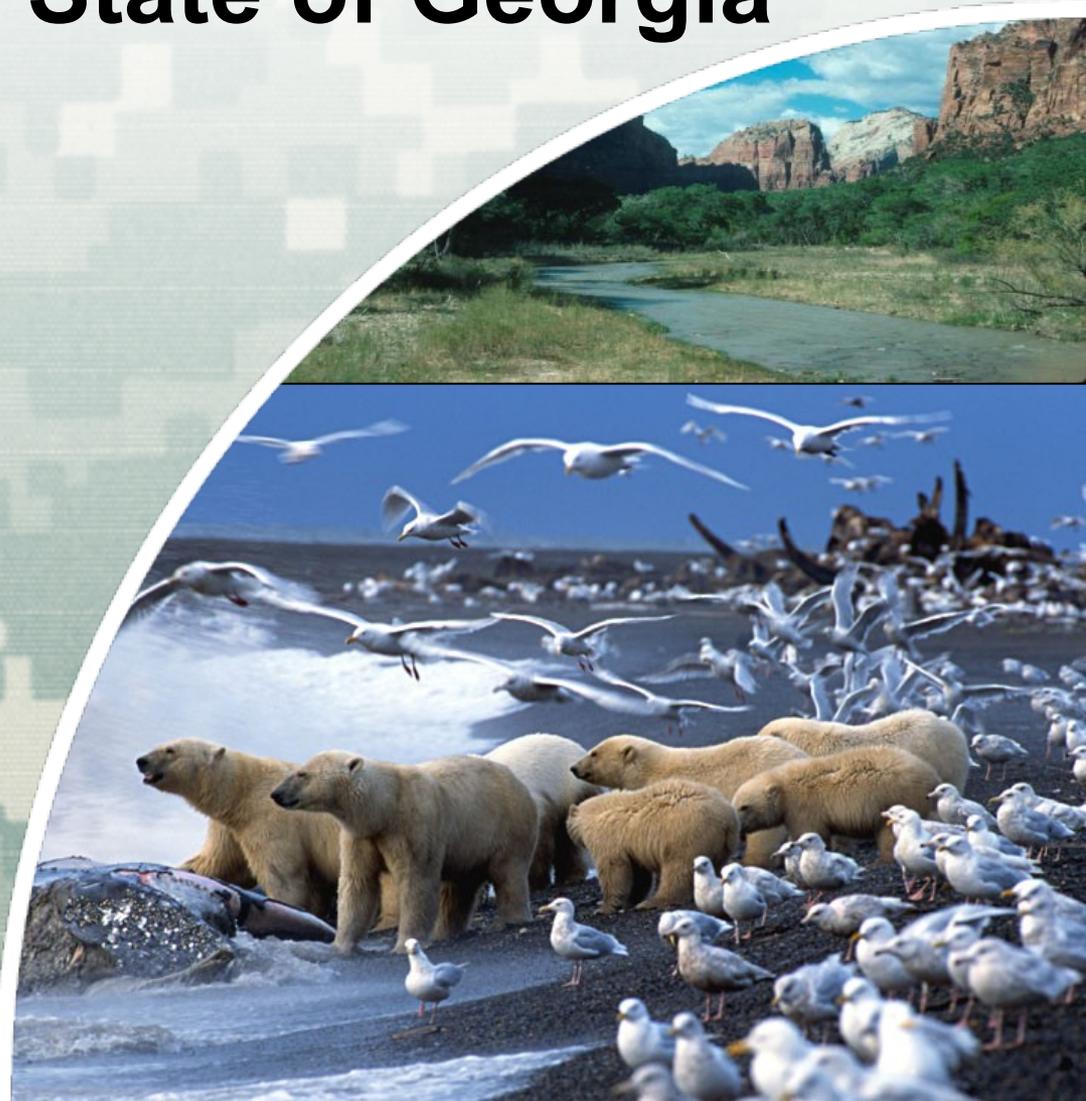
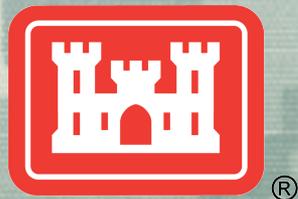


Proposed Changes to Federal Regulations Affecting Aquatic Resources in the State of Georgia

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Topics

- Proposed Rule: Definition of “Waters of the United States” (WoUS) Under the Clean Water Act.
- Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A).



