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EPA and the Army Corps' Proposed Rule to Define "Waters of the United States"

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March 27, 2014

Congressional Research Service
7-5700
www.crs.gov
R43455

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed a rule defining the scope of waters protected under the Clean Water Act (CWA). The proposed rule would revise regulations that have been in place for more than 25 years. Revisions are proposed in light of Supreme Court rulings in 2001 and 2006 that interpreted the regulatory scope of the CWA more narrowly than previously, but created uncertainty about the precise effect of the Court's decisions.

In April 2011, EPA and the Corps proposed guidance on policies for determining CWA jurisdiction to replace guidance previously issued in 2003 and 2008; all were intended to lessen confusion over the Court's rulings. The 2011 proposed guidance was extremely controversial, with some groups contending that it represented a massive federal overreach beyond the agencies' statutory authority. Most environmental advocacy groups welcomed the proposed guidance, although some would have preferred a stronger document. The 2014 proposed rule would replace the existing 2003 and 2008 guidance, which remains in effect because the 2011 proposed guidance was not finalized.

According to the agencies, the proposed rule would revise the existing regulatory definition of "waters of the United States" consistent with legal rulings—especially the Supreme Court cases—and science concerning the interconnectedness of tributaries, wetlands, and other waters to downstream waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. Waters that are "jurisdictional" are subject to the multiple regulatory requirements of the CWA: standards, discharge limitations, permits, and enforcement. Non-jurisdictional waters, in contrast, do not have the federal legal protection of those requirements.

This report describes the March 25 proposed rule and includes a table comparing the existing regulatory language that defines "waters of the United States" with that in the proposal. The proposed rule is particularly focused on clarifying the regulatory status of waters located in isolated places in a landscape, the types of waters with ambiguous jurisdictional status following the Supreme Court's ruling. The proposal does not modify some categories of waters that currently are jurisdictional by rule (traditional navigable waters, interstate waters and wetlands, the territorial seas, and impoundments). Changes proposed in the proposed rule would increase the asserted geographic scope of CWA jurisdiction, in part as a result of the agencies' expressly declaring some types of waters categorically jurisdictional (such as all waters adjacent to a jurisdictional water), and also by application of new definitions, which give larger regulatory context to some types of waters, such as tributaries. The proposal does not identify specific waters—particular streams or ponds—that would be jurisdictional as a result of the rule.

Beyond the categories of waters that would be categorically jurisdictional under the proposed rule is a category sometimes referred to as "other waters." The regulatory term "other waters" applies to wetlands and non-wetland waters such as prairie potholes that are not considered traditionally navigable or meet other of the proposed rule's jurisdictional definitions. Much of the controversy since the Supreme Court rulings has focused on the degree to which "other waters" are jurisdictional. According to the agencies' analyses, 17% of these "other waters" would be determined to be jurisdictional under changes in the proposal. The proposed rule also lists waters and features that would not be jurisdictional, such as prior converted cropland and certain ditches.

It makes no change to and does not affect existing statutory and regulatory permit exclusions, such as exemptions for normal farming and ranching activities.

The agencies believe that the proposed rule does not exceed the CWA's coverage or protect any new types of waters that have not been protected historically. That is, while it would enlarge jurisdiction beyond that under the 2003 and 2008 EPA-Corps guidance, which the agencies believe was narrower than is justified by science and the law, they believe that it would not enlarge jurisdiction beyond what is consistent with the Supreme Court's narrow reading of jurisdiction. Others may disagree. Overall, the agencies estimate that approximately 3% of U.S. waters will additionally be subject to CWA jurisdiction as a result of the proposed rule (including additional "other waters"), compared with current field practice. EPA and the Corps estimate that costs of the proposed rule, resulting from additional permit application expenses, for example, range from $162 million to $279 million annually. Benefits from the rule, including the value of ecosystem services provided by waters and wetlands protected as a result of CWA requirements, such as flood protection, are estimated to range from $318 million to $514 million per year. They acknowledge uncertainties and limitations in the estimate of costs and benefits.

