

# RECENT CASE DEVELOPMENTS IN WETLANDS PERMITTING

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## I. Changing Scope of Clean Water Act § 404 Jurisdiction After U.S. Supreme Court's *SWANCC* Decision

### A. Relevant Provisions of the Clean Water Act:

#### 1. Section 404 (a) [33 U.S.C. § 1344(a)]:

“(a) The Secretary [of the Army] may issue permits ... for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”

#### 2. Section 502 (7) [33 U.S.C. § 1362 (7)]:

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

### B. U.S. Army Corps of Engineers' Implementing Regulations. See Appendix A hereto for 33 C.F.R. Part 328: Definition of Waters of the United States.

C. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (herein “*SWANCC*”). This local agency proposed to develop a 533-acre site for disposal of non-hazardous wastes. The plan would have involved filling seventeen acres of “isolated” wetlands, which had been part of a sand and gravel operation. Groundwater was the sole hydrologic connection of these ponds with any nearby surface waters. At first, the Corps held that the wetlands were not jurisdictional, but later determined that various migratory bird species had been observed at the site. Invoking the “Migratory Bird Rule” as its basis for jurisdiction, the Corps required, and subsequently refused to grant, a Clean Water Act § 404 permit for the landfill. The district court and Seventh Circuit upheld the Corps' application of the Migratory Bird Rule, but the United States Supreme Court reversed, holding that the Clean Water Act (CWA) did not authorize the Corps to regulate wetlands filling solely because migratory birds used the wetlands.

The Court discussed its decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), which upheld § 404 jurisdiction over wetlands that actually abutted on a navigable waterway. In that decision, the Court noted that the “Congress had evidenced its intent to ‘regulate at least some waters that would not be deemed

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navigable under the classical understanding of that term.” *Id.* at 133. The Court then traced the changes to the Corps’ § 404 regulations since 1974, in which the Corps had extended its jurisdiction far beyond traditional navigable waters. The Court found no evidence that Congress had intended the Corps to regulate such isolated wetlands. The Court also refused the Corps’ invitation to uphold the Migratory Bird Rule on Commerce Clause grounds, saying that the Congress’ power under the Commerce Clause, though broad, is not unlimited.

## II. Efforts to Change Consent Decrees Based on SWANCC

### A. *United States v. Krilich*, 152 F. Supp. 2d 983, 988 (N.D. Ill. 2001).

Defendants entered into a consent decree in 1992, after being charged with illegal wetlands filling. Defendants were held to have violated the consent decree in later federal court litigation and ordered to pay \$1.257 million in penalties. Defendants sought on two occasions -- before and after *SWANCC* -- to bar enforcement of the penalty on the ground that the court had had no subject matter jurisdiction to enter the consent decree because the Corps had no jurisdiction over the wetlands in question. The district court held that, at the time the decree was entered, “the parties agreed that the ... wetlands were waters of the United States. Defendants are bound by that stipulation.” *Id.* at 992. “Under a consent decree, a party can agree to greater obligations than could be achieved if the suit were to go to trial.” *Id.* at 993. The court refused to vacate or modify the retrospective application of the decree.

Examining whether the decree should be modified prospectively in light of *SWANCC*, the court concluded that *SWANCC* had made no substantive change in the law that was in effect in 1992, when the decree was entered [*see Hoffman Homes, Inc. v. Administrator, United States EPA*, 961 F.2d 1310 (7<sup>th</sup> Cir. 1992) (holding “isolated wetlands” not subject to CWA regulation)] and *SWANCC* did not narrow the application of the CWA more than that decision had. While *Hoffman* was later vacated, it was the law of the circuit when the consent decree was entered and the decree was not modified following its vacation. Therefore, because there had been no change in the applicable law, there was no basis for altering the consent decree.

### B. *United States v. Rueth Dev. Co.*, 189 F. Supp. 2d 874 (N.D.Ind. 2001).

Defendants urged modification of consent decree entered in wetlands filling case in light of *SWANCC*. The Court found two fundamental factual differences between the cases. Rueth’s site is home to a natural wetland which flows into connecting bodies of water, whereas *SWANCC* involved only isolated mining pits and ponds. “In other words, a molecule of water residing in one of these pits or ponds could not mix with molecules from other bodies of water. At Defendants’ site, however, water molecules currently present in the wetlands will inevitably flow towards and mix with water from connecting bodies, including the Little Calumet River.” *Id.* at 876. Secondly, in Rueth’s case, the government did not invoke the Migratory Bird Rule, and sought to regulate the Site as an “adjacent wetland.”

