MEMORANDUM FOR U.S. ARMY CORPS OF ENGINEERS DIRECTOR OF CIVIL WORKS AND U.S. EPA REGIONAL ADMINISTRATORS I-X

Subject: U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Process for Elevating and Coordinating Specific Draft Determinations under the Clean Water Act (CWA)

1. Purpose. The purpose of this memorandum is to establish a process by which the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) (the agencies) intend to elevate to their headquarters (HQs) for coordination certain case-specific and stand-alone Clean Water Act (CWA) determinations under paragraph (a)(1) of the Navigable Waters Protection Rule: Definition of "Waters of the United States" (NWPR; 85 FR 22250, April 21, 2020).[1] These case-specific elevations include traditional navigable water (TNW) determinations concluding a water is "susceptible to use" solely based on evidence of recreation-based commerce, and the application of the NWPR paragraph (b) exclusions to NWPR paragraph (a)(1) waters.

As stated in the preamble to the NWPR regarding TNW determinations, the agencies commit to implementing "field elevation procedures should difficult legal questions arise, including requiring such interpretations to be reviewed by senior legal staff at each of the agencies' respective HQ." 85 FR 22282. The elevation and coordination process outlined in this memorandum will promote and improve interagency cooperation, facilitate increased communication, and establish an efficient and effective process for certain TNW determinations under the CWA. The agencies also intend to coordinate on draft approved jurisdictional determinations (JDs) that would exclude paragraph (a)(1) waters under the NWPR in instances when such waters meet the conditions of paragraph (b) of the NWPR.[2]

This memorandum does not nullify or supersede the January 19, 1989 "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction of the Section 404 Program and the Application of the

[1] For convenience, the agencies generally refer to the Corps' regulations at 33 CFR 328.3 throughout this memorandum. EPA's codification of the definition of "waters of the United States" is found at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 302.3, 401.11, and Appendix E to Part 300. The NWPR also codifies the definition of "waters of the United States" in a new section 120.2.

[2] The preamble of the NWPR states that "Waters and features that are excluded under paragraph (b) of the final rule cannot be determined to be jurisdictional under any of the categories in the rule under paragraph (a)." 85 FR 22317.

Exemptions under Section 404(f) of the Clean Water Act" (1989 MOA), including its special case provisions.[3]

2. Background on TNW Determinations. Under the NWPR, paragraph (a)(1) waters are defined 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." 85 FR 22338. Waters that are, were, or are susceptible to use in interstate or foreign commence have generally been referred to as TNWs or (a)(1) waters for CWA purposes. The NWPR retains the same basic regulatory text for TNWs in paragraph (a)(1), but the separate territorial seas jurisdictional category from prior regulations was merged into paragraph (a)(1) for administrative efficiency.

Determining whether a waterbody is subject to regulation under the CWA as a TNW is case-specific, and includes an analysis of case law, prior judicial or administrative determinations by the agencies, and relevant portions of the agencies' regulations. Some of these resources are summarized and described in the preamble to the NWPR and the response to comments accompanying the final rule. Relevant excerpts are attached to this memorandum for ease of reference, including Section II.E.1 of the preamble (Appendix A), Section III.B of the preamble (Appendix B), and Section 2 of the Public Comment Summary Document (Appendix C).

As described in the NWPR preamble and the response to comments document accompanying the final rule, the agencies included an appendix to the Corps' 2007 Jurisdictional Determination Form Instructional Guidebook (Appendix D) summarizing some of the applicable case law in this area for field use. The agencies are retaining this appendix as Appendix D to this memorandum to help inform implementation of the "traditional navigable waters" provision of the NWPR, recognizing that the appendix refers to the *Rapanos* Guidance document.[4] The NWPR preamble and response to comments document refer to the appendix to explain some of the applicable case law principles for TNW determinations. As mentioned in the NWPR preamble (85 FR 22282), however, the agencies may develop additional or more in-depth TNW implementation guidance in the future, if warranted.

3. Circumstances Requiring Elevation and Coordination. EPA and the Corps intend to follow the elevation and coordination procedures in paragraph (4) of this memorandum for all instances where:

(a) A new draft TNW determination concluding a water is "susceptible to use" solely based on evidence of recreation-based commerce. Such determinations would include draft stand-alone TNW determinations, draft approved JDs that include a case-specific TNW determination on a feature within the review area, or draft approved JDs where a case-specific draft TNW determination is made on a

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[3] Available at: https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and.

[4] U.S. EPA and U.S. Army Corps of Engineers. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) ("*Rapanos* Guidance"), available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf. As stated in the NWPR preamble, the 2008 *Rapanos* Guidance will be rendered inoperative upon the effective date of the NWPR because it will no longer be necessary or material and may in fact create confusion as the agencies implement the final rule. However, to the extent that, as a result of litigation, the 1986 and 1988 regulations, which the 2019 Rule recodified, remain or become legally effective after the effective date of the NWPR, the agencies intend to use the guidance documents relevant to those regulations, including the 2008 *Rapanos* Guidance, if necessary to inform implementation of those regulations. 85 FR 22272.

feature outside the review area and the TNW is identified as "susceptible to use" solely based on evidence of recreation-based commerce.

(b) A draft approved JD indicates that a water meeting the conditions of paragraph (a)(1) also meets one or more conditions of paragraph (b) of the NWPR.

4. Elevation and Coordination Procedures. To facilitate and expedite the coordination of draft documents associated with the stand-alone TNW determinations and/or draft approved JDs, both agencies intend to transmit all documents electronically. The date of electronic transmission serves as the notification of elevation and initiates timeframes for coordination. For all draft TNW determinations referenced in paragraph (3) of this memorandum, agency coordination is intended to be conducted as follows:

(a) For any draft stand-alone TNW determinations or draft approved JDs which fall under paragraph (3), the Corps district office intends to elevate the determination to both of the following EPA and Corps HQs inboxes: 404JD-HQ@epa.gov and TNW-HQ@usace.army.mil. The district intends to include the draft approved JD form, if any, as well as all documentation supporting the draft TNW determination in this email for review.

(b) Draft stand-alone TNW determinations and/or draft approved JDs elevated to EPA and Corps HQs under this paragraph are intended to be reviewed by relevant EPA and Corps HQ staff as well as Counsel from the Army, Corps, and EPA. The relevant HQ staff and Counsels from Army, Corps, and EPA intend to initiate discussions no later than five (5) calendar days[5] after notification of elevation by the district.

> (i) If a mutual decision is reached whether the aquatic feature in question is or is not a TNW or is excluded under paragraph (b) of the NWPR, a joint HQ-level decision memorandum discussing the rationale for the decision, and signed by the EPA Director of the Office of Wetlands, Oceans and Watersheds and the Corps Director of Civil Works, will be provided to EPA regional and Corps district offices no later than 21 calendar days after notification of elevation; or
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> (ii) If a mutual decision is not reached whether the aquatic feature in question is or is not a TNW or is excluded under paragraph (b) of the NWPR, a decision memorandum prepared by EPA and signed by the Assistant Administrator for the Office of Water explaining EPA's rationale that the feature is or is not a TNW will be provided to the Office of the Assistant Secretary of the Army (Civil Works), Corps HQ, Corps districts, and EPA regional offices no later than 21 calendar days after notification of elevation.

(c) Upon receipt of the decision memorandum under subparagraph (4)(b)(i) or (ii), the Corps district will proceed pursuant to the decision memorandum. Once finalized, the Corps will post the stand-alone TNW determination or approved JD form and memorandum on its website. EPA will also post the decision memorandum on its website.

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[5] Should any deadline in this interagency memorandum fall on a weekend or federal holiday, the deadline will be the next business day. All time periods discussed in this memorandum are based on calendar days, and day one is the first day after notification. For example, if notification is provided on a Thursday, the deadline would be the following Tuesday.