Contents

Tables

Contacts

Introduction

On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed a rule defining the scope of waters protected under the Clean Water Act (CWA). The proposed rule would revise regulations that have been in place for more than 25 years.[1] Revisions are proposed in light of Supreme Court rulings in 2001 and 2006 that interpreted the regulatory scope of the CWA more narrowly than previously, but created uncertainty about the precise effect of the Court's decisions.[2]

In April 2011, EPA and the Corps proposed guidance on policies for determining CWA jurisdiction to replace guidance previously issued in 2003 and 2008; all were intended to lessen confusion over the Court's rulings for the regulated community, regulators, and the general public. The guidance documents sought to identify, in light of the Court's rulings, categories of waters that remain jurisdictional, categories not jurisdictional, and categories that require a case-specific analysis to determine if CWA jurisdiction applies. The 2011 proposed guidance identified similar categories as in the 2003 and 2008 documents, but it would have narrowed categories that require case-specific analysis in favor of asserting jurisdiction categorically for some types of waters. The 2014 proposed rule would replace the existing 2003 and 2008 guidance, which remains in effect because the 2011 proposed guidance was not finalized.[3]

The 2011 proposed guidance was extremely controversial, especially with groups representing property owners, land developers, and the agriculture sector, who contended that it represented a massive federal overreach beyond the agencies' statutory authority. Most state and local officials were supportive of clarifying the scope of CWA-regulated waters, but some were concerned that expanding the CWA's scope could impose costs on states and localities as their own actions (e.g., transportation projects) become subject to new requirements. Most environmental advocacy groups welcomed the proposed guidance, which would more clearly define U.S. waters that are subject to CWA protections but would not, they said, expand the reach of the law beyond the Supreme Court's reading. Some in these groups favored even a stronger document. Still, both supporters and critics of the 2011 proposed guidance urged the agencies to replace guidance with revised regulations that define "waters of the United States." Three opinions in the 2006 Supreme Court *Rapanos* ruling similarly urged the agencies to initiate a rulemaking, as they now have done.

In Congress, a number of legislative proposals were introduced to bar EPA and the Corps from implementing the 2011 proposed guidance or developing regulations based on it; none of these proposals was enacted. Similar criticism followed almost immediately after release of the proposed rule on March 25, 2014, with some Members asserting that the proposed rule would result in job losses and would damage economic growth. Supporters of the Administration, on the other hand, defended the agencies' efforts to protect U.S. waters and reduce frustration that has

[1] Regulatory definition of "waters of the United States" is found at 33 C.F.R. § 328.3 (Corps) and 40 C.F.R. § 122.2 (EPA). The term is similarly defined in other EPA regulations, as is the term "navigable waters." See **Table 1**.

[2] Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159 (2001), and Rapanos v. United States, 547 U.S. 715 (2006).

[3] For background on the Supreme Court rulings, subsequent guidance, and other developments, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA):* Rapanos *and Beyond*, by Robert Meltz and Claudia Copeland.

resulted from the unclear jurisdiction of the act.[4] Support was expressed by environmental and conservation organizations, among others.[5]

The CWA and the Proposed Rule

A prepublication copy of the proposed rule is available on EPA's website.[6] **Table 1** in this report provides a comparison of the current regulatory language that defines "waters of the United States" with language in the proposed rule.

The CWA protects "navigable waters," a term defined in the act to mean "the waters of the United States, including the territorial seas."[7] Waters that are jurisdictional are subject to the multiple regulatory requirements of the CWA: standards, discharge limitations, permits, and enforcement. Non-jurisdictional waters, in contrast, do not have the federal legal protection of those requirements. The act's single definition of "navigable waters" applies to the entire law. In particular, it applies to federal prohibition on discharges of pollutants except in compliance with the act's requirements (§301), requirements for point sources to obtain a permit prior to discharge (§§402 and 404), water quality standards and measures to attain them (§303), oil spill liability and oil spill prevention and control measures (§311), certification that federally permitted activities comply with state water quality standards (§401), and enforcement (§309). It impacts the Oil Pollution Act and other environmental laws, as well.[8] The CWA leaves it to the agencies to define the term "waters of the United States," which EPA and the Corps have done several times, most recently in 1986.