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The Court noted that *SWANCC* reaffirmed the Corps' power to regulate adjacent wetlands. See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985). Because a drop of rainwater landing on defendant's wetland site is certain to intermingle with water from the Little Calumet River, the site has the "significant nexus" to a navigable waterway necessary to trigger the Corps' § 404(a) jurisdiction.

C. ***United States v. Interstate General Company, et al.*, 2002 U.S. App. LEXIS 13232 (4<sup>th</sup> Cir. 2002).** In an earlier related case [*United States v. Wilson*, 133 F.3d 251 (1997)] which involved criminal charges against several parties, including Interstate General Company, the Fourth Circuit had held that "33 CFR 328.3(a)(3) (1993) (defining waters of the United States to include those waters whose degradations 'could affect' interstate commerce) is ... invalid." *Id.* at 253-54. After the Fourth Circuit remanded the case for a new trial, the parties entered a settlement agreement and consent decree requiring payment of a \$400,000 civil penalty and implementation of a wetland remediation plan. Interstate General pled guilty to filling "'jurisdictional wetlands, adjacent to waters of the United States.'" *Interstate General, supra* at 10. The basis for Corps' regulation was that these wetlands "are adjacent, 33 C.F.R. § 328.3(a)(7), to tributaries, § 328.3(a)(5), of traditional navigable waters, 328.3(a)(1)." *Id.*

After *SWANCC* was decided, the defendants sought to have the consent decree vacated on the ground that there had been a fundamental change in the law and that the Corps no longer had jurisdiction over the wetlands involved. The district court refused this relief, observing that where the *SWANCC* decision had explicitly declined to determine the precise meaning of "navigable waters" as used in § 404(g) of the Act, it would be improper to extend the *SWANCC* ruling beyond invalidation of the Migratory Bird Rule. *United States v. Interstate General Co.*, 152 F. Supp. 2d 843, 847 (D. Md. 2001). On appeal, Interstate General argued that "*SWANCC* eliminated the Corps' jurisdiction over wetlands adjacent to waters that are not traditionally navigable even if those waters eventually flow into traditional navigable waters." *Id.* at 10. The Fourth Circuit disagreed that *SWANCC* involved more than the Migratory Bird Rule, which is based on 33 C.F.R. § 328.3(a)(3). Stating that it had already invalidated 33 CFR § 328.3(a)(3) in *Wilson*, the Court held that *SWANCC* had made no change in the law in the Fourth Circuit and petitioners were not entitled to relief based upon changed law.

### III. Post-*SWANCC* Decisions Confining *SWANCC* to its Facts

A. ***Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D.Id. 2001).** In this Clean Water Act citizen's suit, it was alleged that defendant's dairy farm discharged pollutants into groundwater, and that such pollutants adversely affected surface waters that were hydrologically connected to those groundwaters. The issue was whether these groundwaters was "waters of the United States". The Court observed that the Ninth Circuit had defined waters of the United States broadly [*Leslie Salt Co. v. Froehlke* 578 F.2d 742 (9th Cir. 1978)], and that, though the *SWANCC* decision declined read the term

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"navigable" entirely out of the CWA, it also made clear that the term "waters of the United States" includes at least some waters that are not navigable in the classical sense, such as non-navigable tributaries and streams. The Court said this is consistent with EPA's rules (*see* 40 C.F.R. § 122.2), and also noted that the Supreme Court has upheld the EPA's broad definition of this term as including almost any body of surface water that might affect interstate commerce. *International Paper Co. v. Ouellette*, 479 U.S. 481, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987). The Court satisfied itself from the factual record that Butler and Walker Springs are sufficiently connected through surface water to Clover Creek as to fall within the definition of waters of the United States. *Id.* at 1178-79. Thus, while the Congress did not intend a comprehensive regulation of pollutant discharges to groundwater, the Court found that the CWA does extend federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States. To prevail in such a case:

Plaintiffs must still demonstrate that pollutants from a point source affect surface waters of the United States. It is not sufficient to allege groundwater pollution, and then to assert a general hydrological connection between all waters. Rather, pollutants must be traced from their source to surface waters, in order to come within the purview of the CWA.

*Id.* at 1180.

B. ***United States v. Lamplight Equestrian Center, Inc.*, 2002 U.S. Dist. LEXIS 3694 (N.D.Ill.)**. After a thorough review of cases going both ways after *SWANCC*, the court held that the Corps had jurisdiction over filling activities in wetlands drained by an intermittent stream. "Water need not flow in an unbroken line at all times to constitute a sufficient connection to a navigable water or its tributaries." *Id.* at 8. The court distinguished *SWANCC* as involving isolated wetlands with no surface water connection to navigable waters under any circumstances.