Definition of “Waters of the U.S.”

Applies to all CWA programs

Clean Water Act “Navigable” Waters:
WoUS, including Territorial Seas

303
Water
Quality
Standard
& TMDLs

- . ***States***
- . ***Tribes***
- . ***EPA***

311
Oil
Spill
Prgms

- . ***EPA***

401
State
Cert

- . ***States***
- . ***Tribes***
- . ***EPA***

402
Pollutant
Discharge
Permits
(NPDES)

- . ***States***
- . ***EPA***

404
Dredge
and
Fill
Permits

- . ***USACE***
- . ***States***
- . ***EPA***

Goal of the Proposed WoUS Rule

- To ensure the regulatory definition is consistent with the CWA as interpreted by the Supreme Court and to provide maximum clarity to the public as the agencies work to fulfill the CWA's objectives and policies to protect water quality, public health, and the environment.



Value to the Nation

- Overall benefit to aquatic habitat is vital to the Nation's public health, environment, and economy.
- Provides clarity to the regulated public and partner agencies.
- Clarifies non-jurisdictional waters.
- Increases efficiency in jurisdictional determinations and decisions.
- Provides for consistent implementation nationwide.



Proposed Rule Timeline

- OMB approved the Proposed Rule for publication in the Federal Register in March 2014.
- Opened for Public Comment on 21 Apr2014; comment period extended to 20 Oct 2014.

Next:

- Agencies review and address comments, and coordinate with OMB to finalize the Rule.
- EPA's Science Advisory Board's "Connectivity Report" is finalized providing support for the Rule.
- Final Rule published in the Federal Register.
- Public outreach.
- Rule implementation and field training.





What Follows is Paraphrased for Brevity You Must Read and Comprehend Directly from the Proposed Rule!


NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
1985

FEDERAL REGISTER

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No. 76 April 21, 2014

Part II

Department of Defense

Department of the Army, Corps of Engineers
33 CFR Part 328

Environmental Protection Agency

40 CFR Parts 110, 112, 116, et al.
Definition of "Waters of the United States" Under the Clean Water Act;
Proposed Rule



No Changes Proposed

- Territorial Seas as a jurisdictional category of WoUS.
- Impoundments as a jurisdictional category of WoUS.
- Interstate Waters as a jurisdictional category of WoUS.
- TNWs as a jurisdictional category of WoUS.
- Prior-converted Cropland excluded from jurisdiction.
- Waste Treatment Systems designed to meet the requirements of the CWA excluded from jurisdiction.
- Definition of Wetlands.
- Definition of Ordinary High Water Mark (OHWM).



Territorial Seas

- Under the CWA, 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.”
- They are also considered to be TNWs.



Impoundments

- Impoundments of waters otherwise defined as waters of the United States under the definition.
- The Supreme Court confirmed that damming or impounding a “water of the United States” does not make the water non-jurisdictional. [*S. D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 379 n.5 (2006)].



Interstate Waters

- All interstate waters including interstate wetlands, even if they are not navigable for purposes of federal regulation and do not connect to such waters.
- Clarifies that Interstate Wetlands are also included in the category – jurisdictional by Rule.



TNWs

- 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.

A water is considered to be a TNW IF:

- It is subject to section 9 or 10 of the Rivers and Harbors Act.
- A Federal court has determined that the water body is navigable-in-fact under Federal law.
- Currently used for commercial navigation, including commercial waterborne recreation.
- Historically used for commercial navigation, including commercial waterborne recreation.
- Susceptible to being used in the future for commercial navigation, including commercial waterborne recreation.



Wetlands Definition

- “...those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.”



OHWM Definition

- “...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.



Proposed Changes - 33 CFR 328.3 (a)

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) **All interstate waters, including interstate wetlands;**
- (3) The territorial seas;
- (4) All impoundments of waters identified in subsections (1) through (3) and (5) of this section;
- (5) **All tributaries of waters identified in subsections (1) through (4) of this section;**
- (6) **All waters, including wetlands, adjacent to a water identified in subsections (1) through (5) of this section; and**
- (7) **On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in subsections (1) through (3) of this section.**



Proposed Definitions

- Neighboring
- Riparian Area
- Floodplain
- Tributary
- Significant Nexus



Adjacency

- The term *adjacent* means bordering, contiguous, or neighboring.



Proposed Definition – “Neighboring”

- Waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (a)(5) of the Rule, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.
 - Most waters, including wetlands, that are neighboring to a waterbody are found within its riparian zone or floodplain.
 - There are some neighboring waters that might be located outside of the riparian zone or floodplain.
 - Waters located outside the floodplain/riparian areas with confined surface or shallow subsurface hydrologic connections are considered “neighboring” and thereby, “adjacent.”



Proposed Definition – “Riparian Area”

- An area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structures in that area, and
- Transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.



Proposed Definition – “Floodplain”

- An area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.
- Floodplains vary in size based on factors such as flooding frequency, size of the tributary, and topography.
- Generally, large tributaries in low gradient topography will have larger floodplains and smaller streams located in steeper gradients will have smaller floodplains.
- When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which flood interval to use (e.g., 10 to 20 year flood interval zone).



Proposed Definition – “Tributary”

- Waters physically characterized by the presence of a bed and banks and OHWM.
- Contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (a)(4) of the Rule.
- In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or OHWM) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (a)(3) of the Rule.
- Does not lose its status as a tributary if natural or man-made breaks occur provided bed and banks and an OHWM can be identified upstream of the subject break.



Request for Comments on Options to Address Wetlands as Tributaries

Options:

- When a tributary flows through a wetland into another tributary, losing its OHWM through the wetland, it remains a tributary and the wetland itself is considered a tributary; or,
- Clarify that wetlands that connect tributary segments and provide flow at the upper limit of a tributary are adjacent wetlands, and as such are jurisdictional waters of the United States under (a)(6) of the Rule. In this case, wetlands would not be considered “tributaries.”



Proposed Definition – “Significant Nexus”

- A more than speculative or insubstantial effect that a water, including wetlands, either alone or in combination with other similarly situated waters in the region has on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3) of the Rule.
- “Other Waters,” including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or close to a “water of the United States” such that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3) of the Rule.



Request for Comments on Options to Address Adjacency

Options:

- Assert jurisdiction over all waters connected through confined surface or shallow subsurface hydrology regardless of distance; or,
- Include language in the definition of “Neighboring” that waters must be geographically proximate to the adjacent water; or,
- Include Rule language addressing which waters outside the floodplain or riparian zone are jurisdictional only if they are reasonably proximate; or,
- Including Rule language placing geographical limitations on which waters located outside the floodplain or riparian zone are jurisdictional; or,



Request for Comments on Options to Address Adjacency (cont'd)

Options (cont'd.):

- Include distance limitations based on ratios compared to the bank-to-bank width of the water to which the water is adjacent; or,
- Include Rule language that only waters within the floodplain, only waters within the riparian area, or only waters within the floodplain and riparian area (but not outside these areas) are adjacent; or,
- Consider only confined surface connections but not shallow subsurface connections for purposes of determining adjacency; or,
- Whether language should be included to identify particular floodplain intervals within which waters would be considered adjacent; or,
- Assert jurisdiction over such waters based on a case-specific significant nexus analysis.



“Other Waters”

- **NEW CATEGORY:** NOT jurisdictional by Rule – only jurisdictional through “significant nexus” analysis.
- On a case-specific basis, “Other Waters”, including wetlands, would be jurisdictional provided the water alone, or in combination with other similarly situated waters located in the same region, has a significant nexus to a water identified in paragraphs (a)(1) through (a)(3) of the Rule.
- Other waters may be aggregated where they:
 - ▶ Are located in the same watershed of the nearest downstream WoUS;
 - ▶ Perform similar functions; and,
 - ▶ Are located close together, or close to a jurisdictional water within the same watershed.



Request for Comments on Options to Address “Other Waters”

The agencies considering 4 options:

1. Determine by Rule that NO “other waters” are similarly situated.
2. Determine by Rule that “Other Waters” are similarly situated in certain areas of the country (e.g., by ecoregion, or hydrologic landscape region).
3. Determine that certain subcategories of waters would be jurisdictional rather than addressed with case-by-case analysis (e.g., prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, western vernal pools, and perhaps others). Also, would determine by Rule that Playa Lakes, and perhaps other categories of waters do not have a significant nexus and are not jurisdictional.



Request for Comments on Options to Address “Other Waters” (cont’d)

4. Determine by Rule that all “other waters” in a single point-of-entry watershed would be considered similarly situated as “in the region” and can be aggregated and evaluated as a single landscape unit. Generally, the agencies anticipate that under this option these waters would be determined to have a significant nexus and be jurisdictional. Alternately, the agencies solicit comment on whether they could determine by Rule that all similarly situated other waters within a point-of-entry watershed have a significant nexus and are thus jurisdictional by Rule.



Ditches

- Jurisdictional ditches may include, but are not limited to:
 - ▶ Natural streams that have been altered (*e.g.*, channelized, straightened or relocated);
 - ▶ Ditches that have been excavated in “waters of the United States,” including jurisdictional wetlands;
 - ▶ Ditches that have perennial flow; or
 - ▶ Ditches that connect two or more “waters of the United States.”



Ditches

- Non-jurisdictional ditches:
 - ▶ Ditches that are excavated wholly in uplands, drain only uplands or non-jurisdictional waters, and have less than perennial flow;
 - ▶ Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (a)(4) of the Rule;



Request for Comments on Options to Address Ditches

- The agencies seek comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be covered by the exclusion in paragraph (b)(4) of the Rule.
- Whether the flow regime in such ditches should be less than intermittent flow, or less than perennial flow.



Non-jurisdictional Waters

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;
- Prior Converted Cropland;
- Artificially irrigated areas that would revert to uplands should application of irrigation water to that area cease;
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;



Non-jurisdictional Waters (Cont'd)

- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
- Water-filled depressions created incidental to construction activity;
- Groundwater drained through subsurface drainage systems;
- Gullies and rills and non-wetland swales.



Request for Comments on Options to Address Non-Jurisdictional Features

- The agencies welcome comments on how to provide greater certainty as to which specific aquatic features are, and are not jurisdictional tributaries.
- Can the definition of “Tributary” be revised to provide increased clarity as to the distinction between jurisdictional tributaries, as defined, and non-jurisdictional features such as gullies, rills and non-wetland swales.



For Your Comments to Count...

- The Federal Register public comment period extended through **20 October 2014**.
- Comments must be submitted to the public docket via e-mail, regular mail, hand delivery, or the Federal eRulemaking Portal at:
<http://www.regulations.gov>



Bottom Line Today...

- Existing jurisdictional guidance remains in effect.
- No change in practice unless and until a Final Rule is published.

U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK

This document contains instructions to aid field staff in completing the *Approved Jurisdictional Determination Form* ("JD form"). This document is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD until this document is further revised and reissued.¹

Caribbean Sea, St. Thomas, U.S. Virgin Islands.



This document was prepared jointly by the U.S. Army Corps of Engineers and the Environmental Protection Agency.

A large flock of birds, likely terns, is captured in flight over a body of water during a sunset. The sky is a mix of purple, pink, and orange, with the sun low on the horizon. The birds are silhouetted against the bright light of the setting sun, creating a dynamic and somewhat chaotic scene. The water in the foreground is dark and textured with small waves.

Questions?

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Proposed Rule: Definition of “Waters of the United States” Under the Clean Water Act

Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)





**U.S. Environmental Protection Agency and U.S. Department of the Army
Interpretive Rule Regarding the Applicability of
Clean Water Act Section 404(f)(1)(A)**

SUBJECT: Interpretive Rule Regarding Applicability of the Exemption from Permitting under section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices.

PURPOSE: The purpose of this interpretive rule is to clarify the applicability of the exemption from permitting provided under section 404(f)(1)(A) of the Clean Water Act (CWA) to discharges of dredged or fill material associated with certain agricultural conservation practices based on the Natural Resources Conservation Service (NRCS) conservation practice standards that are designed and implemented to protect and enhance water quality.¹



MEMORANDUM OF UNDERSTANDING

**Among the U.S. Department of Agriculture,
The U.S. Environmental Protection Agency, and the U.S. Department of the Army**

**Concerning Implementation of the 404(f)(1)(A) Exemption for
Certain Agricultural Conservation Practice Standards**

I. Purpose and Scope

The Environmental Protection Agency (EPA) and the Department of the Army (the Army) issued, in March 2014, an interpretive rule clarifying the applicability of the exemption from Clean Water Act (CWA) section 404 permitting provided by CWA section 404(f)(1)(A) for discharges to waters of the United States associated with certain conservation practice standards where they are undertaken as part of an established farming operation. This Memorandum of Understanding (MOU) describes how the three agencies will work together to implement the interpretive rule, to protect and enhance water quality and ensure consistency and predictability for the public. This MOU also identifies the procedures for coordinating to maintain the list of conservation practice standards exempt from section 404 permitting, including revisions to the list. This list is included as Attachment A to this MOU.

What is an Interpretive Rule (IR)?

- An IR clarifies the intent of a regulation.
- It DOES NOT change the regulation.
- It DOES NOT go through Rule Making.



What is this Interpretive Rule (IR)

- **The IR clarifies section 404(f)(1)(A) by recognizing 56 NRCS conservation practices implemented in waters of the United States**
- **The IR does not change the process for verification of exemptions for farm ponds, farming access roads, or pivot crossings covered at Section 404(f)(1)(C)**



What is 404(f)(1)(A)?

- The Clean Water Act (CWA) is the primary federal law in the United States governing water pollution. Passed in 1972, the objective of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), is to restore and maintain the chemical, physical, and biological integrity of the nation's waters
 - ▶ **(f)(1)** Except as provided in paragraph (2) of this subsection, the discharge of dredge or fill material—
 - (A)** from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
- Implementing Regulation - 33 CFR 323.4, “Discharges not requiring permits”
 - ▶ 33 CFR 323.4 has 6 subsections related to activities NOT requiring permits – the Interpretive Rule only applies to 1 of them.



NRCS and Waters of the US

- “NRCS works with partners and private landowners and managers on conservation planning and assistance designed to result in productive lands and healthy ecosystems”
- Specifically, they provide financial and technical assistance to farmers and ranchers.
- NRCS does wetland determinations under the Food Security Act; the US Army Corps of Engineers does wetland determinations under the Clean Water Act.



404(f)(1)(A) Interpretive Rule

- The interpretive rule identifies additional practices considered to be among the “normal farming” activities exempt under Section 404(f) under “upland soil and water conservation practices” that are designed and implemented to protect and enhance water quality.
- The activities must be implemented in conformance with NRCS technical conservation practice standards.
- Must be part of “established (i.e., ongoing) farming operation.”



404(f)(1)(A) Interpretive Rule

- The EPA and NRCS believe this interpretive rule will:
 - ▶ improve the consistency and integration of programs as is fully consistent with the law;
 - ▶ promote the mutual objectives of our regulations and statutes;
 - ▶ increase clarity and predictability for the agriculture community who want to protect the resources on their lands.



404(f)(1)(A) Interpretive Rule (cont'd.)

- The landowners would not need to determine whether the activities are in WoUS nor obtain site-specific pre-approval from either the Corps or the EPA before implementation.
- The EPA, the Corps and USDA will enter into a Memorandum of Agreement to develop and implement a process for identifying, reviewing and updating NRCS agricultural conservation practices.
- The MOA will include a list of the exempt NRCS conservation practices and a link to the practice standards.
- The interpretive rule is immediately effective from date of publication for public comment on the proposed rule in the Federal Register.



What is a NRCS Conservation Practice Standard?

- Developed by NRCS
- Each contains information on why and where the practice is applied, and it sets forth the minimum quality criteria that must be met during the application of that practice in order for it to achieve its intended purpose(s).
- Only 56 of the 100's of Conservation Practice Standards are applicable – those designed and implemented to protect and enhance water quality
- Conservation practices are self-implementing
- http://www.usace.army.mil/Portals/2/docs/civilworks/mous/nrcs_cwa_404_exempt.pdf



What's Next...

- Interpretive Rule in effect and self-implementing
- Headquarters EPA and Corps reviewing comments from Districts as well as public comment period that ended July 7, 2014
- Continue to coordinate with our local NRCS and EPA representatives on questions



Questions?



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