According to the agencies, the proposed rule would revise the existing regulatory definition of "waters of the United States" consistent with legal rulings—especially the recent Supreme Court cases—and science concerning the interconnectedness of tributaries, wetlands, and other waters to downstream waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. It is particularly focused on clarifying the regulatory status of waters located in isolated places in a landscape, the types of waters with ambiguous jurisdictional status following the Supreme Court's ruling. In developing the proposed rule, EPA and the Corps relied on a draft synthesis of more than 1,000 published and peer-reviewed scientific reports; the synthesis discusses the nature of connectivity and effects of streams and wetlands on downstream waters.[9] This draft assessment document is under review by EPA's Science Advisory Board

[4] Anthony Adragna and Amena Saiyid, "Republicans Contend EPA Overreached on Clean Water Act Jurisdiction Proposal," *Daily Environment Report*, vol. 58 (March 26, 2014), pp. A-7.

[5] U.S. Environmental Protection Agency, "Here's What They're Saying About the Clean Water Act Proposed Rule," press release, March 26, 2014, http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/3f954c179cf0720985257ca7004920fa!OpenDocument.

[6] Environmental Protection Agency and Department of Defense, Department of the Army, Corps of Engineers, *Definition of "Waters of the United States" Under the Clean Water Act, Proposed Rule* (prepublication version), http://www2.epa.gov/uswaters/definition-waters-united-states-under-clean-water-act. Official publication occurs when the proposed rule appears in the Federal Register. A prepublication version is not expected to diverge from the *Federal Register* publication.

[7] CWA §502(7); 33 U.S.C. § 1362(7).

[8] For example, the reach of the Endangered Species Act (ESA) is affected, because that act's requirement for consultation by federal agencies over impacts on threatened or endangered species is triggered through the issuance of federal permits.

[9] U.S. Environmental Protection Agency, Office of Research and Development, Connectivity of Streams and Wetlands (continued...)

(SAB), which provides independent engineering and scientific advice to the agency. A number of EPA's critics have suggested that the agencies should have deferred developing or proposing a revised rule until a final scientific review document is complete. In the preamble to the proposed rule, the agencies state that the rule will not be finalized until the SAB's review and a final report are complete. However, some have expressed concern that the final report will not be available during the public comment period on the rule.

Under the first section of the March 25 proposal, the following waters would be jurisdictional by rule:

- Waters susceptible to interstate commerce, known as traditional navigable waters (no change from current rules);
- All interstate waters, including interstate wetlands (no change from current rules);
- The territorial seas (no change from current rules);
- Impoundments of the above waters or a tributary, as defined in the rule (no change from current rules);
- Tributaries of the above waters (more inclusive than current rules because "tributary" is newly and broadly defined); and
- All waters, including wetlands, adjacent to a water identified in the above categories (by including all adjacent waters—not simply adjacent wetlands—the proposal is more inclusive than current rules; these waters are considered jurisdictional under the rule because they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas).

The concept of significant nexus is critical because courts have ruled that, to establish CWA jurisdiction between waters, there needs to be "some measure of the significance of the connection for downstream water quality," as Justice Kennedy found in the 2006 *Rapanos* case. He said, "Mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[10] However, as EPA and the Corps observe in the March 25 proposed rule, significant nexus is not itself a scientific term, but rather a determination of the agencies in light of the law and science. Functions that might demonstrate significant nexus include sediment trapping and retention of flood waters. In the proposed rule, the agencies note that a hydrologic connection is not necessary to demonstrate significant nexus, because the function may be demonstrated even in the absence of a connection (e.g., pollutant trapping is another such function).

(...continued)

to Downstream Waters: A Review and Synthesis of the Scientific Evidence, External Review Draft, EPA/600/R-11-098B, September 2013, http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.

[10] 547 U.S. at 784-785.

"Other Waters"

Beyond the categories of waters that would be categorically jurisdictional under the proposed rule is a category sometimes referred to as "other waters." The regulatory term "other waters" applies to wetlands and non-wetland waters that do not fall into the category of waters susceptible to interstate commerce (traditional navigable waters), interstate waters, the territorial seas, tributaries, or waters adjacent to waters in one of these four categories. Current rules contain a non-exclusive list of "other waters," such as intrastate lakes, mudflats, prairie potholes, and playa lakes (see **Table 1**). Headwaters, which constitute most "other waters," supply most of the water to downstream traditional navigable waters, interstate waters, and the territorial seas.

EPA and the Corps recognize that the Supreme Court decisions in *SWANCC* and *Rapanos* put limitations on the scope of "other waters" that may be determined to be jurisdictional under the CWA. Much of the controversy since the Court's rulings has focused on uncertainty as to what degree "other waters" are jurisdictional, either by definition/rule, or as determined on a case-by-case basis to evaluate significant nexus to a jurisdictional water. Under the 2008 guidance, all "other waters" require a case-by-case evaluation to determine if a significant nexus exists, thus providing a finding of CWA jurisdiction. There likewise has been uncertainty as to what degree "other waters" that are similarly situated may be aggregated or combined for a significant nexus determination. In the proposed rule, "other waters," including wetlands, that are adjacent to a jurisdictional water are categorically jurisdictional. Non-adjacent "other waters" and wetlands will continue to require a case-by-case determination of significant nexus. Also, the proposed rule allows broader aggregation of "other waters" that are similarly situated than under the 2008 guidance, which could result in more "other waters" being found to be jurisdictional following a significant nexus evaluation.

Some in the regulated community have urged EPA and the Corps to provide metrics, such as quantifiable flow rates or minimum number of functions for "other waters," to establish a significant nexus to jurisdictional waters. The agencies declined to do so in the proposed rule, saying that absolute standards would not allow sufficient flexibility to account for variability of conditions and the varied functions that different waters provide.

The agencies acknowledge that there may be more than one way to determine which waters are jurisdictional as "other waters," and they are requesting comment on alternate approaches, combination of approaches, scientific and technical data, case law, and other information that would clarify which "other waters" should be considered categorically jurisdictional or following a case-specific significant nexus determination.

Exclusions and Definitions

The second section of the proposed rule excludes specified waters from the definition of "waters of the United States." The listed waters and features would not be jurisdictional even if they would otherwise be included within categories that are jurisdictional. The exclusions are:

- Waste treatment systems, including treatment ponds or lagoons, that are designed to meet CWA requirements;
- Prior converted cropland;
- A list of features that have been excluded by long-standing practice and guidance and would now be excluded by rule, such as artificially irrigated areas that would

revert to upland should application of irrigation water to the area cease (see **Table 1** for the full list); and

- Two types of ditches: ditches that are excavated wholly in uplands, drain only uplands or non-jurisdictional waters, and have less than perennial (i.e., permanent) flow; and ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, impoundment, or the territorial seas. Other ditches, if they meet the rule's definition of "tributary," would continue to be "waters of the United States"—a point of much controversy with some stakeholders.

The proposed rule makes no change to and does not affect existing statutory and regulatory exclusions, such as exemptions for normal farming, ranching, and silviculture activities (CWA §404(f)); exemptions for permitting of agricultural stormwater discharges and return flows from irrigated agriculture; or exemptions for water transfers that do not introduce pollutants into a waterbody. Nor would it change permitting processes.

In the third section of the proposed rule, the agencies define terms, including "floodplain," "riparian area," "tributary," "significant nexus," and "neighboring" as a component of the existing term "adjacent." The terms "adjacent" and "wetland" are not redefined. (See **Table 1**.)

Finally, the proposed rule includes two appendixes. One is an abbreviated, but lengthy, version of the scientific assessment document currently being reviewed by EPA's Science Advisory Board; the other is an analysis of relevant case law.

Impacts of the Proposed Rule

The agencies acknowledge that the proposed rule would increase the asserted geographic scope of CWA jurisdiction, when compared to a baseline of current practices under the existing regulations and the 2003-2008 EPA-Corps guidance. This results in part from the agencies' expressly declaring some types of waters categorically jurisdictional (such as all waters adjacent to a jurisdictional water), and also by application of definitions, which give larger regulatory context to some types of waters, such as tributaries.

The agencies believe, however, that the proposed rule does not protect any new types of waters that have not been protected historically (i.e., prior to the *SWANCC* and *Rapanos* rulings) or exceed the CWA's coverage. That is, while it would enlarge jurisdiction beyond that under the 2003 and 2008 EPA-Corps guidance, which the agencies believe was narrower than is justified by science and the law, they believe that it would not enlarge jurisdiction beyond what is consistent with the Supreme Court's narrow reading of jurisdiction. Others may disagree. Many stakeholders are concerned with what changes the proposed rule will make, how much additional waters will be considered jurisdictional, and what additional costs will result.

The agencies' broader assertion of jurisdiction, compared to existing regulation and current practice, does not identify specific waters that will be found to be jurisdictional—that is, this or that particular stream or pond—but the proposed rule attempts to draw more of a bright line of CWA jurisdiction than in the past.

In an Economic Analysis document that accompanies the proposed rule, EPA and the Corps estimate that approximately 3% of U.S. waters would additionally be subject to CWA jurisdiction

as a result of the proposed rule, compared with current field practice, and thus subject to CWA requirements. The estimated increase includes about 17% of "other waters" (discussed above) that were not jurisdictional under existing regulations and the 2008 guidance.[11]

According to the analysis, costs to regulated entities and governments (federal, state, and local) are likely to increase. Direct and indirect costs would result from additional permit application expenses (for CWA §404 permitting, stormwater permitting for construction and development activities, permitting of pesticide discharges and confined animal feeding operations (CAFOs) for discharges to waters that would now be determined jurisdictional) and additional requirements for oil storage and production facilities needing to develop and implement spill prevention, control and countermeasure (SPCC) plans. Federal and state governments would likely experience costs to administer and process additional permits. Other costs would likely include compensatory mitigation requirements for permit impacts (if applicable), affecting land developers and state and local governments. In all, the agencies estimate that incremental costs associated with the rule range from $162 million to $279 million per year.

The agencies believe that benefits accruing from the proposed rule include the value of ecosystem services provided by the waters and wetlands protected as a result of CWA requirements, such as habitat for aquatic and other species, support for recreational fishing and hunting, and flood protection. Other benefits would include government savings on enforcement expenses, because the rule is intended to provide greater regulatory certainty, thus reducing the need for government enforcement. Business and government may also achieve savings from reduced uncertainty concerning where CWA jurisdiction applies, they believe. In all, the agencies estimate that benefits of the proposed rule range from $318 million to $514 million per year. However, they note that "there is uncertainty and limitations associated with the results," due to data and information gaps, as well as analytic challenges. The analysis does not quantify all possible costs and benefits.[12] Overall, they conclude that benefits would exceed costs.

Unclear for now is a question of the extent to which case law construing the existing regulatory definition of "waters of the United States" will continue to apply. Some of that case law has been in place for more than 35 years. The preamble to the proposed rule does not address this issue.

The agriculture sector has been vigorous in criticizing and challenging EPA regulatory actions that may affect the sector's operations, making potential impacts of the proposed rule on agriculture a likely focus of controversy. One of the sector's concerns about a new "waters of the United States" rule has been whether it would modify existing statutory and regulatory exemptions that exclude certain discharges from agricultural activities from CWA permitting. As described above, the proposed rule makes no change and does not affect these exemptions. An EPA fact sheet discusses the continued exclusions and exemptions.[13] In addition, simultaneous with proposing the rule, EPA and the Corps issued an interpretive rule that identifies 53 conservation practices approved by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) that qualify for exemption under the CWA Section 404(f)(1)(A) exclusion of "normal farming" activities from Section 404 permit requirements and do not require

[11] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States*, March 2014, http://www2.epa.gov/uswaters/economic-analysis-proposed-revised-definition-waters-united-states, p. 12.

[12] Ibid., pp. 21-22, 32.

[13] See http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf.

determination whether the discharge involves a "water of the United States." Through this interpretive rule, the agencies intend to resolve uncertainties about "normal farming" activities that are exempt from permitting when these conservation practices are used. The agencies plan to enter into a Memorandum of Agreement identifying a process for reviewing and updating the list of qualifying NRCS conservation practices.[14]

Conclusion

After publication of the proposed rule in the *Federal Register*, the agencies will accept public comment for 90 days. If past experience regarding controversial proposals is a guide, however, it is likely that the public comment period will be extended. Further, as noted above, the agencies pledge that a final rule will not be promulgated before completion of EPA's scientific assessment report; so, when that may occur is likely to be some months in the future. Once a rule is finalized, legal challenges are likely, possibly delaying implementation of any rule for years.

[14] See http://www2.epa.gov/uswaters/interpretive-rule-regarding-applicability-clean-water-act-section-404. USDA had no formal role in developing the proposed rule, but it was among the federal agencies commenting on it during interagency review.

Table 1. Comparison of "Definition of Waters of the United States" Regulatory Language

Current Regulatory Language and Proposed Rule Announced by EPA and the Army Corps of Engineers March 25, 2014

Current Regulatory Language[a]	Proposed Regulatory Language (3/25/2014)	Comments
(a) The term *waters of the United States* means	(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq*. and its implementing regulations, subject to the exclusions in subsection (b) of this section, 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;	(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;	These waters are often referred to as "traditional navigable waters" (TNWs), which include but are not limited to the "navigable waters of the United States" within the meaning of Section 10 of the Rivers and Harbors Act of 1899. No change from the existing rule.
(2) All interstate waters including interstate wetlands;	(2) All interstate waters, including interstate wetlands;	These waters include tributaries to interstate waters, waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and "other waters" that have a significant nexus to interstate waters. No change from the existing rule. Interstate waters would continue to be "waters of the United States" even if they are not navigable in fact and do not connect to such waters.
(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:	(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.	In the existing rule, there is a non-exclusive list of the types of "other waters" which may be found to be "waters of the U.S." The existing description is omitted under the proposal as unnecessary and confusing because it includes some waters that would be jurisdictional under one of the categories of waters that are jurisdictional by rule under the proposal (for example, an intermittent stream that meets the definition of tributary). Under the proposed rule, "other waters" are not jurisdictional as a single category but require a case-specific analysis of a significant nexus to a traditional navigable water, an interstate water, or the territorial seas. They may be evaluated either individually, or as a group of waters where they are determined to be similarly situated in a region. "In the region" means the watershed that drains

Current Regulatory Language[a]	Proposed Regulatory Language (3/25/2014)	Comments
		to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry. How other waters are aggregated for a case-specific significant nexus analysis depends on the functions they perform and their spatial arrangement within the region or watershed. It is the landscape position within the watershed that is the determinative factor for the analysis, which will focus on the degree to which the functions provided by the other waters affect the chemical, physical, or biological integrity of (a)(1) through (a)(3) waters. Current rule asserts jurisdiction more broadly than what is proposed; the proposal deletes language requiring that an "other water" be one "the use, degradation or destruction of which could affect interstate commerce" and replaces it with requirement that the "other water" meet the significant nexus standard. The agencies consider this a substantial change from the current rule.
(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;		Specific examples are omitted in the proposed rule as unnecessary. The agencies say that the listing has led to confusion where it has been incorrectly read as an exclusive list.
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;	(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;	Impoundments of a traditional navigable water, interstate water, the territorial seas, or a tributary are jurisdictional by rule. As a matter of policy and law, impoundments do not de-federalize a water, even where there is no longer flow below the impoundment. That is, damming or impounding a water of the United States does not make the water non-jurisdictional.

Current Regulatory Language[a]	Proposed Regulatory Language (3/25/2014)	Comments
(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;	(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;	Tributaries, as defined in the proposed rule, of a traditional navigable water, interstate water, the territorial seas, or an impoundment would be jurisdictional by rule. Unless excluded under subsection (b) of the proposed rule, any water that meets the proposed definition of tributary is a water of the United States, whether it is perennial, intermittent, or ephemeral. The water may contribute flow directly or may contribute flow to another water or waters that eventually flow into a jurisdictional water. The tributary must drain, or be part of a network of tributaries that drain, into an (a)(1) through (a)(4) water. "Tributary" is defined below.
(6) The territorial seas;	(3) The territorial seas;	Jurisdictional by rule; no change from the existing rule.
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.	(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and	All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment, or tributary would be jurisdictional by rule. Under the proposed rule, wetlands, ponds, lakes, and similar waterbodies that are adjacent to traditional navigable waters, interstate waters, and the territorial seas, as well as waters and wetlands adjacent to other jurisdictional waters such as tributaries and impoundments, would be jurisdictional by rule.
	(b) The following are not "waters of the United States"	
(8) Waters of the United States do not include prior converted cropland.[b] 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.	(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.	No change proposed.

Current Regulatory Language[a]	Proposed Regulatory Language (3/25/2014)	Comments
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.[c]	(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.	The agencies do not believe that omitting the parenthetical reference to 40 CFR 423.11(m) is a substance change to the waste treatment exclusion or how it is applied.
	(3) Ditches that are excavated wholly in uplands, drain only uplands or non-jurisdictional waters, and have less than perennial flow.	Proposed rule would codify long-standing practice and guidance (including 1986 and 1988 preamble language), which has been to exclude these waters from jurisdiction. Excluded ditches must be dug only in uplands, drain only uplands, and have ephemeral or intermittent flow. Water that only stands or pools in a ditch is not considered perennial flow and, therefore, any such upland ditch would not be subject to regulation. Other ditches, if they meet the new proposed definition of "tributary," would continue to be waters of the U.S. Ditches may function as point sources that discharge pollutants, thus subject to CWA section 402.
	(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.	Proposed rule would codify long-standing practice and guidance (including 1986 and 1988 preamble language), which has been to exclude these waters from jurisdiction. These waters would not be jurisdictional by rule. Ditches that do not contribute flow to the tributary system of a traditional navigable water, interstate water, impoundment, or the territorial seas are not "waters of the United States," even if the ditch has a perennial flow. Other ditches, if they meet the new proposed definition of "tributary," would continue to be waters of the U.S. Ditches may function as point sources that discharge pollutants, thus subject to CWA section 402.
	(5) The following features: (i) Artificially irrigated areas	Proposed rule would codify long-standing practice and

Current Regulatory Language[a]	Proposed Regulatory Language (3/25/2014)	Comments
	that would revert to upland should application of irrigation water to that area cease; (ii) artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; (iii) artificial reflecting pools or swimming pools created by excavating and/or diking dry land; (iv) small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; (v) water-filled depressions created incidental to construction activity; (vi) groundwater drained through subsurface drainage systems; and (vii) gullies and rills and non-wetland swales.	guidance (including 1986 and 1988 preamble language), which has been to exclude these waters from jurisdiction. These waters would not be jurisdictional by rule.
	(c) Definitions—	
(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.	(6) **Wetlands**: 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.	No change proposed. Wetlands are ecosystems that often occur at the edge of aquatic (water, fresh or salty) or terrestrial (upland) systems. Wetlands typically represent transitional zones between aquatic and upland systems.
(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."	(1) **Adjacent**: The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."	Current rule limits consideration of adjacency to wetlands. Proposed rule would change "adjacent wetlands" to "adjacent waters" so that waterbodies such as ponds and oxbow lakes [a U-shaped body of water formed when a wide meander from a river is cut off to form a lake] as well as wetlands that are adjacent to jurisdictional waters are "waters of the U.S." by regulation. The rule would include wetlands and other waterbodies that meet the proposed definition of adjacent, including "neighboring," which is defined separately. Adjacent waters are those that provide similar functions which, *together with functions provided by tributaries to which they are adjacent*, have a significant

Current Regulatory Language[a]	Proposed Regulatory Language (3/25/2014)	Comments
		nexus to traditional navigable waters (TNWs), interstate waters, and the territorial seas. "In the aggregate, all adjacent waters have a significant nexus with their downstream TNWs or interstate waters." The lateral limits of an adjacent water, other than wetlands or tributaries, are determined by the presence of an ordinary high water mark (OHWM) without the need for a bed and banks. Deletion of parenthetical phrase in the existing rule is intended to ensure that all waters that meet the proposed definitions of "adjacent" are "waters of the U.S." regardless of whether or not another adjacent water is located between those waters and the tributary.
(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.	No change proposed	
(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 area.	No change proposed	

Current Regulatory Language[a]	Proposed Regulatory Language (3/25/2014)	Comments
(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.	No change proposed	
	(2) **Neighboring**: The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (a)(5) of this section, or waters with a surface or shallow subsurface hydrologic connection to such a jurisdictional water.	Waters, including wetlands, that are located within the riparian area or floodplain of an (a)(1) through (a)(5) water would be jurisdictional without a case-specific significant nexus analysis. Even if separated from such a water by natural or man-made features (e.g., a berm), the water would be adjacent and thus jurisdictional.
	(3) **Riparian area**: The term *riparian area* means an area bordering a water where surface or subsurface hydrology influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.	The term "riparian area" is used to help identify waters, including wetlands, that may be "adjacent" and would, therefore, be "waters of the United States" under the proposed rule. No uplands located in "riparian areas" can ever be "waters of the United States."
	(4) **Floodplain:** The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during period of moderate to high water flows.	The term "floodplain" is used to help identify waters, including wetlands, that may be "adjacent" and would, therefore, be "waters of the United States" under the proposed rule. No uplands located in "floodplains" can ever be "waters of the United States."
	(5) **Tributary**: The term *tributary* means a waterbody physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR § 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a	This term has not previously been defined in any regulation or preamble. Bed and banks and ordinary high water mark (OHWM) are features that generally are physical indicators of flow. OHWM generally defines the lateral limits of a water. In many tributaries, the bed is that part of the channel below the OHWM, and the banks often extend above the OHWM. Wetland tributaries are wetlands that are located within the stream channel itself or that form the start

Current Regulatory Language[a]	Proposed Regulatory Language (3/25/2014)	Comments
	tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams) or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made waterbody and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.	of the stream channel. Man-altered and man-made tributaries perform many of the same functions as natural tributaries and provide connectivity between streams and downstream rivers.
	(7) **Significant nexus**: The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to a water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or close to a "water of the U.S." so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.	A significant nexus analysis may be based on a particular water alone or on the effect that the water has in combination with other similarly situated waters in the region. "Region" means the watershed that drains to a water identified in (a)(1) through (a)(3). Proposed rule adopts the concept of aggregating certain waters to determine whether they meet the "alone or in combination with similarly situated waters" test of Justice Kennedy. Waters must perform similar functions and be located sufficiently close together or close to a traditional navigable water, interstate water, or the territorial seas so that they can be evaluated as a single landscape unit with regard to their effects. Examining both functionality and proximity limits the "other waters" that can be aggregated for purposes of determining jurisdiction. Functions that might demonstrate significant nexus include sediment trapping and retention of flood waters. A hydrologic connection is not necessary, because the function may be demonstrated even in the absence of a connection (e.g., pollutant trapping).

Source: Prepared by CRS.

Notes:

a. 33 C.F.R. 328.3, 40 C.F.R. 122.2, 40 C.F.R. 230.3, and 40 C.F.R. 232.2 (definition of "waters of the United States"). The term "navigable waters" is defined at 40 C.F.R. 110.1 (Discharge of Oil); 40 C.F.R. 112.2 (Oil Pollution Prevention); 40 C.F.R. 116.3 (Designation of Hazardous Substance); 40 C.F.R. 117.1(i) (Determination of Reportable Quantities for Hazardous Substances); 40 C.F.R. 300.5 and Appendix E 1.5 to Part 300 (National Oil and Hazardous Substances Pollution Contingency Plan); and 40 C.F.R. 302.3 (Designation, Reportable Quantities, and Notification).

b. The term "prior converted cropland" is included in the U.S. Department of Agriculture's regulatory definition of the term "wetland" (see 7 C.F.R. 12.2).

c. A regulatory definition of "waste treatment system is found in EPA regulations (35 C.F.R. 35.905): "Complete waste treatment system. A complete waste treatment system consists of all of the treatment works necessary to meet the requirements of title III of the Act, involved in (a) The transport of waste waters from individual homes or buildings to a plant or facility where treatment of the waste water is accomplished; (b) the treatment of the waste waters to remove pollutants; and (c) the ultimate disposal, including recycling or reuse, of the treated waste waters and residues which result from the treatment process. One complete waste treatment system would, normally, include one treatment plant or facility, but also includes two or more connected or integrated treatment plants or facilities."

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