C. ***Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001)**. In this CWA citizen's suit challenging an irrigation district's use of aquatic herbicides in irrigation canals, the court concluded that the canals were not "isolated waters", like those in *SWANCC*, because they "receive water from natural streams and creeks, and divert water to streams and creeks." *Id.* at 534. Accordingly, the canals were tributaries to "waters of the United States".

D. ***United States v. Buday*, 138 F. Supp. 2d 1282 (D.Mont. 2001)**. Buday pled guilty to an Information charging him with knowingly discharging pollutants, including dredge and fill material, "into navigable waters, including wetlands," in violation of the CWA. At the plea colloquy, Buday and the Government were asked whether the creek involved is a "navigable water" under the CWA, and the parties agreed that it was. Only hours after the plea was accepted, the *SWANCC* decision was handed down, and Buday filed a motion to dismiss for lack of subject matter jurisdiction. The court held that the creek, while not navigable-in-fact itself, was a tributary of a tributary of a navigable-in-

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fact stream, and thus subject to the CWA jurisdiction. “There is no limitation on federal jurisdiction over open waters that flow into interstate waters or waters that are navigable-in-fact.” *Id.* at 1295.

### IV. Post-SWANCC decisions limiting the Corps’ Jurisdiction

#### A. *United States v. Newdunn Assocs.*, 195 F. Supp. 2d 751 (E.D.Va. 2002).

The Corps and Virginia Department of Environmental Quality sought an injunction against filling of wetlands which developer asserted were not subject to the Corps’ jurisdiction. The Court found that rain generated surface water runoff occasionally exits the Property through a spur ditch by the Property. To reach navigable waters, however, this runoff must traverse a manmade drainage ditch adjacent and parallel to the east side of I-64 (dry most of the year), pass through a culvert under I-64, travel more than one mile along another manmade drainage ditch beside I-64, and flow through more than one mile of a stream that is not navigable-in-fact before reaching tidal waters.

The Court drew upon the dissenting opinion in *SWANCC* to determine where the Supreme Court had drawn the new jurisdictional line. “Justice Stevens cogently, if disapprovingly, described the effect of *SWANCC* when he wrote in his dissent, ‘The Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps assertion of jurisdiction over all waters except for actually navigable waters, their tributaries and wetlands adjacent to each.’ *SWANCC* at 176.” *Id.* at 763. The Court concluded that the Supreme Court had excised the Newdunn property from the scope of the CWA, as these wetlands are not adjacent to navigable waters or waters of the United States by any reasonable definition of adjacency. The Court therefore held that the Corps had not proven a sufficient connection between the property and navigable waters or waters of the United States to establish jurisdiction over the property. The Court also held that the State had no regulatory jurisdiction because its jurisdiction had been premised upon that of the Corps.

B. *United States v. R.G. Moore*, \_\_ F.Supp.2d \_\_ (E.D.Va. 2002)(slip opinion July 26, 2002). This case involves isolated wetlands which the parties stipulated do not extend to the Intercoastal Waterway or other navigable waters. The Corps relied on a “surface water” connection and “hydrological connection”, and argues that water from defendant’s wetlands may sometimes enter navigable waters through man-made drainage ditches or ephemeral streams. The court held that, for non-navigable waters to be deemed a tributary to navigable waters, it must have an ordinary high water mark, and found that the Corps had not shown a continuous high water mark to support its claim of jurisdiction.

C. *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001). Plaintiff-landowners sought damages under the Oil Pollution Act ("OPA") for damage to their land allegedly caused by defendant's discharge of pollutants onto land and into unnamed, intermittent tributaries to Big Creek. *Id.* at 265. Although the case was brought under

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OPA, the court followed precedent under the Clean Water Act to define the term "navigable waters" under OPA. *Id.* at 267. The Fifth Circuit observed that, under *SWANCC*, "it appears that a body of water is subject to regulation under [the Act] if the body of water is actually navigable or is adjacent to an open body of navigable water." *Id.* at 269. The court held that groundwater is not covered under OPA because there was no reason to construe the term "waters of the United States" more expansively in OPA than it is construed under the CWA. *Id.* at 270. Thus, plaintiffs had no claim under OPA with respect to discharges that contaminated the groundwater under their property. *Id.* Additionally, the court found that it would be an "unwarranted expansion" of OPA to find that discharges onto land that only infrequently carried running water were discharges into navigable waters. *Id.* at 271.

