraph (a)(1) of this section, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (a)(1) in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (a)(1) through (5) of this section in a typical year;

(5) Impoundments of waters identified in paragraphs (a)(1) through (4) and (6) of this section; and

(6) Adjacent wetlands to waters identified in paragraphs (a)(1) through (5) of this section.

(b) The following are not “waters of the United States”:

(1) Waters or water features that are not identified in paragraphs (a)(1) through (6) of this section;

- (2) Groundwater, including groundwater drained through subsurface drainage systems;
- (3) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;
- (4) Ditches that are not identified in paragraph (a)(3) of this section;
- (5) Prior converted cropland;
- (6) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;
- (7) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (a)(4) or (5) of this section;
- (8) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;
- (9) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;
- (10) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and
- (11) Waste treatment systems.

(c) Definitions: In this section, the following definitions apply:

(1) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (a)(1) through (5) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (a)(1) through (5) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (a)(1) through (5) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (a)(1) through (5) water. Wetlands physically separated from a paragraph (a)(1) through (5) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(2) *Ditch*. The term *ditch* means an artificial channel used to convey water.

(3) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(4) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous

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

(5) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(6) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(8) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (c)(15) 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.

(9) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(10) *Tidal waters and waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(11) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section or through water features identified in paragraph (b)

of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(12) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(13) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(15) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (a)(1) through (6) of this section. Waters identified in paragraphs (a)(1) through (6) of this section are not upland.

(14) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(15) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

#### **Title 40—Protection of Environment**

For reasons set out in the preamble, the EPA proposes to amend 40 CFR part 110 as follows:

#### **PART 110—DISCHARGE OF OIL**

**3.** The authority citation for part 110 continues to read as follows: 33 U.S.C.

**Authority:** 1251 et seq., 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR parts 1971-1975 Comp., p. 793.

**4.** Section 110.1 is amended by revising the definition of “navigable waters” to read as follows:

#### **§ 110.1 Definitions.**

\* \* \* \* \*

*Navigable waters* means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not “waters of the United States”:

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch*. The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (3)(xv) of this definition. 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.

(ix) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

\* \* \* \* \*

## **PART 112—OIL POLLUTION PREVENTION**

**5.** The authority citation for part 112 continues to read as follows:

**Authority:** 33 U.S.C. 1251 et seq.

**6.** Section 112.2 is amended by revising the definition of “navigable waters” to read as follows:

### **§ 112.2 Definitions.**

\* \* \* \* \*

*Navigable waters* means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (a)(1) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (iv) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not “waters of the United States”:

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (1)(v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically

separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch*. The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (3)(xv) of this definition. 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.

(ix) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

\* \* \* \* \*

## **PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES**

7. The authority citation for part 116 is continues to read as follows:

**Authority:** 33 U.S.C. 1251 et seq.

8. Section 116.3 is amended by revising the definition of “Navigable waters” to read as follows:

§ 116.3 **Definitions.**

\* \* \* \* \*

*Navigable waters* means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (a)(1) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (iv) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not “waters of the United States”:

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch*. The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (3)(xv) of this definition. 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.

(ix) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(x) *Tidal waters and waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

\* \* \* \* \*

## **PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES**

**9.** The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 1251 et seq., and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

**10.** Section 117.1 is amended by revising paragraph (i) to read as follows:

### **§ 117.1 Definitions.**

\* \* \* \* \*

(i) *Navigable waters* is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (i)(2) of this section, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (i)(1)(i) of this section;

(iii) Ditches that satisfy any of the conditions identified in paragraph (i)(1)(i) of this section, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (i)(1)(i) of this section, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (i)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (i)(1)(ii) through (vi) of this section or through water features identified in paragraph (i)(2) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (i)(1)(i) through (v) of this section in a typical year;

(vi) Impoundments of waters identified in paragraphs (i)(1)(i) through (iv) and (vi) of this section; and

(vii) Adjacent wetlands to waters identified in paragraphs (i)(1)(i) through (v) of this section.

(2) The following are not “waters of the United States”:

(i) Waters or water features that are not identified in paragraphs (i)(1)(i) through (vi) of this section;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (i)(1)(iii) of this section;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (i)(1)(iv) or (v) of this section;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this paragraph (i), the following definitions apply:

(i) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (i)(1)(i) through (v) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (i)(1)(i) through (v) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (i)(1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (i)(1)(i) through (v) water. Wetlands physically separated from a paragraph (i)(1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch*. The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (i)(3)(xv) 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.

(ix) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms tidal waters and waters subject to the ebb and flow of the tide mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (i)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (i)(1)(ii) through (vi) of this section or through water features identified in paragraph (i)(2) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (i)(3)(xv) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (i)(1)(i) through (vi) of this section. Waters identified in paragraphs (i)(1)(i) through (vi) of this section are not upland.

(xiv) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

\* \* \* \* \*

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

**11.** The authority citation for part 122 continues to read as follows:

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

**12.** Section 122.2 is amended by revising the definition of “Waters of the United States” to read as follows:

**§ 122.2 Definitions.**

\* \* \* \* \*

*Waters of the United States* or *waters of the U.S.* means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not “waters of the United States”:

- (i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;
- (ii) Groundwater, including groundwater drained through subsurface drainage systems;
- (iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;
- (iv) Ditches that are not identified in paragraph (1)(iii) of this definition;
- (v) Prior converted cropland;
- (vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;
- (vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this section;
- (viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;
- (ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;
- (x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and
- (xi) Waste treatment systems.

(3) In this definition, the following terms apply:

- (i) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.
- (ii) *Ditch*. The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (3)(xv) of this definition. 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.

(ix) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(x) *Tidal waters and waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface

can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

\* \* \* \* \*

**PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL**

**13.** The authority citation for part 230 continues to read as follows:

**Authority:** The Clean Water Act, Secs. 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. 1344(b) and 1361(a)).

**14.** Section 230.3 is amended by revising paragraph (o) to read as follows:

**§ 230.3 Definitions.**

\* \* \* \* \*

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

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (o)(3) of this section, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (o)(1)(i) of this section;

(iii) Ditches that satisfy any of the conditions identified in paragraph (o)(1)(i) of this section, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (o)(1)(i) of this section, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (o)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (o)(1)(i) of this section or through water features identified in paragraph (o)(2) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (o)(1)(i) through (v) of this section in a typical year;

(v) Impoundments of waters identified in paragraphs (o)(1)(i) through (iv) and (vi) of this section; and

(vi) Adjacent wetlands to waters identified in paragraphs (o)(1)(i) through (v) of this section.

(2) The following are not “waters of the United States”:

(i) Waters or water features that are not identified in paragraphs (o)(1)(i) through (vi) of this section;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (o)(1)(iii) of this section;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (o)(1)(iv) or (v) of this section;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this paragraph (o), the following definitions apply:

(i) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (o)(1)(i) through (v) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (o)(1)(i) through (v) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (o)(1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (o)(1)(i) through (v) water. Wetlands physically separated from a paragraph (o)(1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch*. The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (o)(3)(xv) 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.

(ix) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (o)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (o)(1)(i) through (vi) of this section or through water features identified in paragraph (o)(3) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (o)(3)(xv) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (o)(1)(i) through (vi) of this section. Waters identified in paragraphs (o)(1)(i) through (vi) of this section are not upland.

(xiv) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

**PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS**

**15.** The authority citation for part 232 continues to read as follows:

**Authority:** 33 U.S.C. 1251 et seq.

**16.** Section 232.2 is amended by revising the definition of “Waters of the United States” to read as follows:

**§ 232.2 Definitions.**

\* \* \* \* \*

*Waters of the United States* means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not “waters of the United States”:

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch*. The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (3)(xv) of this definition. 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.

(ix) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xvi) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

## **PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN**

17. The authority citation for part 300 continues to read as follows:

**Authority:** 33 U.S.C. 1251 et seq.

18. Section 300.5 is amended by revising the definition of “Navigable waters” to read as follows:

**§ 300.5 Definitions.**

\* \* \* \* \*

*Navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not “waters of the United States”:

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following definitions apply:

(i) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch*. The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a

rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (3)(xv) of this definition. 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.

(ix) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or

other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

\* \* \* \* \*

**19.** In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of “Navigable waters” to read as follows:

**Appendix E to Part 300—Oil Spill Response**

\* \* \* \* \*

**1.5 Definitions.** \* \* \*

*Navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this section.

(2) The following are not “waters of the United States”:

(i) Waters or water features that are not identified in paragraphs (1)(i) through (vi) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(iii) of this definition;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(xi) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this definition, the following terms apply:

(i) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch*. The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (3)(xv) of this definition. 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.

(ix) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this definition, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

\* \* \* \* \*

**PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION**

**20.** The authority citation for part 302 continues to read as follows:

**Authority:** 33 U.S.C. 1251 et seq.

**21.** Section 302.3 is amended by revising the definition of “Navigable waters” to read as follows:

**§ 302.3 Definitions.**

\* \* \* \* \*

*Navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(i) of this definition;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(i) of this definition, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(i) of this definition, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(i) through (iv) and (vi) of this definition; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(i) through (v) of this definition.

(2) The following are not “waters of the United States”:

- (i) Waters or water features that are not identified in paragraphs (1)(i) through (v) of this definition;
- (ii) Groundwater, including groundwater drained through subsurface drainage systems;
- (iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;
- (iv) Ditches that are not identified in paragraph (1)(iii) of this definition;
- (v) Prior converted cropland;
- (vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;
- (vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(iv) or (v) of this definition;
- (viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;
- (xi) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;
- (x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and
- (xi) Waste treatment systems.

(3) In this definition, the following terms apply:

- (i) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(i) through (v) of this definition in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(i) through (v) of this definition. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.
- (ii) *Ditch*. The term *ditch* means an artificial channel used to convey water.
- (iii) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (3)(xv) 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.

(ix) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(x) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(ii) through (vi) of this definition or through water features identified in paragraph (2) of this definition so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xv) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (1)(i) through (vi) of this definition. Waters identified in paragraphs (1)(i) through (vi) of this definition are not upland.

(xiv) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

\* \* \* \* \*

## **PART 401—GENERAL PROVISIONS**

**22.** The authority citation for part 401 continues to read as follows:

**Authority:** 33 U.S.C. 1251 et seq.

**23.** Section 401.11 is amended by revising paragraph (1) to read as follows:

### **§ 401.11 General definitions.**

\* \* \* \* \*

(1) *Navigable waters* means “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (1)(2) of this section, the term “waters of the United States” means:

(i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;

(ii) Tributaries of waters identified in paragraph (1)(1)(i) of this section;

(iii) Ditches that satisfy any of the conditions identified in paragraph (1)(1)(i) of this section, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;

(iv) Lakes and ponds that satisfy any of the conditions identified in paragraph (1)(1)(i) of this section, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (1)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(1)(ii) through (vi) of this section or through water features identified in paragraph (1)(2) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (1)(1)(i) through (v) of this section in a typical year;

(v) Impoundments of waters identified in paragraphs (1)(1)(i) through (iv) and (vi) of this section; and

(vi) Adjacent wetlands to waters identified in paragraphs (1)(1)(i) through (v) of this section.

(2) The following are not “waters of the United States”:

(i) Waters or water features that are not identified in paragraphs (1)(1)(i) through (vi) of this section;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(iv) Ditches that are not identified in paragraph (1)(1)(iii) of this section;

(v) Prior converted cropland;

(vi) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

(vii) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (1)(1)(iv) or (v) of this section;

(viii) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;

(ix) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

(x) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and

(xi) Waste treatment systems.

(3) In this paragraph (1), the following definitions apply:

(i) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(1)(i) through (v) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (1)(1)(i) through (v) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(1)(i) through (v) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (1)(1)(i) through (v) water. Wetlands physically separated from a paragraph (1)(1)(i) through (v) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

(ii) *Ditch*. The term *ditch* means an artificial channel used to convey water.

(iii) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of

terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

(viii) *Prior converted cropland*. The term *prior converted cropland* means 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 wetland, as defined in paragraph (1)(3)(xv) 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.

(ix) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions).

(x) *Tidal waters and waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xi) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (1)(1)(i) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (1)(1)(ii) through (vi) of this section or through water features identified in paragraph (1)(2) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(xii) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(xiii) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (1)(3)(xv) of this section, and does not lie below the ordinary high water

mark or the high tide line of a water identified in paragraph (1)(1)(i) through (vi) of this section. Waters identified in paragraphs (1)(1)(i) through (vi) of this section are not upland.

(xiv) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xv) *Wetlands*. The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.