

MJB&A Summary ■ January 27, 2020

## Summary of Final “*Navigable Waters Protection Rule*”

On January 23, 2020 the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) released the final “Waters of the United States” rulemaking, the *Navigable Waters Protection Rule* (Final Rule), finalizing revisions to the scope of federal authority under the Clean Water Act (CWA)<sup>1</sup>, which narrows the scope of waterbodies subject to federal jurisdiction. EPA and the Corps (the Agencies) describe the Final Rule as appropriately recognizing the prior Supreme Court decisions and state and tribal regulatory authority. The rule also explicitly eliminates the case-specific application of Justice Kennedy’s significant nexus test in favor of “categorically jurisdictional and categorically excluded waters...[to provide] clarifying value for members of the regulated community.”

Consistent with the approach proposed by the Agencies in December 2018, the Final Rule defines waters of the United States to include territorial seas, traditional navigable waters, lakes, ponds, and impoundments of jurisdictional water, adjacent wetlands, and perennial and intermittent tributaries that contribute surface water flow to such waters in a typical year. The Final Rule makes clear that a tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a non-jurisdictional surface water feature (e.g., culvert, dam, tunnel) or through a natural feature (e.g., debris pile, boulder field). Similarly, an adjacent wetland remains jurisdictional if a road or similar artificial structure divides the wetland, provided that the structure “allows for a direct hydrologic surface connection through or over that structure in a typical year.” The Final Rule exempts waste treatment systems and stormwater control features and includes definitions for both. The Agencies also confirm that groundwater is not subject to regulation under the CWA and, consequently, surface water features connected only through groundwater are not jurisdictional.

The rule will be effective 60 days after publication in the Federal Register.

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### Background

On June 29, 2015, EPA and the Corps under the Obama Administration finalized the Clean Water Rule redefining the scope of waters protected under the CWA (2015 Rule).<sup>2</sup> Following the publication of the 2015 Rule, several states and environmental and industry groups filed both substantive and procedural challenges to the rule in multiple district and appellate courts. These challenges resulted in 22 states applying the 2015 Rule while courts enjoined its implementation in 28 states.

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<sup>1</sup> EPA and Corps, “*Navigable Waters Protection Rule*”, January 23, 2020, [https://www.epa.gov/sites/production/files/2020-01/documents/navigable\\_waters\\_protection\\_rule\\_prepublication.pdf](https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepublication.pdf).

<sup>2</sup> EPA and Corps, “Clean Water Rule: Definition of “Waters of the United States”, June 29, 2015, 80 FR 37053, <https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>

On February 28, 2017, President Trump issued Executive Order 13778 directing the “Agencies” to review the 2015 Rule and rescind or revise the rule, as appropriate.<sup>3</sup> Subsequently, the Agencies announced that they would implement the Executive Order in a two-step process. In Step One, the Agencies published a final rule that became effective on December 23, 2019 to repeal the 2015 Rule defining “waters of the United States” and re-codify the regulatory text that existed prior to the 2015 Rule. For Step Two, the Agencies proposed a revised definition of “waters of the United States” on December 11, 2018 (Proposed Rule). The rule released on January 23, 2020 finalizes that proposal and becomes effective 60 days after publication in the Federal Register.

In response to the Proposed Rule, EPA’s Science Advisory Board (SAB) found that aspects of the rule were “in conflict with established science, [and] the existing WOTUS rule developed based on the established science...” in that the Proposed Rule “decreases protection for our nation’s water and does not support the objectives” of the Clean Water Act.<sup>4</sup> Specifically, the SAB stated that it was concerned that the Proposed Rule failed to fully incorporate the findings of EPA’s 2015 Connectivity Report, which, among other findings, found that “incremental effects of individual streams and wetlands are cumulative across entire watersheds and therefore must be evaluated in context with other streams and wetlands.”<sup>5</sup> The SAB also concluded that “the departure of the [P]roposed Rule from EPA recognized science threatens to weaken protection of the nation’s waters by disregarding the established connectivity of ground waters and by failing to protect ephemeral streams and wetlands which connect to navigable waters below the surface. These changes are proposed without a fully supportable scientific basis, while potentially introducing 8 substantial new risks to human and environmental health.”

In response to the SAB’s commentary, EPA notes in the Final Rule that the “[A]gencies used the Connectivity Report to inform certain aspects of the definition of ‘waters of the United States,’ but recognized that science cannot dictate where to draw the line between Federal and State waters, as this is a legal question that must be answered based on the overall framework and construct of the CWA.”

Thus, in the Final Rule the Agencies note that:

- jurisdictional waters do not include groundwater;
- irrigation ditches constructed in uplands and irrigation return flows generally have not been subject to CWA regulatory requirements;
- the Final Rule “expand[s] jurisdiction over certain ‘adjacent wetlands’ compared to the proposal to better incorporate common principles from the [*Rapanos v. United States (Rapanos)*] plurality and concurring opinions”;

<sup>3</sup> Executive Order 13778, Vol. 82, No. 41 (March 3, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-03-03/pdf/2017-04353.pdf>.

<sup>4</sup> Science Advisory Board Commentary, “Subject: Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act,” (January 20, 2020 ), available at: [https://yosemite.epa.gov/sab/sabproduct.nsf/ea5d9a9b55cc319285256cbd005a472e/5939af1252ddadfb852584e10053d472/\\$FILE/WOTUS%20SAB%20Draft%20Commentary\\_10\\_16\\_19\\_.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/ea5d9a9b55cc319285256cbd005a472e/5939af1252ddadfb852584e10053d472/$FILE/WOTUS%20SAB%20Draft%20Commentary_10_16_19_.pdf).

<sup>5</sup> U.S. EPA, Connectivity of Streams and Wetland to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report), (January 15, 2015), available at: <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>.

- the Final Rule “strikes a better balance between the objective and policy in the CWA sections 101(a)<sup>6</sup> and 101(b)”<sup>7</sup>; and
- the Final rule is consistent with the text, structure, legislative history, and applicable case law.

## Final Definition of Waters of the United States

The Final Rule includes a definition of waters of the United States that defines jurisdictional water as the “territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; tributaries; lakes and ponds, impoundments of otherwise jurisdictional waters, and adjacent wetlands.”

The Final Rule eliminates the significant nexus test and includes the following exemptions:

- groundwater, including groundwater drained through subsurface drainage systems;
- ephemeral features including ephemeral streams, swales, gullies, rills, and pools;
- diffuse stormwater runoff and directional sheet flow over upland;
- ditches that are not traditional navigable waters, tributaries, or that are not constructed in adjacent wetland;
- prior converted crop land;<sup>8</sup>
- artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland if artificial irrigation ceases;
- artificial lakes and ponds, including water storage reservoirs and farm irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of lakes and ponds, and impoundments of jurisdictional waters;
- water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;
- stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;
- groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional water; and
- waste treatment systems.

Tables 1 and 2 summarize the final definitions for jurisdictional waters, as well as key exclusions compared to the 2015 Rule. Changes from the Proposed Rule are noted in **bold** in the table and in definitions included in the footnotes.

<sup>6</sup> Section 101(a) of the CWA states that it is “the objective of this chapter to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”

<sup>7</sup> Section 101(b) of the CWA states that it is the policy of Congress to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.” 33 U.S.C. 1251(b).

<sup>8</sup> The Final Rule defines “prior converted cropland” as “any area, that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of having the effect of making production of an agricultural product possible.”

**Table 1: Proposed Jurisdictional Waters Under Definition of Waters of the United States (changes from Proposed Rule noted in bold)**

Term	Final Definition	Notes	Comparison to 2015 Rule
<i>Jurisdictional Waters</i>	“territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide” <sup>9</sup>	The following continue to be jurisdictional if they are navigable: <ul style="list-style-type: none"> <li>• Large rivers and lakes</li> <li>• Territorial seas</li> <li>• Tidal waters</li> <li>• Interstate waters, including interstate wetlands</li> </ul>	Both the 2015 Rule and Final Rule treat navigable waters as jurisdictional
<i>Adjacent Wetlands</i> <sup>10</sup>	<ul style="list-style-type: none"> <li>• wetlands that abut<sup>11</sup> jurisdictional waters;</li> <li>• <b>are inundated by flooding from a jurisdictional water in a typical year</b><sup>12</sup>;</li> <li>• <b>are physically separated from a jurisdictional water only by a natural berm, bank, dune or similar natural feature; or</b></li> <li>• <b>are physically separated from a jurisdictional water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection</b><sup>13</sup> <b>between the wetland and the jurisdictional water in a typical year, such as through a culvert, flood or tide gate, pump or similar artificial feature.</b></li> </ul>	Compared to the Proposed Rule, the Final Rule clarifies the language regarding barriers and adds more specific components to the definition. Adjacent wetlands are jurisdictional if they: <ul style="list-style-type: none"> <li>• Physically touch other jurisdictional waters;</li> <li>• Have a direct surface water connection in a typical year;</li> <li>• Are only physically separate from a jurisdictional water through a natural beam, bank, dune; or</li> <li>• are physically separated only by an artificial dike, barrier, or similar artificial structure and have a surface water connection.</li> </ul> An adjacent wetland remains jurisdictional even if a road or article structure divides the wetland provided a direct hydrological surface connection remains in a typical year.	The Final Rule considers the hydrological surface connection to jurisdictional waters, while the 2015 Rule treated all waters adjacent to another water under federal jurisdiction (including adjacent wetlands) as jurisdictional

<sup>9</sup> The Final Rule defines “waters subject to the ebb and flow of tides” and “tidal waters” to 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.”

<sup>10</sup> The Final Rule, consistent with the Proposed Rule, defines “wetlands” as “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.”

<sup>11</sup> The Final Rule defines “abut” to mean “to touch at least at one point or side of a [jurisdictional water].”

<sup>12</sup> The Final Rule defines a “typical year” to mean “**when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on** a rolling thirty-year period.”

<sup>13</sup> Unlike the Proposed Rule, the Final Rule does not define hydrologic surface connection.

Term	Final Definition	Notes	Comparison to 2015 Rule
<i>Tributary</i>	<p>“a river, stream, or similar naturally occurring surface water channel that contributes <b>surface water</b> to a [“traditional navigable water”] in a typical year either directly or through one or more [jurisdictional] waters. <b>A tributary must be perennial<sup>14</sup> or intermittent<sup>15</sup> in a typical year.</b>”</p>	<p>The Final Rule defines tributaries to be jurisdictional if they are waterways that:</p> <ul style="list-style-type: none"> <li>• Contribute surface water flow to a traditional navigable water in a typical year</li> <li>• Must be perennial or intermittent</li> </ul> <p>Tributaries do not include ephemeral streams but if they contribute surface water flow from an upstream jurisdictional water to a downstream jurisdictional water, such tributaries remain jurisdictional.</p> <p>Unlike the Proposed Rule, the Final Rule makes clear that channelized non-jurisdictional surface water features do not sever jurisdiction of upstream perennial or intermittent waters provided that they convey surface water from such upstream waters to downstream jurisdictional waters in a typical year.</p> <p>The alteration or relocation of a tributary would not modify its jurisdictional status if it continues to satisfy the flow conditions of the Final Rule’s definition.</p>	<p>The Final Rule, consistent with the Proposed Rule, focuses on tributaries that contribute perennial or intermittent flow to traditional navigable waters, while the 2015 Rule used the physical presence of a bed, bank, and an ordinary high water-mark, which would capture perennial and most intermittent waterways. The 2015 Rule’s definition of tributary also expressly includes “natural, man-altered, or man-made water” and “rivers, streams, canals and ditches” not explicitly excluded in definition of waters of the United States.</p>
<i>Ephemeral</i>	<p>“surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall)”</p>	<p>The Final Rule continues to exclude ephemeral features, retains the definition of ephemeral as in the Proposed Rule and ties the flow or pooling directly to precipitation. By comparison, sustained intermittent flow, which is not excluded, is used to define the case that is continuous during certain times of the year and more than to direct response to precipitation (e.g., snowpack melts)</p>	<p>The Final Rule, consistent with the Proposed Rule, includes a definition of ephemeral, which the 2015 Rule did not define explicitly.</p>

<sup>14</sup> The Final Rule defines “perennial” to mean “surface water flowing continuously year-round.”

<sup>15</sup> The Final Rule defines “intermittent” as “surface water flowing continuously during certain times of **the** year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).”