**D. *United States v. Bay-Houston Towing Co., 197 F. Supp. 2d 788 (E.D.Mich. 2002).*** EPA sought injunctive relief and a \$3 million civil penalty against defendant for discharging peat bog drainage water with pollutants without a CWA § 402 permit and discharging dredged or fill material into wetlands without a § 404 permit. Considering the penalty issue, the Court found that defendant's permit application had been pending throughout the relevant period, the permitting authorities were fully aware of the defendant's activity, and a legitimate commercial mining activity was involved. Therefore, no penalty was imposed. The Court's decision was influenced by the regulatory environment, with respect to which it had the following to say:

The world of the § 404 permit as displayed in the record here is an Alice-in-Wonderland world. Initially, the State of Michigan processes and issues the permit. EPA can comment and its consent is required before a permit can issue. However, the applicant deals only with the State of Michigan. EPA can withdraw the State of Michigan's authority if dissatisfied with the State of Michigan's draft permit. The applicant has nothing to say on withdrawal. The Corps of Engineers then becomes the permitting authority with EPA having veto power. Again, the applicant deals only with the Corps of Engineers. Obtaining a § 404 permit is not a straightforward proposition - it requires a good deal of negotiation in the course of processing the application and the regulatory framework leaves much to be desired.

What happened here was a breakdown in communication caused in part by the manner in which EPA plays its role in the regulatory process and in larger part by the failure of Michigan Peat to recognize that the State of Michigan was not the final arbiter of permit conditions.

*Id.* at 826.

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### V. Successful Challenges to Corps' Permit Decisions

A. *Crutchfield v. United States Army Corps of Eng'rs*, 154 F. Supp. 2d 878 (E.D.Va. 2001) ["Crutchfield I"]. County undertook construction of a wastewater treatment project, several aspects of which required the Corps' § 404 authorizations. As originally conceived, the project involved a wastewater treatment plant (the "WWTP"), a major sewer pipeline to carry untreated wastewater to the WWTP for treatment, a discharge force main, and an outfall/diffuser structure. The Corps authorized the County to proceed with construction of the WWTP, force main, and outfall pursuant to Nationwide Permits ("NWP") because those three components of the project would cause only minimal impacts to wetlands; however, the interceptor would have more than minimal impacts, so it needed an individual permit. No application was filed for this individual permit.

Plaintiffs claimed that, by verifying that the County could proceed with construction of the WWTP, the force main, and the outfall, the Corps had improperly "segmented" the interceptor from the other components of the project, thereby evading the full measure of regulatory scrutiny that the environmental laws require. *Id.* at 881. The court held that Plaintiffs were correct, noting that the WWTP would have no sewage to treat unless the interceptor were built. Therefore, the verifications that the Corps had given were set aside as arbitrary, capricious, and not in accordance with law. *Id.* at 904-06. Therefore, the matter was remanded to the Corps so that it could evaluate the project as a whole and, in perspective of that evaluation, satisfy the applicable requirements of the CWA, NEPA and NHPA.

B. *Crutchfield v. United States Army Corps of Eng'rs*, 2002 U.S. Dist. LEXIS 14640 (E.D.Va. August 7, 2002) ["Crutchfield II"]. On remand, based on the County's suggestions, the Corps dropped the County interceptor from the scope of the project, added a smaller sewer interceptor with minimal impacts and again verified that all of these improvements could be constructed under the Nationwide Permits. The Court examined the purpose of the County's wastewater project, and determined that that purpose -- collection and treatment of enough sewage at this new plant to avoid sending more sewage to neighboring Henrico County than permitted by contract -- would not be met by this new project configuration. Moreover, the Court found that the interceptor dropped from the project would be built, in part, by private interests to serve private developments, oversized to meet the County's long-term requirements, and dedicated to the County. Finally, the Court found that the Corps' representations that it would process the County's revised joint permit application in accordance with the regulations applicable to individual permits, and its unexpected announcement without any public notification that it would, instead, verify the use of Nationwide Permits, was unlawful. The Court vacated the Nationwide Permits verification and ordered the Corps to begin the individual permit process anew. Underscoring its displeasure with the Norfolk District's handling of this case, the Court

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took the very unusual step of requiring that a different Corps District conduct the permit process on remand.