(d) If EPA, in the course of implementing, overseeing, or enforcing CWA programs, makes a newly designated TNW determination solely based on susceptibility to use and recreation-based commerce, a decision memorandum explaining EPA's rationale will be signed by the Assistant Administrator for the Office of Water (if the determination occurs in the course of implementation or oversight), or the Assistant Administrator for the Office of Enforcement and Compliance Assurance (if the determination occurs in the course of enforcement), and provided to Corps HQ and EPA regional offices and Corps districts within 21 days after a final decision.

5. Appeal. A district approved JD made pursuant to the HQ direction provided through either subparagraph 4(b)(i) or (ii) will be considered an appealable action for purposes of the Corps administrative appeals process under 33 CFR 331 et seq. Any appeal can examine and question any matter or finding of fact, but the decision will not question or overturn any legal or policy determination made by EPA or Corps HQs pursuant to this joint guidance memorandum.

6. General. The procedures contained within this memorandum do not create any rights, either in substance or procedure that are enforceable by any party. Nothing in this memorandum is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any signatory agency and nothing in this memorandum will be construed as indicating a financial commitment by the agencies for the expenditure of funds.

7. Expiration date. This memorandum will remain in effect unless otherwise modified by written agreement of both EPA and Army.

DAVID ROSS

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Date: 2020.06.26 11:39:30 -04'00'

David P. Ross
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency

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R.D. James
Assistant Secretary of the Army (Civil Works)
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Appendices

APPENDIX A

85 FR 22262-22263; Section II.E.1

To determine the scope of executive branch authority under the CWA, the agencies begin with the text of the statute. The objective of the CWA, as established by Congress, is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). As discussed in Section II.B, in order to meet that objective, Congress declared two national water quality goals and established several key policies that direct the work of the agencies. Congress also envisioned a major role for the States in implementing the CWA, carefully balancing the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation.

The agencies have developed regulatory and non-regulatory programs designed to ensure that the full statute is implemented as Congress intended. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."). This includes pursuing the overall "objective" of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), while implementing the specific "policy" directives from Congress to, among other things, "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." *Id.* at 1251(b); *see also* Webster's II, New Riverside University Dictionary (1994) (defining "policy" as a "plan or course of action, as of a government[,] designed to influence and determine decisions and actions;" an "objective" is "something worked toward or aspired to: Goal").[1] The agencies therefore recognize a distinction between the specific word choices of Congress, including the need to develop regulatory and non-regulatory programs that aim to accomplish the goals of the Act while implementing the specific policy directives of Congress.[2] To do so, the agencies must determine what Congress

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[1] The legislative history of the CWA further illuminates the distinction between the terms "policy" and "objective," or "goal." As Congress drafted the 1972 CWA amendments, the Senate bill set the "no-discharge of pollutants into the navigable water by 1985" provision as a policy whereas the House bill set it as a goal. The Act was ultimately passed with the "no-discharge by 1985" provision established as a goal. *See* 33 U.S.C 1251(a)(1). During the House's consideration of the Conference Report, Representative Robert E. Jones, Jr. captured the policy versus goal distinction in section 101(a)(1) as follows: "The objective of this legislation is to restore and preserve for the future the integrity of our Nation's waters. The bill sets forth as a national goal the complete elimination of all discharges into our navigable waters by 1985, but . . . the conference report states clearly that achieving the 1985 target date is a goal, not a national policy. As such, it serves as a focal point for long-range planning, and for research and development in water pollution control technology . . . . While it is our hope that we can succeed in eliminating all discharge into our waters by 1985, without unreasonable impact on the national life, we recognized in this report that too many imponderables exist, some still beyond our horizons, to prescribe this goal today as a legal requirement." 118 Cong. Rec. H. 33749 (daily ed. October 4, 1972).

[2] *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally."); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

had in mind when it defined "navigable waters" in 1972 as "the waters of the United States."

Congress' authority to regulate navigable waters under the CWA derives from its power to regulate the "channels of interstate commerce" under the Commerce Clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *United States v. Lopez*, the Supreme Court explained that the Commerce Clause gives Congress the authority to regulate in three areas: the "channels of interstate commerce," the "instrumentalities of interstate commerce," and those additional activities having "a substantial relation to interstate commerce." 514 U.S. 549, 558-59 (1995). Some commenters stated that Congress' authority over "waters of the United States" is not tethered to navigable channels of interstate commerce, but is also derived from its authority over the "instrumentalities of interstate commerce" and activities that "substantially affect" interstate commerce. *See id.* The agencies disagree with these comments. The Supreme Court made clear in *SWANCC* that the term "navigable" indicates "what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. 159, 172 (2001). The Court further explained that nothing in the legislative history of the Act provides any indication that "Congress intended to exert anything more than its commerce power over navigation." *Id.* at 168 n.3. The Supreme Court, however, has recognized that Congress intended "to exercise its powers under the Commerce clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133; *see also SWANCC*, 531 U.S. at 167.

The classical understanding of the term "navigable" was first articulated by the Supreme Court in *The Daniel Ball*:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. (10 Wall.) 557, 563 (1871). Subsequently, this traditional test was expanded to include waters that had been used in the past for interstate commerce, *see Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921), and waters that are susceptible for use with reasonable improvement, *see United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-10 (1940).

By the time the 1972 CWA amendments were enacted, the Supreme Court had held that Congress' authority over the channels of interstate commerce was not limited to regulation of the channels themselves but could extend to activities necessary to protect the channels. *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508, 523 (1941) ("Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions."). The Supreme Court had also clarified that Congress could regulate waterways that formed a part of a channel of interstate commerce, even if they are

not themselves navigable or do not cross state boundaries. *See Utah v. United States*, 403 U.S. 9, 11 (1971).

These developments were discussed during the legislative process leading up to the passage of the 1972 CWA amendments, and certain members referred to the scope of the amendments as encompassing waterways that serve as a "link in the chain" of interstate commerce as it flows through various channels of transportation, such as railroads and highways. *See, e.g.*, 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell); 118 Cong. Rec. 33699 (Oct. 4, 1972) (statement of Sen. Muskie).[3] Other references suggest that congressional committees at least contemplated applying the "control requirements" of the Act "to the navigable waters, portions thereof, and their tributaries." S. Rep. No. 92-414, at 77 (1971). Some commenters on this rulemaking stated that Congress' authority under the CWA is limited to waters that actually transport commerce, not their tributaries or adjacent wetlands, and that this limitation on CWA jurisdiction would fully preserve the authority of States to address pollution. The agencies disagree with these commenters based on the Supreme Court's holdings and the legislative history of the 1972 amendments discussed above, as well as the text of the 1977 amendments to the CWA. Specifically, in 1977, when Congress authorized State assumption over the section 404 dredged or fill material permitting program, Congress limited the scope of waters that could be assumed by a State or Tribe by requiring the Corps to retain permitting authority over RHA waters (as identified by the test outlined in *The Daniel Ball*) plus wetlands adjacent to those waters, minus historic-use-only waters. *See* 33 U.S.C. 1344(g)(1).[4] This suggests that Congress had in mind a broader scope of waters subject to CWA jurisdiction than waters traditionally understood as navigable. *See SWANCC*, 531 U.S. at 171; *Riverside Bayview*, 474 U.S. at 138 n.11. Thus, Congress intended to assert federal authority over more than just waters traditionally understood as navigable, and Congress rooted that authority in "its commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3. However, there must be a limit to that authority and to what water is subject to federal jurisdiction. How the agencies should exercise that authority has been the subject of dispute for decades, but the Supreme Court on three occasions has analyzed the issue and provided some instructional guidance for the agencies to consider in developing this final rule.

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[3] The agencies recognize that individual member statements are not a substitute for full congressional intent, but they do help provide context for issues that were discussed during the legislative debates. For a detailed discussion of the legislative history of the 1972 CWA amendments, *see* Albrecht & Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042 (Sept. 2002).

[4] For a detailed discussion of the legislative history supporting the enactment of CWA section 404(g), *see Final Report of the Assumable Waters Subcommittee* (May 2017), App. F., *available at* https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf < Caution- https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf.

APPENDIX B

85 FR 2280-2282; Section III.B

B. Territorial Seas and Traditional Navigable Waters

1. What Are the Agencies Finalizing?

The agencies are making no substantive textual changes to the longstanding inclusion of traditional navigable waters and the territorial seas in the definition of "waters of the United States." The agencies are finalizing this portion of the rule as proposed, with slight modifications discussed below. The final rule maintains these categories of "waters of the United States" but consolidates them into a single paragraph in the regulatory text.

Many commenters supported the retention of the agencies' longstanding foundational category of CWA jurisdiction, unchanged from previous regulatory text. They stated that the category was well understood, and its application guided by a developed body of case law. Most commenters supported integrating territorial seas into a single category with traditional navigable waters, agreeing with the agencies that it helped streamline the regulatory text, but some requested clarifications to maintain the distinction between the two types of waters. Some commenters requested that the agencies modify the test for traditional navigable waters by clarifying that such waters must be used to "transport commerce" rather than simply being "used" for or susceptible to "use" in interstate or foreign commerce, reflecting the terminology used by Congress in section 404(g) of the CWA. Responding to the agencies' request for comment on Appendix D, several commenters requested that the agencies eliminate or modify Appendix D to the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (hereinafter, "Appendix D"),[1] stating that Appendix D is confusing, overstates the agencies' authority under existing case law, and allows the agencies to regulate virtually any isolated water by misapplying the established judicial tests for navigability under the CWA. Other commenters suggested the agencies retain Appendix D as useful field guidance and to avoid confusion associated with any changes in the agencies' approach to traditional navigable water determinations.

The agencies have considered all of the public comments received addressing these topics and are finalizing paragraph (a)(1) as proposed, with slight modifications to address questions regarding the inclusion of the territorial seas within a single category with traditional navigable

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[1] U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2316. The agencies note that Appendix D is sometimes referred to as "Appendix D to the *Rapanos* Guidance" and was inadvertently referred to as such in the preamble to the proposed rule. The appendix actually resides as an attachment to the Jurisdictional Determination Form Instructional Guidebook that was published in 2007 concurrently with the 2007 *Rapanos* Guidance. The *Rapanos* Guidance was later undated in 2008, but Appendix D has remained unchanged since 2007. Appendix D notes (at page 1) that "EPA and the Corps are providing this guidance on determining whether a water is a 'traditional navigable water' for purposes of the *Rapanos* Guidance, the Clean Water Act (CWA), and the agencies' CWA implementing regulations." This sentence is what is often used to link the *Rapanos* Guidance to Appendix D, as the two were intended to operate in tandem, with other agency resources, to assist in guiding field implementation of CWA jurisdictional determinations.

waters. The agencies are not modifying the definition of "traditional navigable waters" as it has existed in regulatory text for decades. As discussed in Section II.G, when this final rule becomes effective, certain agency guidance documents, memoranda, and materials (*e.g.,* the 2003 *SWANCC* Guidance and 2008 *Rapanos* Guidance) will be rendered inoperative because they will no longer be necessary or material, and they may in fact create confusion as the agencies implement this final rule. However, because the agencies have not modified the definition of "traditional navigable waters," the agencies are retaining Appendix D to help inform implementation of that provision of this final rule, as discussed further in Section III.B.2.

2. Summary of Final Rule Rationale and Public Comment

The final rule defines "waters of the United States" to encompass traditional navigable waters and the territorial seas. The agencies' existing definition of "waters of the United States" includes all waters that 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. *See, e.g.,* 33 CFR 328.3(a)(1). This paragraph of the 2019 Rule (and previous regulations) encompasses waters that are often referred to as waters more traditionally understood as navigable or "traditional navigable waters." A separate paragraph of the 2019 Rule (and previous regulations) lists the territorial seas as jurisdictional. *See* 33 CFR 328.3(a)(6). To streamline and simplify the definition of "waters of the United States," the agencies are finalizing the rule as proposed to include both traditional navigable waters and the territorial seas into a single paragraph of jurisdictional waters. The final rule makes no other substantive changes to these historically regulated categories of waters.

The agencies note that the term "territorial seas" is defined in CWA section 502(8), 33 U.S.C. 1362(8), as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." The territorial seas establish the seaward limit of "waters of the United States." The agencies did not propose including this definition in the rule because it is already defined by statute and are not including the definition or any further interpretation in the final rule.

In this final rule, the agencies are streamlining the regulation so that the first category of jurisdictional waters includes both traditional navigable waters and the territorial seas. Most commenters on this topic agreed with the proposal to combine the territorial seas and traditional navigable waters into one paragraph of the regulation, stating that it would streamline and simplify the definition of "waters of the United States," and makes practical sense since the jurisdictional status of other categories of waters relies on their surface water connection to either a traditional navigable water or the territorial seas.

In the proposed rule, the agencies included the territorial seas as a type of traditional navigable water because the agencies had not identified an instance in which a territorial sea would not also be considered traditionally navigable and thus proposed that the broader term should suffice. A few commenters expressed concern that the proposed rule implied that the definition of "waters of the United States" included only the portions of the territorial seas that

are navigable and capable of use in interstate or foreign commerce. The agencies did not intend to exclude any portion of the territorial seas as the term is defined in CWA section 502(8), 33 U.S.C. 1362(8). To avoid any confusion, the agencies have made minor modifications to the proposed rule text to further clarify that this category of foundational waters includes both traditional navigable waters and the territorial seas. The final rule states that the category of "waters of the United States" defined in paragraph (a)(1) includes "the territorial seas, and water 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."

The agencies have not changed their interpretation of traditional navigable waters in this final rule, and the agencies are retaining Appendix D to help inform implementation of this provision with additional clarification in this notice in response to comments. As discussed in Section II.E, the definition of navigable-in-fact waters originates with the Supreme Court's decision in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). In that case, the Supreme Court stated:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. at 563. As explained by the Supreme Court in 2012, "[t]he *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012). "With respect to the federal commerce power, the inquiry regarding navigation historically focused on interstate commerce." *Id.* at 593. The Supreme Court further explained that, "of course, the commerce power extends beyond navigation" and cautioned "that the test for navigability is not applied the same way" in all cases. *Id*. at 592-93; *see also Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) ("[A]ny reliance upon judicial precedent [in this area] must be predicated upon careful appraisal of the *purpose* for which the concept of navigability was invoked in a particular case." (internal quotation marks, citation omitted, and emphasis in original)). But generally, navigability for purposes of federal regulatory authority under the federal commerce power encompasses waters that were "once navigable but are no longer," *PPL Montana*, 565 U.S.at 592 (citing *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-24 (1921)), "waters that only recently have become navigable," *id.* (citing *Philadelphia Co. v. Stimson*, 223 U.S. 605, 634-35 (1912)), and waters that "are not navigable and never have been but may become so by reasonable improvements," *id.* at 592-93 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940)). The agencies note that this summary articulated by the Supreme Court in 2012 generally reflects the basic structure of the longstanding jurisdictional test for "traditional navigable waters" retained in paragraph (a)(1) of the final rule.

Many commenters expressed support for the agencies' decision to retain the existing regulatory text describing traditional navigable waters. These commenters stated that the existing text is clear, concise, predictable, and well understood by the public. Other commenters expressed concern about implementation of the regulation and guidance and suggested modifications to the regulation. Some commenters suggested clarifying that traditional navigable waters must be used to "transport commerce," as that is the phrase Congress used to describe the

waters over which the Corps retains permitting authority when States and Tribes assume CWA section 404 permitting. *See* 33 U.S.C. 1344(g). As discussed in Section II.E, and consistent with a technical advisory committee report submitted to EPA as part of an effort to modernize the section 404(g) assumption process (*see* n.28), section 404(g) refers to RHA section 10 waters. Some commenters recommended that the agencies adopt the RHA section 10 definition and the two-part legal test established by *The Daniel Ball* for "navigable waters of the United States" as the test for "traditional navigable waters" for purposes of implementing the term "waters of the United States" under the CWA. That test requires first that a water be navigable-in-fact, and second that commerce be transported across State or foreign lines on those waters. *The Daniel Ball*, 77 U.S. (10 Wall.) at 563.

The Supreme Court has not spoken directly to the precise meaning of the phrase "traditional navigable waters" as that term applies in the CWA context, but it has stated that the statutory "term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. In the agencies' view, the Supreme Court has therefore signaled an acceptance of the first prong of *The Daniel Ball* test. Whether the second prong applies in full to the administrative definition of "traditional navigable waters" is less clear, but the legislative history suggests that Congress had in mind a more expanded notion of interstate commerce when enacting the CWA, including overland links to commercial navigation on navigable-in-fact waters.[2] As described in Section II.E, the Supreme Court has stated that nothing in the legislative history of the Act suggests "that Congress intended to exert anything more than its commerce power over navigation." *SWANCC*, 531 U.S. at 168 & n.3. The agencies therefore are not modifying the longstanding regulatory text for traditional navigable waters to specifically align it with the RHA test for jurisdiction, as some commenters suggested.

The agencies acknowledge that some commenters suggested that Appendix D as-applied in certain circumstances has led to confusion. For example, some commenters expressed concern that Appendix D could be read to support a conclusion that *any* water that can float a boat, even very shallow draft vessels like canoes and kayaks, is by definition "susceptible" to use in interstate commerce and therefore may be deemed a traditional navigable water. The agencies believe that this interpretation is inconsistent with the cases summarized in Appendix D and sweeps too broadly. For example, whether a water is susceptible to use in interstate commerce requires more than simply being able to float a boat to establish jurisdiction over navigable-in-fact waters under paragraph (a)(1); it requires evidence of physical capacity for commercial navigation and that it was, is, or actually could be used for that purpose. *See, e.g.*, Appendix D (citing *The Montello*, 87 U.S. 430, 441-42 (1874); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940)).

Other commenters provided examples of traditional navigable water determinations about which the commenters asserted that the capacity to float a boat in a water that is near an interstate highway was deemed sufficient to make a traditional navigable water determination

[2] *See* Section II.E for additional discussion of the complex legislative history on this topic, as well as the detailed discussion of the same in the Albrecht & Nickelsburg article cited in note 25.

under the paragraph (a)(1) standard. This interpretation is inconsistent with the applicable case law, including the cases discussed in Appendix D. Simply driving across a State line and using a waterbody, or having the potential to use a waterbody, is similar to the theory of jurisdiction that the Supreme Court specifically rejected in *SWANCC*. One of the arguments raised in support of the "Migratory Bird Rule" for CWA jurisdiction was that individuals cross State lines and engage in commercial activity to hunt or observe migratory birds that use isolated waters as habitat. *See SWANCC*, 531 U.S. at 166; *id.* at 195 & n.17 (Stevens, J., dissenting). The *SWANCC* Court rejected this interpretation of CWA jurisdiction because it raised "significant constitutional questions" that would require the agencies to "evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." *Id.* at 173-74. The "substantial effects" test is the most expansive of the three primary bases for exercising congressional authority under the Commerce Clause articulated by the Supreme Court in *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). This application of the "substantial effects" test to assert CWA jurisdiction over waters beyond those more traditionally understood as navigable was not intended by Appendix D and has been rejected by the *SWANCC* Court because it was inconsistent with Congress' intent to exercise its more traditional "commerce power over navigation." *SWANCC*, 531 U.S. at 173 & n.8. Thus, the legal principles summarized in Appendix D were not intended to endorse, and should not be interpreted as endorsing, the application of the "substantial effects" test to CWA jurisdiction, or otherwise suggesting that the mere capacity to float a boat makes a waterbody susceptible to commercial navigation.

The agencies intend to update their guidance materials, if and as necessary, as the agencies begin to implement the revised tests for jurisdiction established by the final rule, both initially and as the agencies gain field experience to address implementation questions that may arise. As part of that process, the agencies will continue to evaluate prior guidance on how to apply established case law principles to traditional navigable water determinations. The agencies will also implement field elevation procedures should difficult legal questions arise, including requiring such interpretations to be reviewed by senior legal staff at each of the agencies' respective headquarters. Implementation of this section of the traditional navigable waters provision of paragraph (a)(1) in the final rule will be case-specific, as it has always been. This case-specific analysis will include relevant portions of EPA and Corps regulations, prior determinations by the Corps and by the federal courts, and case law. Should the agencies determine that additional, more formal guidance on traditional navigable waters is warranted, the agencies will develop any such guidance in compliance with Executive Order 13891, and with any applicable public participation requirements.

APPENDIX C

Navigable Waters Protection Rule – Public Comment Summary Document, Section 2;
January 22, 2020

The Navigable Waters Protection Rule – Public Comment Summary Document

See the Introductory Section of the Response to Comments (RTC) Document for a discussion of the Environmental Protection Agency and the Department of the Army's (hereafter, the agencies) comment response process and organization of the thirteen sections. While the majority of public comments on legal arguments and the agencies' responses are included in RTC Section 1 Legal Arguments, some topic sections also include brief discussions of legal arguments raised by commenters and may cross-reference Section 1 for further discussion.

Traditional Navigable Waters and Territorial Seas

2.1. General

Some commenters stated that it is important for the agencies to clarify the scope of traditional navigable waters since they are the basis for all Clean Water Act (CWA) jurisdiction. A few commenters stated that the definition of traditional navigable waters is more important because there is no longer a separate category for interstate waters to serve a basis for the jurisdiction of other waters. A few commenters stated that the agencies should focus on tying CWA jurisdiction to only those waters that affect traditional navigable waters.

A few commenters stated that jurisdictional waters under the CWA should include interstate waters that are navigable-in-fact and currently used or susceptible to use in interstate or foreign commerce and include the territorial seas. One commenter stated that there should be no jurisdiction over isolated ponds and other features that are not navigable, cannot be made navigable, and contribute no flow to a navigable water. One commenter stated that water features that are not navigable-in-fact should not be considered jurisdictional and the *Rapanos* plurality opinion should be adopted.

One commenter stated that the agencies' proposed definition of "traditional navigable waters" narrowly focused on large rivers and lakes and paid little attention to the nation's other wetland resources that serve as the origin of many of these larger waterbodies.

Some commenters requested clarification on which specific waters will be traditional navigable waters through more dialogue, coordination, and consultation with state counterparts. One commenter suggested that the agencies limit the definition of traditional navigable waters to a list of such waters proposed by each state, subject to public comment. The commenter stated that this process will end any uncertainty about what is or is not a traditional navigable water. One commenter stated that the agencies do not know which waters are included in the traditional navigable waters category and therefore cannot know whether any waters connected to them are jurisdictional. Another stated that the category was well understood, its application guided by a developed body of case law, and that the existing regulatory text is clear, concise, predictable, and well understood by the public.

A few commenters stated CWA jurisdiction is not limited to traditional navigable waters; waters that are not traditionally navigable are still subject to jurisdiction if they fall into one of the other jurisdictional categories. One commenter stated the rule text should make clear that waters subject to jurisdiction under paragraphs (2) through (6) of the proposal are separate categories from the waters subject to paragraph (1).

Some commenters questioned whether the proposed rule would result in any changes to past traditional navigable water determinations.

Agency Response

The agencies agree that traditional navigable waters and the territorial seas are foundational to the scope of "waters of the United States," as the jurisdictional status of other categories of water relies on a surface water connection to either. The agencies are making no substantive changes to the longstanding categories of traditional navigable waters and the territorial seas in the definition of "waters of the United States" other than combining them into a single category.

While interstate waters are no longer a standalone jurisdictional category, any interstate waters that meet the terms of paragraph (a)(1) waters are traditional navigable waters and are jurisdictional. Other interstate waters may also be jurisdictional under paragraphs (a)(2) through (4) of the final rule. For additional discussion of interstate waters, see the preamble to the final rule in Section III.C and the agencies' response to comments on interstate waters in Section 3.

The agencies agree that CWA jurisdiction is not limited to traditional navigable waters; waters that are not traditionally navigable are jurisdictional if they satisfy the conditions codified in one of the other jurisdictional categories. The agencies believe the regulatory text is clear that the waters in paragraph (a)(1) of the final rule are separate from the other jurisdictional categories and are making no changes to further clarify that. The agencies note that a water may be a paragraph (a)(1) water and also meet the definition of another category of jurisdictional waters, such as "tributary" or "lakes, ponds and impoundments of jurisdictional waters."

In the final rule, the agencies are not establishing a process for coordination or consultation with states of the kind requested by commenters, nor are they limiting traditional navigable waters to those identified by the states as suggested by one commenter. However, the agencies are committed to providing more information to states and the public about the jurisdictional status of waters, including traditional navigable waters. For example, the agencies have initiated the development of state-of-the-art geospatial data tools through federal, state, and tribal partnerships with the goal of providing an enhanced, publicly-accessible platform for critical CWA information, such as the location of federally jurisdictional waters, the applicability of state and tribal water quality standards, permitted facility locations, impaired waters, and other significant features.

The agencies agree with commenters that stated that the existing regulatory text is clear, concise, predictable, and well understood by the public; however, the agencies acknowledge that implementing paragraph (a)(1) of the final rule will be a case-specific analysis, as it has always been. This case-specific analysis of traditional navigable waters requires the application of relevant portions of EPA and Corps regulations, prior determinations by the Corps and by the federal courts, and case law. As the agencies implement the final rule, they will continue to look to existing guidance on how to apply established case law principles to traditional navigable water determinations. The agencies will also implement field elevation procedures should difficult legal questions arise, including requiring such interpretive questions to be reviewed by senior legal staff at each of the agencies' respective headquarters.

Because the agencies are making no substantive changes, the final rule does not result in any changes to past traditional navigable water determinations. See Final Rule Preamble Section III.A on

traditional navigable waters and the agencies' response to comments on geospatial datasets of waters of the United States in Section 12.

2.2. Support Continuing Existing Definition of Traditional Navigable Waters

Many commenters expressed support for the agencies' decision to retain the existing regulatory text for traditional navigable waters, stating that the existing text is clear, concise, predictable, and well understood by the public. Some commenters stated that retaining the existing definition will ensure that there is no basis to withdraw jurisdiction of any waters that have been included in the traditional navigable waters category, which will ensure clarity and consistency. Some commenters suggested clarifying that any nonnavigable wetlands subject to the ebb and flow of the tide are traditional navigable waters. Some commenters stated that the proposed definition of "traditional navigable waters and territorial seas" is too narrow and may eliminate CWA jurisdiction over portions of tidal waters that are not necessarily accessible for navigation but are still hydraulically connected to navigable waters.

Another commenter suggested that the agencies have not disclosed their alternative approach to defining traditional navigable waters or provided any reasoned basis for changing the definition.

One commenter supported the existing regulatory text but stated that the agencies should include non-ephemeral CWA section 303(d) impaired waters that cross interstate boundaries in the traditional navigable waters definition. The commenter stated that surface waterbodies in the arid West that cross interstate boundaries may not fall within the proposed "traditional navigable waters" definition and assuring restoration of those waters is warranted.

Agency Response

The agencies did not propose any substantive changes to the existing regulatory text for traditional navigable waters and are not making any substantive changes to the paragraph (a)(1) text in the final rule. The agencies are retaining existing guidance on traditional navigable waters to help inform implementation of this provision with additional clarification in the preamble to the final rule in response to comments. See the preamble to the final rule in Section III.B for a detailed discussion of applicable case law and the agencies' interpretation of "traditional navigable waters."

Federal courts have long held that waters subject to the ebb and flow of the tide are subject to the federal power to regulate navigation. See, e.g., *The Steam-Boat Thomas Jefferson*, 23 U.S. 428, 429 (1825), *overruled on other grounds by The Genesee Chief*, 53 U.S. 443 (1851) *as noted in The Hine*, 71 U.S. 555, 563 (1866). Paragraph (a)(1) of the final rule retains longstanding regulatory text and includes "all waters which are subject to the ebb and flow of the tide," including tidal wetlands. As explained in the preamble to the final rule in Section III.B, the agencies did not intend to exclude any portion of the territorial seas as the term is defined in CWA section 502(8), 33 U.S.C. 1362(8). To avoid any confusion, the agencies have made minor modifications to the proposed rule text to further clarify that this category of foundational waters includes both traditional navigable waters and the territorial seas.

The agencies disagree with the commenter's suggestion that a water's impaired status should inform whether it falls within the category of "traditional navigable waters." As described in Section 2.1 above, implementation of this section of the regulation is case-specific and to determine whether a waterbody is a traditional navigable water, the agencies will apply EPA and the Corps regulations,

prior determinations by the Corps and by the federal courts, and case law. The agencies will determine whether a particular waterbody is a traditional navigable water based on application of those considerations to the specific facts in each case. For further discussion on waters crossing interstate boundaries, see Final Rule Preamble Section III.C and the agencies' response to comments on interstate waters in Section 3.

2.3. Concerns Over Continuing Existing Definition of Traditional Navigable Waters

Many commenters expressed concern regarding the agencies' decision to retain the existing regulatory text for traditional navigable waters. These commenters stated that the existing definition of traditional navigable waters has always been too broad and the agencies should narrow the scope of traditional navigable waters in the final rule. One commenter stated that there is no way to know in what manner, if any, waters were used to transport goods for commerce. Another commenter stated that the agencies should amend the definition to reflect that historic use alone is insufficient to demonstrate navigability.

A few commenters stated that the agencies should remove "may be susceptible to use in interstate commerce" from the definition. One of these commenters stated that it is improper to base CWA jurisdiction on whether a waterway could be available for navigation if some unknown set of undescribed eventualities takes place at some uncertain future time. One commenter stated that the agencies should define "susceptible to use" to mean that the waters could be used for transporting goods in interstate or foreign commerce, with or without modifications such as dredging, through improvement of existing navigation structures, or by removal or alteration of manmade structures such as bridges or causeways. This commenter stated that defining "susceptible to use" will also effectively address traditional navigable waters that are no longer navigable-in-fact.

Some commenters suggested that past use in commerce should only be considered when the water's navigability can be restored, and waters should lose their traditional navigable water status if it is clear that the water will no longer convey sufficient volumes of water for commerce. Some commenters stated that past use should be removed from the definition.

<u>Agency Response</u>

The agencies did not propose to make any substantive changes to the longstanding category of traditional navigable waters and are not making substantive changes to the definition in the final rule. The agencies disagree that the existing text of the regulation is too broad. The agencies are not removing "may be susceptible to use in interstate commerce" from paragraph (a)(1), as that is a criterion established by the Supreme Court. The agencies are also not defining "susceptible to use" in the final rule; that is a standard established by the Supreme Court and best understood through the decisions of the federal courts. The agencies note, however, that whether a water is susceptible to use in interstate commerce requires more than simply being able to float a boat to establish jurisdiction over navigable-in-fact waters under paragraph (a)(1); it requires evidence of physical capacity for commercial navigation and that the water was, is, or actually could be used for that purpose. See Final Rule Preamble Section III.B for further discussion.