Term	Final Definition	Notes	Comparison to 2015 Rule
<i>Ditch</i>	“a <b>constructed or excavated</b> channel used to convey water”	<p>The Final Rule revises the Proposed Rule’s treatment of ditches to not include separate category for jurisdictional ditches but makes clear that ditches are exempted unless they:</p> <ul style="list-style-type: none"> <li>• Function as traditional navigable waters or tributary;</li> <li>• Are constructed in an adjacent wetland that is jurisdictional</li> </ul> <p>Exempted ditches could still be regulated by states and tribes and would still be subject to CWA permitting if they meet the definition of “point source” in CWA section 502(14)</p>	<p>Both the 2015 Rule and Final Rule include certain ditches as jurisdictional and exempt others</p> <p>The 2015 Rule’s definition of tributary expressly included as jurisdictional any ditches that are relocated tributaries, are excavated in a tributary, or do not drain wetlands, and also have perennial flow, as well as any ditches that flow into another jurisdictional water</p>
<i>Waste Treatment System Exemption</i>	“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)”	Consistent with the Proposed Rule’s definition, the Final Rule continues to exempt waste treatment systems and includes a definition to clarify the exemption	Both the 2015 Rule and the Final Rule exempt waste treatment systems from jurisdiction
<i>Stormwater Control Features Exemption</i>	“stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off”	Consistent with the Proposed Rule, stormwater control features remain exempt	Both the 2015 Rule and the Final Rule exempt stormwater control features but with different language. The 2015 Rule based the exemption on those constructed in dry land and the Final Rule exempts features constructed in upland

Term	Final Definition	Notes	Comparison to 2015 Rule
<p><i>Lakes and Ponds, and Impoundments of Jurisdictional Waters</i></p>	<p>“standing bodies of open water that contribute surface water flow to a [jurisdictional] water in a typical year either directly or through one or more [tributary, lakes and ponds and impoundments of jurisdictional waters and adjacent wetlands]... A lake or pond, or impoundment of a jurisdictional water is also jurisdictional if it is inundated by flooding from a [jurisdictional] water in a typical year.”</p>	<p>The Final Rule includes as jurisdictional certain lakes and ponds that:</p> <ul style="list-style-type: none"> <li>• Function as traditional navigable waters;</li> <li>• Contribute perennial or intermittent flow to a traditional navigable water either directly or indirectly in a typical year; or</li> <li>• Are flooded by a water under federal jurisdiction as defined in this rule in a typical year</li> </ul>	<p>The Final Rule treats lakes and ponds as jurisdictional based on their relationship to navigable water, while the 2015 Rule defined lakes and ponds as jurisdictional if adjacent<sup>16</sup> to another water under federal jurisdiction</p>

**Table 2: Additional Jurisdictional Consideration in Final Rule** (changes from Proposed Rule noted in **bold**)

Term	Final Approach	Comparison to 2015 Rule
<p><i>Exemptions</i></p>	<p>The Final Rule exempts from jurisdiction:</p> <ul style="list-style-type: none"> <li>• Groundwater, including groundwater drained through subsurface drainage systems</li> <li>• Ephemeral features <b>including ephemeral streams, swales, gullies, rills, and pools</b></li> <li>• Diffuse stormwater runoff and directional sheet flow over upland</li> <li>• <b>Ditches that are not traditional navigable waters, tributaries, or that are not constructed in adjacent wetland, subject to certain limitations</b></li> <li>• Prior converted crop land<sup>17</sup></li> <li>• Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland if artificial irrigation ceases</li> <li>• Artificial lakes and ponds, including water storage reservoirs <b>and farm irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of [lakes and ponds, and impoundments of jurisdictional waters]</b></li> <li>• Water-filled depressions <b>constructed or excavated in upland or in non-jurisdictional waters</b> incidental to mining or construction activity, and pits excavated in upland or in <b>non-jurisdictional waters</b> for the purpose of obtaining fill, sand, or gravel</li> <li>• Stormwater control features <b>constructed or excavated in upland or in non-jurisdictional waters</b> to convey, treat, infiltrate, or store stormwater run-off</li> <li>• <b>Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basis and ponds, constructed or excavated in upland or in non-jurisdictional waters</b></li> <li>• Waste treatment systems</li> </ul>	<p>For comparison, the 2015 Rule expressly excluded:</p> <ul style="list-style-type: none"> <li>• Groundwater, including groundwater drained through subsurface drainage systems</li> <li>• Prior converted crop land<sup>18</sup></li> <li>• Artificially irrigated areas that would revert to dry land should application of water to that area cease</li> <li>• 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, as well as artificial reflecting pools or swimming pools created in dry land</li> <li>• Water-filled depressions created in upland incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water</li> <li>• Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds build for wastewater recycling; and water distributary structures built for wastewater recycling</li> <li>• Puddles and erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, lawfully constructed grassed waterways, and small, ornamental waters created in dry land</li> </ul>

<sup>17</sup> The Final Rule defines “prior converted cropland” as “any area, that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of having the effect of making production of an agricultural product possible.”

<sup>18</sup> The 2015 Rule did not define “prior converted crop land.”



Term	Final Approach	Comparison to 2015 Rule
<i>Significant Nexus Analysis</i>	The Final Rule eliminates the case-by-case application of the significant nexus test in favor of categories of jurisdictional waters	<p>The 2015 Rule applied a case-by-case application of the significant nexus test for Prairie potholes, Carolina and Delmarva bays, Pocosins, Western vernal pools in California, and Texas coastal prairie wetlands. The 2015 Rule also used the significant nexus test for:</p> <ul style="list-style-type: none"> <li>• Waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and</li> <li>• Waters within 4,000 feet of the high tide line or the ordinary high water mark<sup>19</sup> of a traditional navigable water, interstate water, the territorial seas, impoundments or covered tributary.</li> </ul>

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<sup>19</sup> The Final Rule defines “ordinary high water mark” as the “line on the shore established by the fluctuations of the water and indicated by physical characteristics such as a clean, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presences of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”

## Additional Details on Key Provisions

### *Waste Treatment Systems*

The Final Rule retains the 2015 Rule’s exclusion of waste treatment systems from jurisdictional waters, which the preamble explains has existed since 1979. However, the Agencies note that the Final Rule includes a definition of “waste treatment system” for the first time in order to “improve regulatory predictability and clarity.” The final definition “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).” A waste treatment system would still require a CWA section 402 permit if it discharges into waters of the United States, and a section 404 permit for new construction in a water of the United States. Additionally, if a waste treatment system is abandoned or otherwise ceases to serve the treatment function for which it was designed, it would not qualify for the exclusion.

The Final Rule makes clear that the exclusion applies “only to waste treatment systems constructed in accordance with the requirements of the CWA and to all waste treatment systems constructed prior to the 1972 amendments.” In response to comments requesting clarification regarding units constructed prior to the 1972 CWA amendments, the preamble states that the “regulatory text applies to all waste treatment systems that meet the definition set forth therein, including systems constructed prior to the 1972 CWA amendments, and there is no basis for construing the exclusion not to apply to such systems.”

### *Adjacent Wetlands*

The Final Rule includes adjacent wetlands as jurisdictional. The preamble notes that the Agencies retain the definition of wetland to mean “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.” The presence or boundaries of wetlands would be determined based upon an area satisfying all three of the definition’s criteria (i.e., hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances.

In defining adjacent wetlands, the Final Rule considers the hydrological surface connection to jurisdictional waters. The Final Rule defines “adjacent wetlands” as wetlands that:

- abut<sup>20</sup> jurisdictional waters;
- are inundated by flooding from a jurisdictional water in a typical year<sup>21</sup>;
- are physically separated from a jurisdictional water only by a natural berm, bank, dune or similar natural feature; or
- are physically separated from a jurisdictional water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection<sup>22</sup> between the wetland and the jurisdictional water in a typical year<sup>23</sup>, such as through a culvert, flood or tide gate, pump or similar artificial feature.

<sup>20</sup> The Final Rule defines “abut” to mean “to touch at least at one point or side of a [jurisdictional water].”

<sup>21</sup> See footnote 12 for a definition of typical year.

<sup>22</sup> Unlike the Proposed Rule, the Final Rule does not define hydrologic surface connection.

<sup>23</sup> The Final Rule defines a “typical year” to mean “**when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.**”

As proposed, the preamble notes that the Agencies removed reference to the terms “bordering, contiguous, or neighboring,” to reduce confusion and use “abut” to “clearly identify those waters that are inseparably bound up with other jurisdictional waters, in addition to the other clear tests for adjacency in this final rule.” In addition to the Proposed Rule’s approach of using a categorical test for abut and a direct hydrological surface connection in a typical year, the Final Rule also maintains jurisdiction if the wetlands are separated from other jurisdictional waters only by natural berms, banks or dunes “as those natural separations are evidence of a dynamic and regular direct hydrological surface connection between the resources based on the agencies’ technical expertise and experience.” The Final Rule also expands the type of surface water connections that are not jurisdictional themselves but can maintain jurisdictional connectivity between wetlands and other waters of the United States that are separated only by artificial dikes and other barriers. Additionally, the Final Rule expands the definition from the Proposed Rule to include “wetland complexes that are crossed by roads and similar structures if those structures allow for a surface water connection between the segregated wetland portions... in a typical year.”

The Final Rule also states that, consistent with the Proposed Rule, features that were once wetlands but have been “naturally transformed or lawfully converted to upland”<sup>24</sup> would be considered upland, and therefore, not jurisdictional. The Final Rule further notes that if a CWA section 404 permit is issued with applicable mitigation requirements for a structure that does not allow for a direct hydrological surface connection in a typical year, the jurisdiction would be severed. However, if the barrier is constructed unlawfully in a jurisdictional wetland, that construction remains subject to the agencies’ enforcement authorities.

The Final Rule acknowledges that definition of “adjacent wetlands” in the Final Rule differs from the regulatory definition that the Supreme Court addressed in *United States v. Riverside Bayview Homes (Riverside Bayview)*, but states that “a court’s deference to an agency’s interpretation of a statute does not foreclose an agency from adopting alternative interpretations.” The Agencies’ state that Final Rule’s alternative interpretation is based on additional case law following *Riverside Bayview*. For example, the preamble states that the Final Rule’s definition of adjacent wetlands is consistent with the decisions in *Solid Waste Agency of Northern Cook County v. United States (SWANCC)* and *Rapanos v. United States (Rapanos)* by excluding isolated wetlands that only have a physically remote hydrological connection to jurisdictional waters.

### *Tributaries*

The Final Rule includes tributaries as jurisdictional and defines the term to include any rivers, streams, or similar naturally occurring surface water channels that contribute perennial<sup>25</sup> or intermittent<sup>26</sup> flow to a traditional navigable water or territorial sea in a typical year. Thus, the approach excludes ephemeral<sup>27</sup> features as they are incapable of providing perennial or intermittent flow. Additionally, the definition would establish that a “mere hydrological connection cannot provide the basis for CWA jurisdiction.” Rather, the bodies of water must be “geographic features” that are “relatively permanent...and that contribute perennial or intermittent flow to a traditional navigable water or the territorial seas in a typical year.”

The Agencies note that under the proposed definition of “tributary,” an artificial or natural ephemeral feature would have severed jurisdiction upstream of the feature, because the waterbody would not contribute surface water to

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<sup>24</sup> In the Final Rule, “upland” refers to any land area above the ordinary highwater mark or high tide line that does not satisfy all three wetland delineation features under normal conditions.

<sup>25</sup> Perennial is defined as “surface water flowing continuously year-round during a typical year.”

<sup>26</sup> Intermittent is defined as “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).”

<sup>27</sup> Ephemeral includes “surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).”

jurisdictional waters on a perennial or intermittent basis. However, as discussed more fully below, the Final Rule now makes clear that a tributary does not lose its jurisdictional status if it contributes to a downstream jurisdictional water through a non-jurisdictional surface water feature in a typical year.

The preamble also notes that to implement the approach, the Agencies will “identify whether the feature contributes surface water flow to a [jurisdictional water] either directly or through one or more [waters of the United States] in a typical year.” The Final Rule explains that the use of “direct” is “intended to distinguish between flow solely caused by individual precipitation events (including multiple, individual back-to-back storms), and continuous flow resulting, for example, from weeks- or months-long accumulation of precipitation in form of snowpack that melts slowly over time or an elevated groundwater table that provides baseflow to the channel bed.”

### *Breaks*

The Final Rule includes a specific discussion regarding an artificial or natural ephemeral feature occurring in a typical year along a tributary. The Proposed Rule would have required tributaries and most lakes and ponds to maintain a perennial or intermittent surface water connection all the way to a downstream jurisdictional water. However, some commenters raised concerns that “breaks” could affect the jurisdiction of many waters and “inadvertently subject otherwise exempt waters transfers to CWA section 402 permitting; and it could implementation challenges.”

The Final Rule includes changes to address these concerns noting that the Supreme Court “has not spoken directly to the question of whether a non-jurisdictional ephemeral break along or downstream of an otherwise jurisdictional tributary, lake, pond, or impoundment would sever jurisdiction of upstream waters.” As noted above, the Final Rule makes clear that a tributary does not lose its jurisdictional status “if it contributes surface water flow in a typical year to a downstream jurisdictional water through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial features, or through a debris pile, boulder field, or similar natural feature.”

### *Ditches*

The Proposed Rule included a new category in the definition of waters of the United States for jurisdictional ditches that: 1) function as traditional navigable waters or that are subject to the ebb and flow of the tide, 2) are constructed in a tributary or that relocate or alter a tributary as long as they also satisfy the conditions of the proposed “tributary” definition, or 3) are constructed in an adjacent wetland and also satisfy the conditions of the “tributary” definition. All other ditches were proposed to be excluded.

However, in response to concerns that the proposed approach would add confusion, the Final Rule does not include a separate category for ditches but instead exempts all ditches unless they function as traditional navigable waters or tributary or are constructed in a jurisdictional adjacent wetland. The Agencies state that it is clearer to include in the definition of tributary that the alteration of a tributary does not modify its jurisdictional status as long as it continues to meet the flow conditions in that definition rather than, as proposed, to classify the alteration of a tributary as a ditch. The example provided in the preamble is the Los Angeles River, which would be jurisdictional—the Final Rule explains that such a feature may satisfy the definition of an excluded “ditch”, but it also satisfies the definition of “tributary”, which overrides the exclusion for ditches. In other words, a “ditch that straightens a tributary is considered to be ‘constructed in’ a tributary, and the ditch would be jurisdictional as a tributary so long as it continues to meet the flow conditions of the ‘tributary’ definition.”

In response to some comments that the Final Rule should exempt ditches in uplands that do not relocate a tributary and other comments that ditches should be jurisdictional even if upland if they have perennial flow, the Agencies

explain that “upland ditches were not jurisdictional for decades under the agencies’ previous definitions of ‘waters of the United States,’ and they are not jurisdictional under this final rule” unless they meet the criteria noted above.

#### *Lakes and Ponds and Impoundments of Jurisdictional Waters*

The Final Rule combines lakes, ponds and impoundments of jurisdictional waters as one category of “waters of the United States”. Such waters are jurisdictional if it is a traditional navigable water (e.g., Lake Michigan); contributes surface water flow to the territorial sea or a traditional navigable water in a typical year either directly or through one or more jurisdictional waters; or is inundated by flooding from jurisdictional waters in a typical year.

The Agencies state that the rule focuses on those waters’ connection to a traditional navigable water or the territorial sea “to remain consistent with the overall structure and function of the CWA.” To simplify the language compared to the Proposed Rule’s approach, the Final Rule eliminates the flow classification requirement and now focuses on the “types of features that can provide a sufficient surface water connection between the lake, pond, or impoundment of a jurisdictional water and a downstream jurisdictional water in a typical year to warrant federal jurisdiction consistent with the CWA.”

The Final Rule notes that it is changing the approach for impoundments of jurisdictional waters. In the past, such impoundments would be jurisdictional regardless of the surface water connection to a downstream jurisdictional water. Now, however, based Justice Kennedy’s concurring opinion in *SWANCC*, the Agencies conclude that the principle that “the word ‘navigable’ in the Act must be given some effect” requires the Agencies to apply it to all waters, including impoundments. The Agencies also state that the approach is “consistent with the agencies’ longstanding practice that a jurisdictional water may be altered and made non-jurisdictional by obtaining a CWA section 404 permit to place fill material in a wetland or other water, thereby converting that water to fast land.”

#### *Stormwater Control Features*

The Final Rule continues to explicitly exempt stormwater control features that are “constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off.” The Agencies note that they disagree with commenters who stated that “jurisdictional waters that are incorporated into a drainage or stormwater conveyance system should be excluded by virtue of the fact that they are part of the larger stormwater control system.” Rather, a “water does not lose its jurisdictional status if it is modified for use as a stormwater control measure.” The Final Rule also notes that while excluded from the definition of waters of the United States, stormwater control features may “function as a conveyance of a discharge of pollutants from a point source to water of the United States.” Additionally, municipal separate storm sewer systems (MS4s) “that may have replaced natural drainage features may therefore have jurisdictional waters within their systems, but this does not represent a change from longstanding practice.” Using the Los Angeles River as an example, the Final Rule notes that it still meets the requirements of jurisdictional waters.

### **Legal Basis**

The Final Rule describes the past case law and regulatory developments leading to this proposal. Overall, the preamble states that the objective of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” The Agencies also make clear that the Final Rule is intended to read the case law narrowly and rely on the Commerce Clause to guide what waters are jurisdictional. Summarizing the case law, the Final Rule notes a wetland that abuts a navigable water traditionally understood as navigable is subject to CWA permitting under *Riverside Bayview*, and the Agencies can establish categories of jurisdiction for adjacent wetlands. Additionally, the Final Rule notes that a Court’s deference to an agency’s particular interpretation “does not foreclose alternative interpretations...and in this final rule the agencies have provided ample justification for a

change in interpretation of the CWA concerning the scope of jurisdiction over waters and wetlands, including any changes from their prior interpretation.”

With respect to *SWANCC*, the Final Rule states that the decision “stands for the key principles related to federalism and the balancing of the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation.” Accordingly, the Agencies state that consistent with *SWANCC*, the Final Rule “avoids pressing against the outer limits of the agencies’ authority under the Commerce Clause and the Supreme Court case law and recognizes the limiting principles articulated by the *SWANCC* decision.

In *Rapanos v. United States (Rapanos)*, Justice Scalia wrote an opinion in a four-Justice plurality interpreting waters of the United States to “include[] only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes’ and “wetlands with a continuous surface connection” to relatively permanent water. By contrast, Justice Kennedy’s concurring opinion found that “to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” The Final Rule notes that since *Rapanos*, the Federal government adopted a “broad interpretation of Justice Kennedy’s concurring opinion, arguing that his ‘significant nexus’ test provides an independent basis for establishing jurisdiction over certain waters of the United States.” However, the Final Rule states that while it “is informed by key aspects by Justice Kennedy’s opinion, . . . the agencies now appropriately recognize some of the limiting principles articulated within his concurring opinion.”

The Final Rule outlines similarities between the two opinions. The Agencies state that both approaches considered the “connection of the wetland to the tributary” as well as “the status of the tributary with respect to the downstream traditional navigable waters”. Both also agree that the connection “must be close” with the plurality referring to a “continuous surface connection” or “continuous physical connection” and Kennedy’s opinion recognizing that “the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a ‘navigable water’ under the Act.”

With respect to tributaries, the Final Rule summarizes the commonalities of the plurality and Justice Kennedy’s opinion as both focus on tributaries’ contribution to and connection with traditional navigable waters. However, the Agencies note that neither “defined with precision where to draw the line” between relatively permanent, intermittent streams, and non-jurisdictional tributaries.

Based on the discussion of the Supreme Court precedent, the Final Rule includes certain principles and considerations that were previously included in the Proposed Rule, including, for example:

- The Agencies’ authority under the CWA is “grounded in Congress’ commerce power over navigation” and the Agencies can “choose to regulate beyond waters more traditionally understood as navigable . . . but must provide a reasonable basis grounded in the language and structure of the Act for determining the extent of jurisdiction.”
- The Agencies can choose to regulate adjacent wetlands and some tributaries if the “wetlands are closely connected to the tributaries.”
- *SWANCC* “calls into question the agencies’ authority to regulate nonnavigable, isolated, intrastate waters that lack a sufficient connection to traditional navigable waters.”
- The Agencies can “regulate certain waters by category, which could improve regulatory predictability and certainty and ease administrative burdens while still effectuating the purposes of the Act.”

The preamble also discusses in detail the responsibilities and rights of states and tribes to regulate their water resources. The Agencies explain that the Final Rule does not conclusively determine which of the nation's waters warrant environmental protection; rather "the agencies interpret the definition as drawing the boundary between those waters subject to federal requirements under the CWA and those waters States and Tribes are free to manage under their independent authorities."

### **Next Steps**

The Final Rule will be effective 60 days after publication in the Federal Register. As with the litigation of the 2015 Rule, litigation on this Final Rule is expected to commence immediately following publication.

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