C. ***Forest Conservation Council v. United State Army Corps of Engineers, Civil Action No. 01-CV-162 (D.D.C.) (filed January 25, 2001)***. The Corps' Norfolk District promulgated the "Abbreviated Standard Permit 18" (ASP-18, a general permit) which authorized Virginia citizens to "perform work determined by the District Engineer to be of minimal environmental consequence and not be [*sic*] contrary to the public interest." Two environmental advocacy groups, the Forest Conservation Council and Friends of the Earth, sued the Corps of Engineers in the U.S. District Court for the District of Columbia, seeking a declaration that ASP-18 was invalid and an order enjoining "all ground disturbing work in Virginia that has been authorized pursuant to ASP-18." Complaint at 26 (prayer for relief). Plaintiffs alleged that ASP-18 did not comply with the requirements of the CWA or the National Environmental Policy Act.

The parties reached a settlement agreement and the action was subsequently dismissed prior to any adjudication of the merits. Without admitting any of the allegations contained in the Complaint, the Corps agreed to cease authorizing projects pursuant to ASP-18 and prospectively revoked the ASP-18.

## VI. Wetlands Regulatory Takings Cases

A. The *Loveladies* Regulatory Takings Test: There has been a regulatory taking if: (1) there was a denial of economically viable use of the property as a result of the regulatory imposition; (2) the property owner had distinct investment-backed expectations; and (3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed.Cir. 1994).

B. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). The Supreme Court considered when a takings claim becomes ripe for judicial resolution. Although "a landowner may not establish a taking [claim] before a land-use authority has the opportunity ... to decide and explain the reach of a challenged regulation", once a land owner has done so and the agency lacks discretion to permit any development, or "the permitted uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." The Supreme Court agreed with the Rhode Island Supreme Court that a taking had not occurred because the landowner had not been deprived of all economically beneficial use of the property.

C. *Laguna Gatuna, Inc. v. United States*, 50 Fed.Cl. 336, 2001 U.S.Claims LEXIS 175 (Sept. 13, 2001). Plaintiff, lessee of part of a dry lake bed (playa) in New Mexico onto which it discharged oil field brines, had been ordered by the EPA in 1992 to cease and desist discharge due to adverse effects on migratory birds on the lake bed. This

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followed initial clearances from EPA and others to proceed this activity, which involved acquiring needed land interests, raising capital and generating business.

Plaintiff filed a takings action but, following the *SWANCC* decision, the United States claimed the earlier order was *ultra vires* and that no taking occurred. The Court disagreed, for three reasons. First, plaintiff had conceded the validity of the EPA order (its judicial challenges had been dismissed as unreviewable), and the Court said it would have no jurisdiction to review the order. Therefore, the validity of this EPA action was not before the Court. Second, the EPA's reversal of opinion came nine years after its order, during which time the property had lost all economic use. Third, *SWANCC* affected the jurisdiction only of the Corps, and not the EPA. The EPA had relied, not on the Corps' regulation invalidated in *SWANCC* [33 U.S.C. § 328.3(a)(3)], but on its regulation, 40 C.F.R. § 122.2, which was not involved in *SWANCC*. Because there was no reason to believe that the EPA order was not within the scope of the agency's duties, or to question the good faith of the agency's determination, the Court rejected the *ultra vires* argument, and held that a compensable taking had occurred.

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## Appendix A

### Part 328 - Definition of Waters of the United States

328.1 Purpose.

328.2 General scope.

328.3 Definitions.

328.4 Limits of jurisdiction.

328.5 Changes in limits of waters of the United States.

Authority: 33 U.S.C. 1344.

#### § 328.1 Purpose.

This section defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States." The terminology used by Section 404 of the Clean Water Act includes "navigable waters" which is defined at Section 502(7) of the Act as "waters of the United States including the territorial seas." To provide clarity and to avoid confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used throughout 33 CFR Parts 320-330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR Parts 322 and 329).

#### § 328.2 General scope.

Waters of the United States include those waters listed in §328.3(a). The lateral limits of jurisdiction in those waters may be divided into three categories. The categories include the territorial seas, tidal waters, and nontidal waters (see 33 CFR 328.4 (a), (b), and (c), respectively).

#### § 328.3 Definitions.

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

(a) The term "waters of the United States" means

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

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa takes, or

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natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

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

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

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

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

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

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

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

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

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

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

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

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

### § 328.4 Limits of jurisdiction.

(a) Territorial Seas. The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR 329.12)

(b) Tidal Waters of the United States. The landward limits of jurisdiction in tidal waters:

(1) Extends to the high tide line, or

(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) Non-Tidal Waters of the United States. The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

### § 328.5 Changes in limits of waters of the United States.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the boundaries of the waters of the United States. For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the

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district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer.