



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

REPLY TO
ATTENTION OF

CECW-CO-R

24 April 2015

MEMORANDUM FOR Deputy Commanding General for Civil and Emergency Operations,
U.S. Army Corps of Engineers (ATTN: MG John W. Peabody)

THROUGH the Chief of Operations and Regulatory, U.S. Army Corps of Engineers (ATTN:
Edward E. Belk)

SUBJECT: Technical Analysis of Draft Final Rule on Definition of "Waters of the United
States"

1. References

a. Title 33 of the Code of Federal Regulations, Part 328, Definition of Waters of the United
States (1986 Regulations).

b. 2003 Post-SWANCC Guidance (FR Vol 68, No. 19, p. 1985) (SWANCC Guidance).

c. 2008 Joint Agency Guidance "Clean Water Act Jurisdiction Following the U.S. Supreme
Court Decisions in *Rapanos vs. U.S.* & *Carabell vs. U.S.* (Rapanos Guidance).

d. Draft Final Clean Water Rule: Definition of "Waters of the United States," submitted to the
Office of Management and Budget for Interagency Review on 3 April 2015 (draft final rule)

2. This memorandum and its attachments provide a technical analysis of reference d. This
technical analysis includes documentation of representative examples of aquatic resources over
which the Corps has asserted Clean Water Act (CWA) jurisdiction in accordance with existing
regulations and current guidance, but which would no longer be subject to CWA jurisdiction if
the current draft of the final rule takes effect. CWA jurisdiction was appropriately asserted by
the Corps over every aquatic resource described in these representative examples.

3. The examples included in Appendix A do not represent the only currently jurisdictional
aquatic resources in the Nation over which CWA jurisdiction would be lost by adoption of the
draft final rule in its present form; what is provided here is only a representative sample based on
Approved Jurisdictional Determinations (AJDs) completed by Corps Districts and completed
permit actions based on Preliminary Jurisdictional Determinations (PJDs), also completed by
Corps Districts. It is important to note that the representative examples included in Appendix A
as well as additional others used for discussion purposes were developed in a limited amount of
time to facilitate discussion with the Environmental Protection Agency (EPA). It was unknown
to the Corps until early February that Army and EPA were contemplating a "bright-line" cut off
of CWA jurisdiction either 5,000 or 4,000 linear feet from the Ordinary High Water Mark
(OHWM)/High Tide Line (HTL) and a robust interagency discussion of the potential effects of

the "bright-line" on currently jurisdictional water bodies has continued since that time. Throughout those discussions, the Corps has provided representative examples, including those in Appendix A, to factually illustrate its concern. To provide every example, both AJDs and issued permits with no JD or based on a PJD, where jurisdiction currently exists but would be extinguished if the draft final rule is adopted in its final form would take several months of multiple staff members working full time.

4. The examples were extracted from the Corps' existing database, ORM2, which is based entirely on what landowners request from the Corps. We have not undertaken any specific technical analysis of what aquatic resources may or may not be subject to CWA jurisdiction independent of requests for a jurisdictional determination or a permit decision. Therefore, the data discussed and conclusions reached in this memorandum are based on facts, that is, on actual AJDs and permit decisions, and not on assumptions about watershed areas that could contain jurisdictional waters.

5. Based solely on the data entered into ORM2 associated with AJDs, approximately 6.7% of all waters of the U.S. are wetlands that are adjacent to, but not directly abutting, relatively permanent waters/non-relatively permanent waters, and 3.4% of all waters of the U.S. are wetlands adjacent to traditionally navigable waters, both directly abutting and non-abutting. The Corps' data demonstrate that 98% of the adjacent wetlands that require a significant nexus evaluation are jurisdictional waters under the CWA, following the 2008 *Rapanos* Guidance. Thus, approximately 10% of all waters over which the Corps has asserted CWA jurisdiction under its 1986 regulations and current guidance are non-abutting, adjacent wetlands. Under those 1986 regulations and current guidance only wetlands can be determined to be jurisdictional because they are adjacent waters. Under the draft final rule, any type of aquatic resource (e.g., lake, pond, oxbow, wetland) can be determined to be jurisdictional because the aquatic resource is adjacent to a jurisdictional tributary.

6. Neither the *Rapanos* Guidance nor the form used to implement that guidance (which is used by the Corps to document AJDs) requires the Corps to indicate the distance that an adjacent wetland is located from the nearest jurisdictional tributary's OHWM or HTL when evaluating whether a significant nexus exists, and in making a jurisdictional determination concerning such waters. Rather, the Guidebook that accompanies the *Rapanos* Guidance indicates that consideration will be given to the distance between a tributary and traditionally navigable water (TNW) such that the effect of the tributary on the TNW is not speculative or insubstantial. The Guidebook further states that, "it is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW).

7. Thus, from the information collected and tracked within the USACE Regulatory Program database, it is not possible to estimate the specific percentage of the approximately 10% of adjacent water bodies that could be lost to CWA jurisdiction as a result of application of the 4,000 linear foot limitation if the draft final rule is finalized. A portion of the approximately 10% of all water bodies that are currently jurisdictional as adjacent, non-abutting wetlands fall outside of 4,000 linear feet of the OHWM/HTL. To verify the exact portion of the 10% of currently jurisdictional waters that would be lost to Federal jurisdiction as a result of adoption of

the draft final rule in its current form, the Corps would need to complete a robust analysis of its data that would yield statistically significant and reliable results. This is precisely the type of research and analysis that would be undertaken in completing an Environmental Impact Statement (EIS).

8. To remove from CWA jurisdiction what is potentially as much as 10% of the currently jurisdictional aquatic resources without the benefit of a detailed analysis, such as one that would be performed as part of an EIS, would present the potential for significant adverse effects on the natural and human environment. In its permit evaluations, the Corps is charged with keeping in perspective the functions and values of any given aquatic resource, recognizing that the functions and values of those resources rely heavily on their geographic location in relation to (as well as their hydrologic connection to) other waters, and to balance the need for the proposed use with the need for conservation of the resource. Nowhere in this process is it considered that important aquatic resources that are traditionally and legitimately part of the tributary system to navigable waters, contributing water to traditionally navigable waters of the U.S., are not within the jurisdiction of the CWA.

9. Additionally, by excluding as much as 10% of currently jurisdictional waters from CWA jurisdiction, the draft final rule is crafted in a manner that will be challenging for the regulated public to understand and for the Corps to implement. These implementation challenges are outlined in Appendix B to this memorandum.

10. I have read the legal analysis of the draft final rule prepared by the Office of the Chief Counsel and I agree with the conclusions of that document. Based on the evidence of the loss of CWA jurisdiction over currently jurisdictional aquatic resources, as illustrated by the representative examples provided in Appendix A, and significant implementation concerns summarized in Appendix B, I recommend the following essential revisions to the draft final rule:

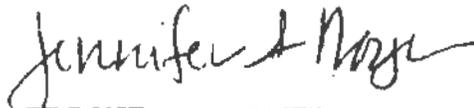
- a. Allow case-specific significant nexus determinations for hydrologically isolated water bodies such as prairie potholes, remal pools, Carolina and Delmarva bays, Texas coastal prairie wetlands, and pocosins, including determinations of whether such water bodies are "similarly situated". In other words, eliminate section (a)(7) and include those water body categories within section (a)(8).
- b. Include within section (a)(8) (as waters regarding which a case-specific significant nexus evaluation can be completed to determine CWA jurisdiction) two additional criteria: i.e., waters located within the 100-year floodplain (regardless of distance) and those water bodies that contribute a flow of water to an (a)(1)-(a)(5) water.
- c. Reduce the linear foot distance in the definition of neighboring under parts (B) and (C) from 1,500 feet to 300 feet.
- d. Make additional edits to the draft final rule to enhance clarity and simplicity as indicated in the attached revised draft final rule previously submitted to EPA staff for their consideration.

MEMORANDUM FOR DCG-CEO

SUBJECT: Technical Analysis of Draft Final Rule on Definition of WOUS

11. If the changes recommended above are not adopted, then the draft final rule cannot be promulgated as a final rule without an EIS to evaluate the potential significant adverse effects on the natural and human environment that the final rule as currently written may cause.

12. The point of contact for this memorandum is Ms. Jennifer Moyer at 202-761-4598.



JENNIFER A. MOYER
Chief, Regulatory Program

cc: Revised Draft Final Rule

House Oversight and Govt Reform
For Committee Use Only
Litigation Sensitive

PART 328 – DEFINITION OF WATERS OF THE UNITED STATES

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

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by removing the introductory text and revising subsections

(a), (b) and (c) to read as follows:

328.3 Definitions

- (a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:
- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
 - (2) All interstate waters, including interstate wetlands;
 - (3) The territorial seas;
 - (4) All impoundments of waters otherwise identified as waters of the United States under this section;
 - (5) All tributaries, as defined in paragraph (e)(5) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;
 - (6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
 - (7) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each paragraph (A) through (E)

of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. ~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis.~~ Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

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

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

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

Comment [DRC1]: The Corps agrees with EPA that a water under section (a)(7) or (a)(8) cannot be found to be jurisdictional merely by aggregating that waterbody with adjacent waters and asserting that the adjacent waters somehow confer or transmit CWA jurisdiction to or over the isolated waters; that would be an inappropriate form of "bootstrapping" jurisdiction. The proposed insert would forbid that bootstrapping, but would still allow all waterbodies with similar functions within an SPOE watershed to be aggregated and evaluated together during a significant nexus determination. This fix is necessary to avoid the effect of the current language, which would forbid the aggregation of waterbodies that have similar functions and exist side by side in a SPOE watershed, merely because similar waterbodies happen to lie on one side or the other of a line that demarcates adjacency.

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

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

(8) All of the following waters, if they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section: (1) All waters located within 4000 feet of the high tide line or ordinary high water mark, or within the 100-year floodplain, whichever is greater, of a water identified in paragraphs (a)(1) through (5) of this section; and (2) waters that contribute a flow of water (either directly or through another water body) to a water identified in paragraphs (a)(1) through (5) of this section, where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The entire water is a water of the United States if a portion is located within 4000 feet of the high tide line or ordinary high water mark, or is within the 100-year floodplain, or if that water contributes a flow of water to a water identified in paragraphs (a)(1) through (5) of this section. Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent

Comment [DRC2]: Previous language, "found in southeastern Oregon to northern Baja California," has been replaced with "in parts of California." Why are vernal pools in southeastern Oregon being omitted?

and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

Comment [DRC3]: Same comment as above on no "bootstrapping" under section (a)(7).

~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.~~

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(1) through (8) of this section.

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

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

(3) The following ditches:

(A) Ephemeral ditches that are not a relocated tributary or excavated in a tributary or other jurisdictional waterbody, and that would not have the effect of draining a jurisdictional waterbody.

(B) Ephemeral and intermittent roadside ditches that drain a Federal, state, tribal, county, or municipal road, and that are not a relocated tributary or excavated in a tributary.

Comment [JAM4]: The language ensures that ditches that are constructed within or to drain jurisdictional waters, once constructed, are themselves waters of the U.S. That would have the effect of making the waterbody being drained a jurisdictional "adjacent" water, thereby providing some degree of CWA control over drainage of wetlands.

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

(4) The following features:

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

(B) Artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds;

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

(D) Small ornamental waters created in dry land;

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

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

(G) Puddles.

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

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

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

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

(1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes and the like. For purposes of determining adjacency, a waterbody that includes ~~includes, and is considered a single waterbody with all wetlands within or that~~ includes, and is considered a single waterbody with all wetlands within or that are bordering, contiguous to, or abutting that waterbody, its ordinary high water mark is considered a single water. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. All waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water, are adjacent. ~~Waters subject to established, normal farming, silviculture, and ranching activities (33 USC § 1344(f)(1)) are not adjacent.~~

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

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

(B) all waters located within the 100 year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than ~~1500~~ 300 feet of the ordinary high water mark of such water. The entire water is neighboring if a portion is located within ~~1500~~ 300 feet of the ordinary high water mark and within the 100 year floodplain;

Comment [DRCS]: This language would correct a problem presented by the comparable sentence found in the draft final rule submitted to OMB. The problem is that often it is impossible to identify an OCHWM for a river, stream, lake, pond, or similar waterbody that has adjacent wetlands; any OCHWM is obscured by the wetlands. The current wording would require the Corps or EPA to identify an OCHWM where none can be found because of the adjacent wetland.

Comment [JAM6]: Including this language conflates geographic jurisdiction with activity-based exemptions. There is no scientific basis to support the notion that waters subject to specific activities are any more or less "adjacent" than other adjacent waters.

Comment [DRC7]: Per the Corps' prior comments, this language would capture all waterbodies that are separated vertically, which is inappropriate (e.g., wetlands and open waters on bluffs).

(C) all waters located within ~~1500~~300 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1500~~300~~ feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located with 1500 feet of the high tide line.

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

(4) *Ditch*: The term *ditch* means a man-made channel whose physical characteristics are often straightened to efficiently convey water from a source to an outlet. Ditches are generally constructed for the purpose of drainage, irrigation, water supply, water management and/or distribution. A ditch may carry flows that are perennial, intermittent, or ephemeral.

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

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

Comment [JAM8]: This addition has been discussed previously and language provided previously. Many types of ditches are excluded and certain ditches are referred to in the definition of tributary, however, ditches are not defined. A common understanding is necessary for clarity.

Comment [JAM9]: This sentence, in particular, and in combination with the definition overall, does not work effectively for both paragraphs (a)(7) and (a)(8). Additionally, the sentence contains a partially incomplete thought. Waters are similarly situated when they function alike and are sufficiently close to each other? Downstream waters? Each other so it can be ascertained they are functioning as a single landscape unit? The bracketed language is offered to complete the thought.

This must be clarified and I may suggest clarification is necessary. In (a)(8), make it clear in what sense those waters are "similarly situated" - close to each other? Functioning as a landscape unit?

region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are include, but are not limited to, the following:

- (A) sediment and pollutant trapping, transformation, filtering, and transport;
- (B) nutrient recycling, trapping, transformation, filtering, and transport;
- ~~(C) pollutant trapping, transformation, filtering, and transport;~~
- (D) retention and/or attenuation of flood waters;
- (E) runoff storage;
- (F) contribution of flow;
- (G) export, trapping, and transformation of organic matter, including food resources;
- ~~(H) export of food resources;~~
- (I) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or as a nursery area) for species located in, or dependent on, a water identified in paragraphs (a)(1) through (3) of this section;
- ~~(J) habitat support for aquatic and wetland plant communities;~~
- (K) groundwater discharge and recharge;
- (L) carbon sequestration.

(67) *Ordinary High Water Mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of

Comment [IAM10]: These changes were discussed and provided previously. Edits capture functions provided by Corps districts that are currently being used to demonstrate significant nexus in support of affirmative jurisdictional determinations.

soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

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

House Oversight and Govt Reform
For Committee Use Only
Litigation Sensitive