The agencies are also not defining or limiting by regulation past or historical use for purposes of traditional navigable waters because the Supreme Court has established the general standard for navigable-in-fact determinations under the Commerce Clause as encompassing waters that were "once navigable but are no longer," *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (citing *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-24 (1921)), "waters that only recently have

become navigable," *id.* (citing *Philadelphia Co. v. Stimson*, 223 U.S. 605, 634-35 (1912)), and waters that "are not navigable and never have been but may become so by reasonable improvements," *id.* at 592-93 (citing *United States v. Appalachian Elec. Power*, 311 U.S. 377, 409 (1940)). With respect to the commenter concerned that there is no way to know in what manner, if any, waters were historically used to transport goods for commerce, the factual information to support a traditional navigable water determination is a case-specific matter and has long been used by the agencies for CWA determinations and by the Corps for Rivers and Harbors Act determinations.

2.4. Combining the Territorial Seas with Traditional Navigable Waters

Most commenters agreed with the inclusion of territorial seas in the jurisdictional category of "traditional navigable waters" and stated that it streamlines and simplifies the definition. Commenters stated that including territorial seas makes practical sense since the jurisdictional status of other categories of water rely on their connection to either a traditional navigable water or a territorial sea. One commenter stated that while it is difficult to imagine that territorial seas would not fall within the traditional navigable waters category, the commenter did not see any benefit to removing "traditional navigable waters" from the definition and does not support any new or modified exclusions to this category without further public review.

Some commenters stated that the definition of territorial seas should be kept separate from the definition of traditional navigable waters. A few commenters expressed concern that the proposed rule implies that waters of the United States include only the portions of the territorial seas that are navigable and capable of use in interstate or foreign commerce, but the CWA definition of navigable waters makes clear that all of the territorial seas, including portions of the territorial seas that cannot be used in interstate or foreign commerce, such as those that are too shallow or frozen to an uncuttable depth, are considered waters of the United States. One commenter stated that traditional navigable waters and territorial seas should be kept separate to clarify the separation of freshwater and saline/brackish waters to spare future water rights legal cases.

Agency Response

In the final rule, the agencies are streamlining the regulation so that the first category of jurisdictional waters includes both traditional navigable waters and the territorial seas. Most commenters on this subject agreed with the proposal to combine the territorial seas and traditional navigable waters into one paragraph of the regulation, stating that it streamlines and simplifies the definition of "waters of the United States," and makes practical sense since the jurisdictional status of other categories of water relies on their connection to either a traditional navigable water or the territorial seas.

The agencies did not intend to exclude any portion of the territorial seas as the term is defined in CWA section 502(8), 33 U.S.C. 1362(8). To avoid any confusion, the agencies have made minor modifications to the proposed rule text to further clarify that this category of foundational waters includes both traditional navigable waters and the territorial seas. The final rule does not include "territorial seas" within the definition of "traditional navigable waters"; rather they are two stand-alone categories of jurisdictional waters combined in a single paragraph in the final rule. For further discussion, see Final Rule Preamble Section III.B.

2.5. Definition of Territorial Seas

A few commenters stated that the agencies should include the definition of "territorial seas" in the final rule to increase clarity. A few commenters stated that the regulatory definition of territorial seas should state that the extent of jurisdiction is three nautical miles, not three statutory miles, to further increase the clarity in the definition and ensure that it is consistent in terms of units with other definitions.

In contrast, a few commenters stated that the agencies should not include a definition of territorial seas in the final rule. These commenters stated that territorial seas is already defined in the CWA and adding a definition would only cause confusion. One commenter stated that traditional navigable waters and territorial seas are currently defined in 33 CFR part 329 and within case law as referenced within section III (A) of the proposed rule preamble and that there is potential that through further amendments to "waters of the United States," these definitions could be in conflict with other federal laws, such as Rivers and Harbors Act sections 9 and 10.

Agency Response

The agencies agree with commenters that stated that the agencies should not include a definition of "territorial seas" in the final rule. The term "territorial seas" is defined in CWA section 502(8), 33 U.S.C. 1362(8), as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." The territorial seas establish the seaward limit of 'waters of the United States.' In light of the statutory definition, the agencies are not repeating that definition or providing any further interpretation in the final rule.

For the purpose of applying the term "miles" in the CWA definition of "territorial seas," the agencies' intention is not to disturb the Corps' regulation in 33 CFR 328.4. The distances reflected by three geographic miles and three nautical miles are the same, thus the EPA applies either or both. For simplicity's sake *vis a vis* the states (at least on the Atlantic and Pacific coasts), the EPA's use of the three geographic mile distance (based on the term used in the Submerged Lands Act) makes the seaward limit at the ocean surface consistent with the seaward limit of states' interests in the underlying submerged lands. The agencies are aware that whenever the United States has proclaimed its maritime zones for international law purposes (for example, with respect to the territorial seas, the contiguous zone, and the Exclusive Economic Zone), it has always used either the geographic mile (initially in 1783 and in later some other cases) or the nautical mile to specify the relevant the metric. The agencies are not aware of an instance when the United States has used the statute mile to describe distances on water as it has terrestrially. This also is not EPA's current practice.

2.6. *Daniel Ball* and Transporting Commerce

Many commenters stated that the definition of traditional navigable waters should be based on the two-part test for jurisdiction under the River and Harbors Act that was established by the Supreme Court in *The Daniel Ball, Economy Light & Power Co. v. United States*, and *United States v. Appalachian Elec. Power Co.* A few commenters stated that relying on these cases is appropriate because the Supreme Court referred to them in both *SWANCC* and *Rapanos. Solid Waste Agency v. United States Army Corps of Engineers, 531 U.S.159 (2001) ("SWANCC")*; and *Rapanos v. United States,* 547 U.S. 715, 731 (2006). Some of these commenters stated that navigability-in-fact alone should not be sufficient to classify a water as a traditional navigable water. Many commenters suggested revisions to the proposed

definition of traditional navigable waters to require "transport of commerce" instead of "use in commerce." These commenters stated this revised definition would better align with Congress' authority to regulate navigable waters, which is based on the ability of those waters to actually transport goods in commerce. A few commenters stated that requiring "transport of commerce" would clarify that waters used in the production of goods, such as irrigation of crops or watering of livestock, are not traditional navigable waters even though they have been used to produce goods in interstate commerce.

Some commenters stated that requiring "transport of commerce" would appropriately prevent waters that do not flow year-round or only support non-commercial boats from being considered traditional navigable waters. These commenters stated that traditional navigable waters should not include waters that have seasonal or ephemeral flow. A few commenters suggested that the agencies should add a requirement that traditional navigable waters should only be considered "susceptible to use" in commerce in either their "natural state" or with "reasonable improvement." A few commenters stated that traditional navigable waters should be required to form a continuous highway of commerce that is used to transport goods. One commenter suggested adding the requirement that waters subject to the ebb and flow of the tide must be navigable-in-fact and used to transport commercial goods.

Many commenters stated that the proposed definition for traditional navigable waters inappropriately allows for recreational use to be a basis for a traditional navigable water determination. These commenters suggested that the agencies explicitly state that recreational use is not a sufficient basis for a traditional navigable water determination. One commenter stated considering recreational use in a traditional navigable water determination potentially allows waters that are non-jurisdictional to be become jurisdictional solely through the building of a nearby highway that make previously inaccessible waters accessible to out-of-state visitors.

A few commenters stated that the definition of traditional navigable waters should not be changed to focus on transport of commerce, as it would improperly narrow the definition. These commenters stated that the provision in CWA section 101 regarding "an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water," shows that the definition of traditional navigable waters should continue to be interpreted as broadly as possible to include waters that are used or are susceptible to being used in commerce, including recreational uses. One commenter stated that the definition of traditional navigable waters should be revised to explicitly include recreational uses.

Agency Response

The agencies did not propose to make any substantive changes to the longstanding category of traditional navigable waters in the regulation and are not making any substantive changes in the final rule. The longstanding regulation is based on and supported by *The Daniel Ball, Economy Light & Power Co. v. United States*, *United States v. Appalachian Elec. Power Co.,* subsequent relevant decisions by the Supreme Court, and the statute under which the regulation was promulgated and its Congressional purpose. For a detailed discussion of the historical development of the test for navigability articulated in *The Daniel Ball* and its progeny and its relationship to the final rule and the agencies' treatment of traditional navigable waters, see the preamble to the final rule in Section II.E and Section III.B.

Given the wide applicability of *The Daniel Ball* test, the Supreme Court has cautioned "that the test for navigability is not applied in the same way in [different] types of cases[,]" referring, for example, to cases arising under the Federal Power Act, the CWA, and title disputes. *PPL Montana*, 565 U.S. at 592; see also *Appalachian Electric Power*, 311 U.S. at 404 ("The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times."). The Supreme Court in *Kaiser Aetna* rejected the notion "that the concept of 'navigable waters of the United States' has a fixed meaning that remains unchanged in whatever context it is being applied." *Kaiser Aetna v. United States*, 444 U.S. 164, 170 (1979). Instead, the Court cautioned that "any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Id*. at 171 (internal quotations omitted) (emphasis in original). As further explained by the Supreme Court: "The *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds. It has been used as well to determine questions of title to water beds under the equal-footing doctrine. It should be noted, however, that the test for navigability is not applied in the same way in these distinct types of cases." *PPL Montana*, 565 U.S. at 592 (internal citations and quotations omitted).

Given this cautionary guidance from the Supreme Court, the agencies have declined to adopt the recommendation from commenters to integrate the phrase "transport of commerce" into the final rule's traditional navigable waters jurisdictional category. In the agencies' view, the Supreme Court has signaled an acceptance of the first prong of *The Daniel Ball* test. Whether the second prong applies in full to the administrative definition of "traditional navigable waters" is less clear, but the legislative history suggests that Congress had in mind a more expanded notion of interstate commerce when enacting the CWA, including overland links to commercial navigation on navigable-in-fact waters. As described in the preamble to the final rule in Section II.E, the Supreme Court has stated that nothing in the legislative history of the Act suggests "that Congress intended to exert anything more than its commerce power over navigation." *SWANCC*, 531 U.S. at 168 & n.3. The agencies did not propose to limit the scope of traditional navigable waters for purposes of the CWA only to waters covered by section 10 of the Rivers and Harbors Act (RHA), and the agencies are not modifying the longstanding regulatory text for traditional navigable waters to specifically align it with the RHA test for jurisdiction, as some commenters suggested. See Final Rule Preamble Section III.B for additional discussion.

As described in the preamble to the final rule in Section III.B, the capacity to float a boat in a water that is near an interstate highway is not sufficient to make a traditional navigable water determination under the paragraph (a)(1) standard. Such an interpretation is inconsistent with the applicable case law, including the cases discussed in Appendix D to the Jurisdictional Determination Form Instructional Guidebook. Federal cases also make clear that traditional navigable waters need not be navigable all year round, and that navigability determinations do not apply only to a water's natural state. The key is whether the water has supported commercial navigation, does support commercial navigation, or can support commercial navigation through reasonable improvement. Similarly, in response to commenters who raised the issue of recreational use, the threshold tests for jurisdiction over traditional navigable waters require evidence of past, current, or potential future use of the water for commercial activity. Use of waters by recreational craft may in some circumstances provide evidence of susceptibility to use, but that alone does not satisfy the legal threshold for a traditional

navigable water determination; evidence is also required to demonstrate that the use (past, current, or potential future use) is commercial in nature.

Beyond the general requirement of navigability for commercial purposes, the agencies decline to establish by rule specific activity-based categorical tests, because traditional navigable water determinations are based on a number of considerations and the factual information available about a particular waterbody. In some instances, the evidence is clear. For example, a lake with a water-dependent manufacturing facility connected by rail that delivers raw materials to the facility from out of state is more likely to be a traditional navigable water, whereas an isolated pond or small stream along which hikers walk trails but do not engage in water-based commercial activity is less likely to be a traditional navigable water. In other situations, the agencies will need to evaluate the available evidence of historic use (moving logs to market), current use (small harbor), or potential future use (deepening a small channel) to make the determination. The multiple commercial uses of surface waters therefore make it difficult to categorically establish jurisdiction over traditional navigable waters based on specific activities. See Final Rule Preamble Section III.B for further discussion on the agencies' interpretation and implementation of the "traditional navigable waters" category in paragraph (a)(1) of the final rule.

2.7. Implementation

A few commenters stated that the agencies should create a map of traditional navigable waters, since the proposed rule relies on those waters as a basis to assert jurisdiction over all other categories of waters. These commenters stated that mapping traditional navigable waters will improve the efficiency, consistency, and accuracy of traditional navigable water, significant nexus, and CWA jurisdictional determinations.

One commenter stated that traditional navigable water jurisdictional determinations are inconsistent because the Corps does not consistently make these determinations based on the most inclusive information available, and in many cases, the Corps will turn to their navigability studies completed under the Rivers and Harbors Act. This commenter asserted that these studies are often outdated and rely excessively on Rivers and Harbors Act section 10 waters for traditional navigable water determinations, which would lead to missing many traditional navigable waters. The commenter stated that, to improve the accuracy and consistency of traditional navigable water determinations, the agencies should require the Corps to consider information from third parties in making traditional navigable water determinations and ensure that such information is given equal weight as the Corps' navigability studies.

One commenter requested clarification on how the agencies would approach traditional navigable water determinations on major river courses in their entirety and stated that not all of the major river courses in Arizona have been fully evaluated to determine their traditional navigable water status. A few commenters also highlighted the uncertainty surrounding the traditional navigable water status of waters in Nevada, stating that the Corps needs to be more open about traditional navigable water determinations.

Some commenters requested clarification on how to interpret degree of navigability and prior use. One commenter requested clarification and guidance on how to determine if a water is susceptible to interstate or foreign commerce based on current or future use and who makes that determination.

One commenter suggested that the format of any reported findings in a traditional navigable water determination should document the chemical and biological importance of waterbodies in determining a traditional navigable water.

Some commenters expressed concern about past traditional navigable water determinations that they believe to be incorrect and asked the agencies to revise these past determinations.

Agency Response

The agencies note that implementation of this section of the regulation is case-specific. To determine whether a waterbody constitutes a traditional navigable water, some relevant considerations include EPA and Corps regulations, prior determinations by the Corps and by the federal courts, and case law. The agencies will determine whether a particular waterbody is a traditional navigable water based on application of those considerations to the specific facts in each case.

In addition, the agencies are in the initial stages of developing state-of-the-art geospatial data tools through federal, state, and tribal partnerships to provide an enhanced, publicly-accessible platform for critical CWA information, such as the location of federally jurisdictional waters, the applicability of state and tribal water quality standards, permitted facility locations, impaired waters, and other significant features. See Final Rule Preamble Section IV for further discussion regarding geospatial data tools.

It is true that not all traditional navigable waters have been identified by the agencies, including in Arizona and Nevada. The Corps makes determinations regarding the status of traditional navigable waters when needed, for example to make approved jurisdictional determinations. When making traditional navigable water determinations, the agencies do not make findings about the chemical and biological importance of the waterbody, as those considerations are not relevant information under the agencies' regulations or applicable Supreme Court decisions. The agencies agree that traditional navigable waters determinations should be informed by all available relevant information, including but not limited to previous Rivers and Harbors Act Section 10 determinations.

In response to the concern expressed by some commenters regarding past traditional navigable water determinations, the agencies observe that approved jurisdictional determinations for particular sites can be reviewed upon request, and an affected party may administratively appeal or seek judicial review of approved jurisdictional determinations. See 33 CFR 331.2, 331.5. To the extent that a reviewable approved jurisdictional determination relied upon an earlier traditional navigable water determination, an affected party could seek administrative or judicial review of that jurisdictional issue. The agencies have provided additional clarification about traditional navigable waters in the preamble to the final rule in Section III.B.

2.8. Appendix D to the Corps Jurisdictional Determination Form Instructional Guidebook

A few commenters stated that the agencies should retain Appendix D of the agencies' *Rapanos* Guidance because changing the agencies' current approach to traditional navigable water determinations would cause confusion and the proposed rule does not provide enough information on any possible alternative approaches to the current process. One commenter stated that the agencies have not provided the public with a reasoned basis for making any changes to Appendix D.

Many commenters stated that Appendix D should be revised or rescinded. These commenters stated that Appendix D adopts a view of navigable waters that is broader than the traditional, historical understanding, and there is no support for it in either the case law or the statutory language. These commenters also stated that Appendix D causes confusion and results in too many traditional navigable water determinations that are not tied to the transport of interstate commerce. One commenter stated that Appendix D should be rescinded because it relies on multiple cases that do not meet the two-part test from *The Daniel Ball*.

Agency Response

The agencies note that Appendix D is sometimes referred to as "Appendix D to the *Rapanos* Guidance" and was inadvertently referred to as such in the preamble to the proposed rule. Appendix D resides as an attachment to the Jurisdictional Determination Form Instructional Guidebook that was published in 2007 concurrently with the 2007 *Rapanos* Guidance.

Because the agencies have not modified the definition of "traditional navigable waters," the agencies are retaining Appendix D to the Corps Jurisdictional Determination Form Instructional Guidebook with additional clarification in the preamble to the final rule to help inform implementation of that provision of the final rule. The agencies note that implementation of this section of the regulation is case-specific. To determine whether a waterbody constitutes traditional navigable water, some relevant considerations include EPA and Corps regulations, prior determinations by the Corps and by the federal courts, and case law. The agencies will determine whether a particular waterbody is a traditional navigable water based on application of those considerations to the specific facts in each case. For additional discussion, see Final Rule Preamble Section III.B.

APPENDIX D

Legal Definition of “Traditional Navigable Waters”

This document was formerly known as Appendix D to the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook. No changes have been made. This document was originally issued to provide guidance on determining whether a water is a “traditional navigable water” for purposes of the *Rapanos* Guidance, the Clean Water Act (CWA), and the agencies’ CWA implementing regulations. Because the agencies have not modified the definition of “traditional navigable waters,” the agencies are retaining this document to help inform implementation of that provision of the final Navigable Waters Protection Rule [85 FR 22250].

Waters that Qualify as Waters of the United States
Under Section (a)(1) of the Agencies' Regulations

The Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps) "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States" guidance (Rapanos guidance) affirms that EPA and the Corps will continue to assert jurisdiction over "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1). The guidance also states that, for purposes of the guidance, these "(a)(1) waters" are the "traditional navigable waters." These (a)(1) waters include all of the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).

EPA and the Corps are providing this guidance on determining whether a water is a "traditional navigable water" for purposes of the Rapanos guidance, the Clean Water Act (CWA), and the agencies' CWA implementing regulations. This guidance is not intended to be used for any other purpose. To determine whether a water body constitutes an (a)(1) water under the regulations, relevant considerations include Corps regulations, prior determinations by the Corps and by the federal courts, and case law. Corps districts and EPA regions should determine whether a particular waterbody is a traditional navigable water based on application of those considerations to the specific facts in each case.

As noted above, the (a)(1) waters include, but are not limited to, the "navigable waters of the United States." A water body qualifies as a "navigable water of the United States" if it meets any of the tests set forth in 33 C.F.R. Part 329 (e.g., the water body is (a) subject to the ebb and flow of the tide, and/or (b) the water body is presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce). The Corps districts have made determinations in the past regarding whether particular water bodies qualify as "navigable waters of the United States" for purposes of asserting jurisdiction under Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 USC Sections 401 and 403). Pursuant to 33 C.F.R. § 329.16, the Corps should maintain lists of final determinations of navigability for purposes of Corps jurisdiction under the Rivers and Harbors Act of 1899. While absence from the list should not be taken as an indication that the water is not navigable (329.16(b)), Corps districts and EPA regions should rely on any final Corps determination that a water body is a navigable water of the United States.

If the federal courts have determined that a water body is navigable-in-fact under federal law for any purpose, that water body qualifies as a "traditional navigable water" subject to CWA jurisdiction under 33 C.F.R. § 328.3(a)(1) and 40 C.F.R. § 230.3(s)(1).

Corps districts and EPA regions should be guided by the relevant opinions of the federal courts in determining whether waterbodies are "currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce" (33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1)) or "navigable-in-fact."

This definition of "navigable-in-fact" comes from a long line of cases originating with The Daniel Ball, 77 U.S. 557 (1870). The Supreme Court stated:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The Daniel Ball, 77 U.S. at 563.

In The Montello, the Supreme Court clarified that "customary modes of trade and travel on water" encompasses more than just navigation by larger vessels:

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

The Montello, 87 U.S. 430, 441-42 (1874). In that case, the Court held that early fur trading using canoes sufficiently showed that the Fox River was a navigable water of the United States. The Court was careful to note that the bare fact of a water's capacity for navigation alone is not sufficient; that capacity must be indicative of the water's being "generally and commonly useful to some purpose of trade or agriculture." Id. at 442.

In Economy Light & Power, the Supreme Court held that a waterway need not be continuously navigable; it is navigable even if it has "occasional natural obstructions or portages" and even if it is not navigable "at all seasons . . . or at all stages of the water." Economy Light & Power Co. v. U.S., 256 U.S. 113, 122 (1921).

In United States v. Holt State Bank, 270 U.S. 49 (1926), the Supreme Court summarized the law on navigability as of 1926 as follows:

> The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability

> does not depend on the particular mode in which such use is or may be had - whether by steamboats, sailing vessels or flatboats- nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

Holt State Bank, 270 U.S. at 56.

In U. S. v. Utah, 283 U.S. 64, (1931) and U.S. v. Appalachian Elec. Power Co, 311 U.S. 377 (1940), the Supreme Court held that so long as a water is susceptible to use as a highway of commerce, it is navigable-in-fact, even if the water has never been used for any commercial purpose. U.S. v. Utah, at 81-83 ("The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question."); U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 416 (1940) ("Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.").

In 1971, in Utah v. United States, 403 U.S. 9 (1971), the Supreme Court held that the Great Salt Lake, an intrastate water body, was navigable under federal law even though it "is not part of a navigable interstate or international commercial highway." Id. at 10. In doing so, the Supreme Court stated that the fact that the Lake was used for hauling of animals by ranchers rather than for the transportation of "water-borne freight" was an "irrelevant detail." Id. at 11. "The lake was used as a highway and that is the gist of the federal test." Ibid.[1]

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[1]Also of note are two decisions from the courts of appeals. In FPL Energy Marine Hydro, a case involving the Federal Power Act, the D.C. Circuit reiterated the fact that "*actual use* is not necessary for a navigability determination" and repeated earlier Supreme Court holdings that navigability and capacity of a water to carry commerce could be shown through "physical characteristics and experimentation." FPL Energy Marine Hydro LLC v. FERC, 287 F.3d 1151, 1157 (D.C. Cir. 2002). In that case, the D.C. Circuit upheld a FERC navigability determination that was based upon three experimental canoe trips taken specifically to demonstrate the river's navigability. Id. at 1158-59.

The 9th Circuit has also implemented the Supreme Court's holding that a water need only be susceptible to being used for waterborne commerce to be navigable-in-fact. Alaska v. Ahtna, Inc., 891 F.2d 1404 (9th Cir. 1989). In Ahtna, the 9th Circuit held that current use of an Alaskan river for commercial recreational boating is sufficient evidence of the water's capacity to carry waterborne commerce at the time that Alaska became a state. Id. at 1405. It was found to be irrelevant whether or not the river was actually being navigated or being used for commerce at the time, because current navigation showed that the river always had the capacity to support such navigation. Id. at 1404.

In summary, when determining whether a water body qualifies as a “traditional navigable water” (i.e., an (a)(1) water), relevant considerations include whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R § 329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. § 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is “navigable-in-fact” under the standards that have been used by the federal courts.